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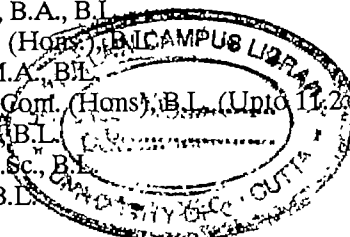
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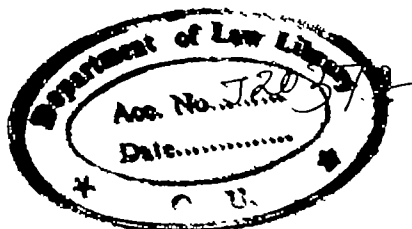
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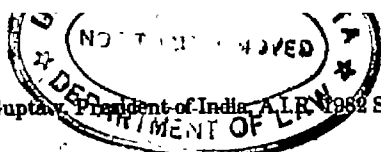
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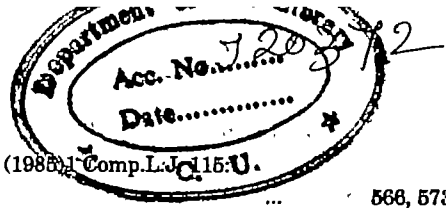
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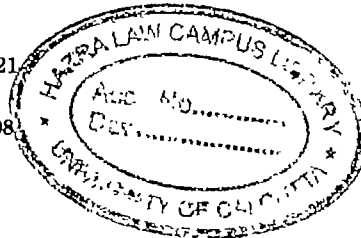
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Rational Approach For Rapid Justice and Speedy Trial in 'The Compensation Proceedings' in the Motor Vehicles Act, 1988 (Act 59 of 1988)

By

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The salient provisions as to the Compulsory Insurance of Motor Vehicles, Liability of the Insurance Company towards the victims and the Transfer of Insurance policy of the Vehicles as enunciated in Secs.146, 147(2)(5) and 157(2) of the Motor Vehicles Act, 1988 (Act 59 of 1988) - (Secs.94, 95(2) and 103-A(2) of M.V.Act, 1939), require pragmatic deeds in the sphere of 'backlog cases' in the Courts. The Socio-economic conditions prevailing in our downtrodden Society also seek further scrutiny on the said aspects.

Rational Approach Required: According to the provisions incorporated in the Sec.146 of M.V.Act 1988, the Motor Vehicles plying on the public Road have to be compulsorily insured. The holy object of compulsory insurance of Motor Vehicles is to ensure and provide the definite compensation amount to the injured persons and the Legal Representatives of deceased. Further, they provide statutory protection to the victims for their livelihood by way of definite compensation. The Compulsory Insurance for the Motor Vehicles plying on the Public Road is mandatory one which provides speedy trial and quick Justice to the victims.

For instance, 'A' purchased a Motor Vehicle on the basis of Hire Purchase Agreement through a Nationalised Bank on 1.10.1992 and the said Vehicle is insured for the period of one year. He sells the said Motor Vehicle to the 'B' on 2.11.1992. The Motor Vehicle in the custody of 'B' meets with the accident on 6.11.1992 and the name of owner of said vehicle is not yet changed in the R.C.Book. 'A' has not sent an application in the 'Prescribed Form' about the said Transfer to the Insurance Company immediately.

Now the question arises whether the Transfer of Motor Vehicle has to be allowed to put an end to the Insurance policy OR Whether the mere Transfer of Motor Vehicle entangles the statutory protection of definite compensation amount to the victims? OR Whether the Application in 'Prescribed Form' is mandatory one? It is worthwhile to study the provision of Sec.196 of M.V.Act, 1988 (Sec.125 of M.V.Act, 1939) that the driving of an uninsured Motor Vehicle is an offence, requiring punishment for 3 months OR fine of One Thousand Rupees. If so, the insurance policy of Motor Vehicles as contemplated in the said Sec.146, is not to be construed as an optional one and it need not be considered as mere contract based purely on the policy of 'Good Faith'.

According to the provision of Sec.157(2) of M.V. Act 1988, the transfer of the said Motor Vehicle puts an end to the Compulsory Insurance Policy itself as the Application in the 'Prescribed Form' is not sent to the Insurance Company. As the said vehicle is hypothecated by the Nationalised

Bank, it will get back the Motor Vehicle from said 'A'. Who has no immovable property in his name. Now, the transfer of Motor Vehicle to the said 'B' is complete as per the Sale of Goods Act. In such circumstances, the poor victims are shoved to the Sea of Troubles for their inability of getting the compensation amount in time or enjoying the fruits of Court decrees, from 'A'. The Compensation proceedings are being protracted even for ten years. Apart from that, the Insurance Company could escape from the clutches of statutory liability of paying definite compensation amount.

It has to be borne in mind that the said Insurance Policy is valid for one year, as per the Compulsory Insurance Policy as contemplated in the Sec.146 of M.V. Act, 1988. The moot point which I put forth herein, is that the compulsory insurance for the Motor Vehicle and the statutory protection to the victims for the definite compensation amount as enshrined in the Sec.146 of said Act, need not be allowed to be curtailed due to the said 'Transfer of Vehicle OR so called 'Prescribed Form' stated in Sec.157(2) of said Act at any cost. Of course, Sec.157(2) of said Act is an exception to the proposition of Law relating to the lapse of insurance policy on the Transfer of the Vehicle to some extent.

The vital point is that the Secs.157(2) and 146 of M.V. Act, 1988 will have to be allowed to be consonant with the concept of 'Rapid Justice' for the victims in the Motor accidents irrespective of the 'said Transfer'. Considering the Socio-economic aspects in India, the 'Rapid Justice' has to be brought forth from the Cocoon of the legal-hyper technicality as adumbrated in the Secs.146 and 157(2) of M.V. Act 1988. It does not mean that 'Such Concept' is derogatory to the defences available to the Insurance Company in the Sec.149(2) of the said Act. So, the Secs.146 and 157(2) of the M.V. Act 1988 require further scrutiny on the automatic lapse of Insurance Policy of the Vehicle due to the "Transfer".

Implication of the Limited Liability of the Insurer: According to the Sec.147(2) of M.V. Act 1988, the liability of Insurance Company is restricted to the Victims - passengers of Bus for the Compensation amount in the accident. The liability of Insurance Company for the 'Risk of Passenger in the Bus' is somewhat different from the 'Third Party Risk'. It is appropriate to study the decision reported in (1992)1 L.W. 477 (Mad.), which considered the term 'Passenger in the Bus' and the 'Limited Liability of Insurer for the quantum of compensation in the Bus Accident elegantly, as per the Sec.147(2) of the M.V. Act, 1988.

For instance, the Bus carrying the Passengers, catches fire suddenly, causing the death of 20 passengers or the bus capsizes suddenly and falls down from the tall bridge into the valley, causing the death of Ten Passengers. In such cases, the risk of precious life is applicable to both the passenger of a bus and the 'Third party Risk' equally.

Now, the question arises, whether the discriminating Insurance Policy has to be applied for the passenger in the Bus and the Third Party Risk in the Motor Accident in respect of Quantum of Compensation?

In view of the Sec.147(2) of the said Act, the Insurer is not bound to indemnify the injured passenger OR legal representatives of the deceased passengers in the Bus accident, fully as in the case of third party risk, due to its limited liability. The crux of this, is that, the option is provided to the Insurance Company in respect of compensation amount. Such a 'distinction' between the passenger of a Bus and the Third Party Risk in the accident with regard to the Quantum of Compensation, will make the Insurance Company wriggle out of the Statutory liability of paying the 'Just Compensation amount' as contemplated in the Sec.146 of the said Act itself. Further, especially, in the case of 'Passenger in the Bus Accident' the Insured (Owner of the Bus) is forced to face the Himalayan Burden of paying huge excess compensation amount, due to the limited liability of the Insurer. Again, the hapless victims will have to face the uphill task of getting the compensation amount by protracted proceedings in the M.A.C.T. Cases (Motor Accident Claims Tribunal Cases).

So, the simple question as to the term 'passenger' in the bus accident or the liability of Insurer thereof, in the Sec.147 of said Act, need not be allowed to be proceeded up to the Apex Court under the game of Legerdemain, for the quantum of compensation. The vital point which has to be considered rationally is that there should be a uniform insurance policy for the passenger of Bus and the Third party Risk in the Motor Accident in respect of the liability of Insurance Company for quantum of compensation amount, without any glimpse of option OR limit.

Effective Amendments required: The Amendments are to be considered in the following manner: In Sec.146 of the M.V. Act 1988 (59 of 1988),

1. (i) The Insurance Policy has to be allowed to run with the Motor Vehicle irrespective of the transfer of said Vehicle.

(ii) The Insurance policy will not be allowed to be lapsed due to the 'Transfer' automatically.

(iii) The Insurance Policy has to be made Valid for 'the period' to which the Vehicle is insured.

2. In Sec.147(2) of the said Act, the uniform insurance policy has to be inserted for both 'passenger' in the Bus' and the 'Third Party Risk' without 'limit' OR 'Option' in respect of the liability of Insurer for the 'Quantum of Compensation'.

3. In Sec.157(2) of the said Act, 'the Application in the prescribed Form' to the Insurance Company about the transfer of Motor Vehicle need not be mandatory one and the mere intimation to the Insurance Company about the Transfer of Vehicle by any written Form is sufficient one.

If such amendments are made in Secs.146, 147(2)(5) and 157(2) of M.V. Act, 1988, certainly, they will accelerate the process of "Rapid Justice" to the hapless victims by speedy trial and pave the way for speedy disposal of backlog cases in the M.A.C.T. cases, to a great extent.

A Need to Amend Sec.15(1) of Hindu Succession Act 1956

By

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As per Sec.15(1) of Hindu Succession Act the property of a female Hindu dying intestate except the property inherited from her father or mother shall devolve upon the heirs of the husband in the absence of sons and daughters (including the children of any pre-deceased son or daughter) and the husband. But as per Sec.8 of Hindu Succession Act the property of a Male Hindu dying intestate shall devolve upon the mother, Widow of a pre-deceased Son, Son of a predeceased Son of a pre-deceased Son, daughter of a pre-deceased Son of a pre-deceased son, Widow of a pre-deceased son of a pre-deceased Son along with Sons and daughters including the Children of a pre-deceased Son and daughter and Widow as Class I heirs.

If there is no Class I heirs alive the property of a Male Hindu shall devolve upon the father. If no father then upon the brother, sister, daughter's son's son, daughter's son's daughter equally, If no one is alive in the second entry than on third entry etc. If there is no Class I and Class II heirs then on agnates and lastly on cognates of the Male Hindu deceased. If no one is alive then the property will be taken by the Government. In nowhere the heirs of wife get any place as heirs of deceased male in the Act.

Only when there is no heirs of the husband alive the property of a female Hindu dying intestate instead of going to Government devolves upon the mother and father who had taken good care of the daughter upto her marriage, who had given good education, who had given her the capacity to earn. Why such inequalities between male and female? Are the females, not having the heart of saving their parents from poverty at their old age? Will any female would like to give her property to her husband's heirs like his mother, his father, his sister, his brother etc., than to her blood relatives like father and mother etc. if she is alive? In fact no woman would like to give her property to her husband's relatives. But it is happening in the event of her unexpected death. Is it not against her will and wish?"

Job opportunities, Working conditions etc., are all same to all except some concessions that too showed towards females by Government and not by husband or the relatives of husband. Why the intestate properties of a deceased female should go to the heirs of the husband? Is it not injustice?

A.I.R. 1976 Mad. 154. Amount gifted to a female at the time of her marriage will devolve upon husband according to Sec.15(1).

A.I.R. 1978 Bom. 44. Female inherits her brother, Succession is governed by Sec.15(1).

In *Desa Bakthudu v. Dilli Achari*, It is decided that all properties absolutely held by a female Hindu except the property inherited from her father or mother will devolve upon the heirs of the husband in the absence of a heir or heirs coming under Class I.

Now-a-days people are advised to give birth only to one or two children though both the children are born as females. If the intestate property of a female goes to the heirs of the husband then who will save the parents of the female? At the life time of the female the parents can get maintenance. If she dies intestate what will happen?

To make a sound and good law what are the amendments to be done in the Hindu Succession Act, 1956?

1. Sec.15(1) to be repealed completely.
2. As consequential amendment in Sec.15, sub clause (2)(a) the words "not upon the other heirs" referred to in Sub-sec.(1) in the order specified therein but" to be repealed.
3. As consequential amendment in Sec.15, sub clause (2)(b) the words "not upon the other heirs" referred to in sub-sec.(1) in the order specified therein but" to be repealed.
4. As consequential amendment Sec.16 with all 3 rules also to be repealed.
5. Since Sec.15(1) has been repealed to govern the intestate property of a deceased female the Word males in Sec.8 is to be taken away and the word Hindus to be inserted, and
6. The word widower to be added or inserted at the place next to widow by putting a bar like a vertical line in the Schedule of class I heirs.

If the learned Law Commission think that the aforesaid amendments are not possible at the present atleast the sub-clause (b) of Sec.15(1) may be repeated or may be put at last as a fifth class or entry.

Order 21, Rule 90, Civil Procedure Code -

A debacle if not a disease

By

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A judgment-debtor whose intention is to legally prolong a litigation cannot think of a more lethal weapon in his arsenal than an application under O.21, Rule 90, C.P.C. to set aside a court sale. Courts of all grades have been repeatedly confronted with the intricacies of the said provision comprising of complex situations and they have been presented with problems in plenty basically due to the inherent wide scope of the said provision. It has become the order of the day that whenever there is a court sale it is automatically followed by an application to set aside the same since an application of this type throws new avenues of offence to attack a court sale. It is the last resort and it is intended to bring the decree-holder around for a compromise despite the court sale.

It will not be possible to discuss law of various High Courts on this point. I would like to refer to citations of our High Court and Supreme Court. But there are some rulings of importance from other High Courts as well without reference to which this article may sound mundane.

It would only be proper on my part to deal with case laws topic-wise as I intend presenting a wholesome and worthwhile reading:

Furnishing of Security: This is one aspect about which one awaits a pronouncement from a bench of Madras High Court or from Supreme Court as the position is not definite. The earliest judgment was reported in 1972 *T.N.L.J.* 36. But this judgment by a single judge relates to a case where mortgagor filed a petition to set aside the court sale. Madras High Court would observe that in cases where mortgaged property itself had been sold (which related to a secured debt), courts should not insist on furnishing of security. It further reads that courts must not insist on furnishing of security if the property the value of which would be much more than the amount due under the decree. The full text of the said judgment is not available to this writer.

Padmini Jesudurai, J. sitting singly had observed in *Janakirama Iyer's case*, (1987)2 *M.L.J.* 284: (1988)1 *L.W.* 6, that Madras High Court amendment requiring the judgment-debtor to furnish security is inconsistent with O.21, Rule 90, and hence, there was no need to furnish security.

But Khader, J. in *A.Shannugam v. Lakshmipathy Naidu and another*, *A.I.R.* 1988 *Mad.* 42: 100 *L.W.* 99: (1987)1 *M.L.J.* 320, had taken a more acceptable view by holding that the amendment was not inconsistent and hence, furnishing of security was mandatory.

A similar view has been expressed in (1988)1 *L.W.* 18, wherein it has been held that furnishing of security was absolutely necessary.

Treatment: To attack a court sale, an identical provision is available to a judgment-debtor under Sec.47, C.P.C. If O.21, Rule 90, deals with irregularities in the publishing and conducting sale, Sec.47 deals with all questions relating to execution of decree. A raging controversy has been going on about the powers of court to treat an application under O.21, Rule 90 even though it has been filed under Sec.47 and *vice versa*. Divergent views have been expressed by various High Courts about maintainability or rejection of such petitions.

A Full Bench of the Madras High Court in *A.P.V. Rajendran's case*, (1980)1 M.L.J. 198: 93 L.W. 47, had the occasion to deal with a petition filed under Sec.47 to set aside court sale on the grounds of irregularities. The Full Bench observed that the petition can be construed to be one under O.21, Rule 90 (as it complains about irregularities in the publishing and conducting sale) though it has been filed under Sec.47. The most important point is that this matter went upto Supreme Court and the Apex Court had confirmed the Madras view in 95 L.W. 35. The said observation of the Supreme Court has been relied upon in a subsequent judgment of Madras High Court in (1982)2 M.L.J. 258. (Ratnam, J.)

While things remain so, *A.I.R. 1963 All 319*, is emphatic that if some of the grounds relate to O.21 Rule 90 and some relate to Sec.47, the application can be treated partly under O.21, Rule 90 and partly under Sec.47, C.P.C.

This controversy has been effectively put an end to in a very recent Supreme Court judgment reported in *A.I.R. 1992 S.C. 1857*. It is a case wherein an application under O.21, Rule 89, C.P.C. has been filed to set aside a court auction on deposit. But the discussion was about possibility of treating a Sec.47 application as one under O.21, Rule 90. The Apex Court has not minced words when it expressed its view as follows:

"An application under Sec.47, C.P.C., cannot be treated as application under O.21, Rule 90 of the Code when some of the grounds of the objections set out in the application under Sec.47 are not such as are covered by O.21, Rule 90. Hence, the bar prescribed under sub-rule (2) of O.21, Rule 189 would not come into play at all. Merely on the reason of the pendency of the objections under Sec.47 it could not be said that the application under O.21, Rule 89 would be necessarily barred."

This Full Bench decision puts an end to the argument that quoting of wrong provision of law by itself cannot be a ground for dismissal (1989)2 M.L.J. 223. The said Madras ruling is no longer good law in view of the recent Supreme Court ruling.

Inadequacy-Irregularity-Injury-The nexus factor:- Even after a detailed consideration of the rulings on this point, one would not get to know that substantial injury is all about. The judgment-debtor is bound to prove the same and ultimately lose the petition even if he satisfies a court of law that his petition would survive on other points. Invariably, all rulings on O.21, Rule 90, C.P.C. deal with this point (only to reject the petition).

A.I.R. 1983 Delhi 317, is one purposeful ruling as it lays down the gist that mere irregularity or fraud in the conduct of the sale cannot be the ground for setting aside sale unless it is proved that it resulted in substantial injury. It also reads that mere inadequacy of price is not a good ground for setting aside a sale.

Law on this point gained momentum in the recent past. After referring to various rulings of Madras High Court and Supreme Court, K.M. Natarajan, J. in (1986)1 M.L.J. 155, had held that since judgment-debtor did not prove that he sustained substantial injury and hence, there was no question of setting aside the sale. This view had been expressed even after it had been proved the judgment-debtor was not served with notice under O.21, Rule 66(2), C.P.C.

A.I.R. 1987 M.P. 106, is one ruling which every advocate for decree-holder would like to remember. Law has been further simplified that any objection which the judgment-debtor would have raised but did not raise before the sale cannot be raised by way of a petition under O.21, Rule 90, C.P.C. The ruling further emphasises that there must be a clear nexus between the irregularity and the inadequacy of price which had resulted in substantial injury to judgment-debtor. The said ruling is important as it states the legal heirs of judgment-debtor cannot be permitted to raise grounds which the deceased

judgment-debtor himself did not raise. On the same line, we have an earlier ruling in (1979)1 M.L.J. 180, (Ramanujam, J.) wherein it had been held that a judgment-debtor, who prefers to remain *ex parte* on receipt of notice under O.21, Rule 22, C.P.C., cannot be allowed to set up objections by way of a petition under O.21, Rule 90, C.P.C.

Srinivasan, J. in (1992)1 L.W. 437, and in (1992)2 L.W. 542, had rightly insisted upon nexus between the alleged irregularity and the alleged consequences resulting in substantial injury. Ratnam, J. in (1990)1 M.L.J. 134, says that if the judgment-debtor, by way of answer to O.21, Rule 66, C.P.C. did not file his objections, cannot subsequently complain of irregularity in the proclamation.

The nexus factor got settled by a Full Bench of the Supreme Court in *A.I.R. 1991 S.C. 770*. Though this ruling was about permission to be granted to a decree-holder to bid and set off, there has been a reference to the nexus to be established while dealing with an application under O.21, Rule 90, C.P.C. This writer is duty bound to extract the concerned passage from para.3 which reads as follows:

"For, O.21, Rule 90, it is not sufficient for the appellant to contend that there was an illegality or irregularity in the conduct of the sale; he must also prove by adducing sufficient facts that some substantial injury has been caused to the petitioner as a result of the order under O.21, Rule 72 having been passed without such notice."

A comprehensive ruling is available to the decree-holder on this point in (1992)2 M.L.J. 75. Any objection regarding misdescription of property in the sale proclamation, the sale of more extent of property than required, existence of irregularity or fraud in the publishing and conducting sale must be raised before the sale and not afterwards. Even assuming that there was material irregularity, the judgment-debtor is expected to prove the substantial injury which he had suffered due to such material irregularity and inadequacy of price.

(Mis) Description of property:- This is one of the areas where the helpless judgment-debtor would like to attack the sale fervently. Here also nothing is assured of. Usually the judgment-debtor would plead that some of the components like, well, house, etc., have not been specifically mentioned in the description of property with the result the property had fetched a lesser price than what it would have if the components have been mentioned in the proclamation.

One such occasion had arisen for consideration before Madras High Court in (1988)2 L.W. 234. Ratnam, J. in his own inimitable style, had held that non-mention of electrification or existence of a well or vacant space was not fatal since description of property by four boundaries was sufficient.

But one comes across a dismetrically opposite view expressed by Orissa High Court in (1990)3 S.C.C. 128, wherein the sale was held to be irregular for non-mention of house in the description of property.

The view expressed in (1988)2 L.W. 234, has been confirmed, though in a different manner, by Srinivasan, J. in (1991)2 M.L.J. 9. The said ruling is based on O.21, Rule 90(3), C.P.C. that any objection regarding description of property which should have been taken before the settlement of proclamation if not taken, is deemed to have been waived, and so cannot be raised under O.21, Rule 90.

While considering these aspects one cannot lose sight of *A.I.R. 1988 All. 204*, as this is one of the most resourceful rulings. The judgment-debtor who makes part payments of decretal amounts prays for adjournment of sale waiving fresh proclamation. Such a waiver goes to the root of the matter as the judgment-debtor courts disaster. Such waiver of fresh proclamation would estop the judgment-debtor to challenge the sale on the ground of irregularity in the publishing and conduction sale.

Duty of Court:- Certain well-recognised restraints have been placed upon the powers of courts when they order for sale of judgment-debtor's property. One of them is the extent of property that must be sold for realisation of decretal amount in cases where the decree amount is small but the property sought to be sold is large. (1985) 2 M.L.J. 123: 98 L.W. 352, deals with a case where several items were brought for sale. Madras High Court is emphatic that all items should not be put up for sale and only those items which would be sufficient to satisfy the decree amount alone must be ordered to be sold.

A similar view has been expressed in a recent ruling of Supreme Court in *A.I.R. 1990 S.C. 119*, which runs as follows:

"It is of importance to note from O.21, Rule 64 that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."

The non-adherence to this duty by the executing court would only expose it before the appellate court.

Though this is an article under O.21, Rule 90, C.P.C., a hallmark judgment of recent origin reported in *A.I.R. 1992 S.C. 1857*, pertaining to O.21, Rule 89, C.P.C. will have to be referred to. The Apex Court had directed the judgment-debtor to deposit not only the amount spent by the auction-purchaser in taking the property, but also interest at the rate of 12% from the date of sale by way of equitable relief. If there is going to be a similar direction to the judgment-debtor while dealing with an application under O.21, Rule 29, C.P.C., it will be the day on which the judgment-debtor would stop being frivolous. Anyway, that day is not far off.

To conclude, the dreaded disease has a definite cure. But it remains as a debacle to the executing court every time a petition under O.21, Rule 90 is pressed into service as it is the execution court which conducts the sale.

**Immunity from arrest of women under Civil Procedure Code
Its validity and tenability at present -
constitutionally and otherwise.**

By

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Eversince the passing of the C.P.C. in 1908, uptill the present, women have been exempted from arrest, in enforcement of a decree for payment of money. Sec.56, C.P.C. enacts:

“Notwithstanding anything in this Part, Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.”

The reasons that impelled the then law makers, to secure the above protection for the softer gender were manifold; viz., their social position, custom, poverty and want of literacy, etc.- Whatever might have been the motive, for the rule made nearly a century ago, it is imperative now, for us to give a second look, and find out, whether there is any need or relevance to continue the above concession or bar, as on today.

First and foremost, sentiment and custom have no place at all, in this matter in our secular state, where the rule of law, prevails. These have become shibboleths and ceased to be cursive coin, at the present age.

Economic conditions, status in society etc. among women have by now improved by leaps and bounds. They like men have been given full franchise to vote in electing the members of Parliament and State Assemblies. Compulsory free education of them upto the age of 14 (fourteen) is imparted by the State; They have become entitled to inherit, and hold properties, with absolute rights over them, as in the case with men, under various statutes, dating back at least from 1956 onwards. They have reached equal and highly distinguished status and positions in the fast changing conditions of our society today. Vast number of ladies in several thousands, if not in lakhs, are holding top posts, in political, governmental, administrative and defence services, scientific, Industrial, Commercial, Judicial, Art, Film, Educational and Sports fields. They have exhibited superior mettle than men in certain spheres of activity. It can safely be proclaimed, that there is no branch of activity where the Fairer Sex, have not yet entered and acquitted themselves remarkably well.

Last but not least, the founding fathers of our Constitution, have also as early as 26.1.1950 enacted and emphasised the *Equality of men and women, in the eye of law and its non discrimination against one or the other of them*, as follows:

Art.14: “The State shall not deny to any person equality before the law, and equal protection of the laws within the territory of India.”

I feel convinced, that this article by itself is more than sufficient, to neutralise Sec.56, C.P.C., as one opposed to the equality fabric of our Constitution. It can have no more vires at all. To add to the above, we have,

Art.15(1): “The State shall not discriminate against any citizen, on grounds only of religion, race, caste, sex, place of birth or any of them.”

This immunity of Sec.56 acts as a clog or handicap for women themselves, in that, they cannot have

free and easy credit facilities from money lending classes, financial and banking institutions. This shackle of immunity (though it may sound paradoxical) is a factor that will make creditors, hesitate to advance loans to women without any property, since they do not have any coercive sanction of arrest of women, as is the case with men. Thus it is discriminatory and detrimental to their interests and welfare.

It is my plea, that after the declarations of equality, and non-discrimination among the two sexes, in our Constitution, there is no place for the survival of Sec.56, C.P.C. at all.

It is unfortunate that in spite of the lapse of nearly five decades from 26.1.1950 the Parliament has not thought it fit to do away with this retrograde section in C.P.C. in the teeth of the above Constitutional mandate, and also in spite of the huge strides that have been made in the cause of woman as described above.

Some among the Protagonists or women in this country murmur and point out to Art.15(3) which runs as follows:

“Nothing in this article shall prevent the State *from making any special provision for women and children.*”

The above sub clause cannot cut ice against quashing Sec.56, C.P.C. for the following reasons:

(a) It cannot prevail over the all embracing ambit and amplitude of the Arts.14 and 15(1). Sec.56, C.P.C. cannot survive the majestic sweep of these two provisions any more. The Rule of Law will not tolerate or suffer such reserved pockets for women.

(b) Further Art.15(3), is clearly indicative of only prospective *beneficial* provisions and cannot resurrect an invalid retrospective protective piece of legislation of Sec.56, C.P.C., to life.

Even assuming, without conceding, that Art.15(3) is any, hindrance, I assert that after the phenomenal progress women have made in this land, as illustrated above, there is no justification, for the umbrella of Sec.56, C.P.C. to continue any more.

Now, there are three remedies, open to annul the effect of Sec.56, C.P.C.:

(a) Parliament can repeal or delete the impugned section by an Amending Act of its own. This will be a very slow long drawn process to happen;

(b) The invocation of the powers of High Court and/or Supreme Court, in execution proceedings, seeking arrest of women judgment-debtor, challenging the vires of Sec.56, C.P.C. The difficulty, is to find out a decree holder against a woman, who is prepared to bell the cat. This is equally not a quick remedy.

(c) The only feasible and quick method is to initiate a public interest litigation before High Court and/or the Apex Court, by filing a suitable writ proceeding, seeking the Central Government to justify the continuance of Sec.56, C.P.C. which has become obsolete and invalid for all the above reasons.

MUSINGS ON 1992

By

R.Srinivasan, Editor, M.L.J.

It is wistful thinking that one should be like the ancient Roman God Janus which is credited with two heads one looking back into the old year and one forward into the new commanding both hindsight as well as foresight, so that warned about the shoals and rocks of the immediate future one might use the experiences and wisdom of the immediate past in meeting them. Each year has its own momentous events involving as they do individuals and countries which matter. Judged by any standard the expiring year has been an eventful year.

International:

U.S.A.: President Mr. George Bush visited Sydney on Asian Pacific Tour. U.S.A. established full diplomatic ties with South Africa. U.S. and Japan signed a declaration for a just, peaceful and prosperous world. U.S. agreed to fly food to Common Wealth of Independent States of the erstwhile Soviet Union.

In May, 1992 U.S. suspended duty benefits granted for some Indian goods under the Generalised System of Preferences as India failed to protect U.S. intellectual property rights. It was decided to retain India on Special 301 list for another year. In Los Angeles emergency was declared violence erupted after four white policeman who were involved in the beating of Mr. Rodney King, a black motorist was acquitted and therefore national guard was ordered out. U.S. warned India saying that it would take retaliatory action if India does not protect U.S. pharmaceutical patents. President Mr. George Bush outlined U.S. Defence strategy in Post Cold War era. U.S. had to function as a strong strategic deterrent.

In June, 1992, Mr. George Bush, got republican party nomination and Mr. Bill Clinton, Democratic Party nominee for the next U.S. Presidential election. U.S. announced fresh missile contract sanctions agreement with India, China, Iraq, North Korea and 17 other countries. The Central Intelligence Agency (C.I.A.) targeted India, Pakistan, Iran Libya and North Korea for surveillance of their military weapon programme. President Mr. George Bush agreed in principle to go ahead with the proposal to provide \$10 billion in loan guarantees for four lakh Jewish migrants in Israel from the former Soviet Union. Mr. George Bush told the republican convention at Houston that elimination of the Cuba leader Dr. Fidel Castro's brand Marxism would be a target in the next four years. The Congress called for a new auto theft law to deal with one of America's fastest growing crimes after the tragic death of India Housewife Mrs. Pamela Bush. Mr. Bill Clinton was elected as U.S. President and the power was grabbed by the democrats after 12 years. He sent out message of continuity in foreign policy.

RUSSIA: In the month of January Russia and Ukraine arrived at Shaky Compromise to divide black sea fleet into strategic and non-strategic parts and give Ukraine control over the non-strategic part. There was unrest in Russia and rallies were formed and private shops were attacked. Important steps to preserve the unity as autonomous ethnic republics and region sign federal treaty on decision of power between centre and local Government. Russia and Ukraine agreed to suspend rival decrees taking over the black sea fleet. President Mr. Boris Elstin won effective vote of confidence from Russia's Supreme Legislature. Rocket Technology to India was resumed after expert approval. President Mr. Boris Elstin stood by Rocket engine deal with India. U.S. and Russia agreed to resume joint space flights.

U.N.: In January, 1992 the Security Council asked Libya to surrender for trial two of its nationals accused of complicity in the blowing up of Pan America's Airliner in Scotland. Security Council imports

and embargo on sale of weapons to combatants in Somalia. In February, 1992 Summit meeting security council was held at *New York* with a call by the British Prime Minister Mr. John Major for a firm attachment to the people of collective security. World leaders of Security Council meeting laid down principles of a new world order. British Prime Minister Mr. John Major read out a joint statement focussing on the responsibility of the world body to maintain world peace. Security Council agreed to set up protection force for Civil War. Security Council condoned Iraq's failure to begin destroying Saudi missile facility and warns of serious consequence. Security Council slapped trade sanctions and harm embargo on Libya for failing to surrender suspects in territories acts on Jetliners. Five permanent members of Security Council, U.S., Russia, Britain, France and China agreed to set 10 guidelines to prevent spread of weapons of mass destructions. U.N. Conference on Environment Development was held at Rio de Janeiro Brazil. The Security Council authorised use of force as a last resort to ensure humanitarian aid to the deceased civilians in Bosnia-Herzegovina.

Other Countries: In the month of January, Israel and Palestine launched historic negotiations in Washington on Palestinian autonomy. China agreed to protect U.S. patents and averts penal action hours before expiry of a deadline. Bulgarian President Mr. Zhelyu Zhelev won new five year term. United Arab Emirates (UAE) cut oil outputs by 50,000 barrels a day. Organisation of Petroleum Exporting Countries (OPEC) cut oil production to stabilise world oil prices.

Palestine Liberation Organisation boycotted West Asia Peace Conference in Moscow following U.S. refusal for a bigger PLO delegation. British Prime Minister submitted a new and tougher draft for the U.N. Summit. Italian President Mr. Francesco Cossiga dissolved Parliament five months early and called for elections on April 5. 150 Myanmar Muslim refugees including women killed in a boat capsize while trying to cross over to Bangladesh. 28 killed in a French chartered airliner crash near Senegal. High level inspection team for International Atomic Energy Agency from U.S. leave for Iran to inspect nuclear facilities there. Western countries started sending food supplies and medicines to the Commonwealth of Independent States of the erstwhile Soviet Union. Russian Parliament ratified border treaty concluded between the Soviet Union and China in 1991. Ousted Georgian President Mr. Gamsakhurdia surfaced after six weeks of hiding declared to fight for restoration of legitimate power to Georgia. President of Yugoslav Republic of Bosnia Mr. Alija Izetbegovic, proclaimed Muslim dominated republic's independence. Mauritius became a republic. Bade goodbye to British Monarch as head of State. South African whites gave a massive mandate to their President Mr. F.W. de Klerk to end apartheid and share power with black majority. French Prime Minister Mrs. Edith Cresson resigned; Finance Minister Mr. Pierre Berégovoy appointed Prime Minister. Conservative party led by Mr. John Major claws its way to power in the U.K. securing for Tories an unprecedented fourth term in office. Former Panamanian dictator Manuel Noriega found guilty on eight out of 10 drug and racketeering charges by a Federal Court Jury. Dr. Najibullah, Afghan President deposed as Coalition took over. Afghan Government ceded power to Mujahideen leaders. 12 nations signed Climate Treaty to curb gas emission that affect environment at Rio Summit. India proposes a Planet Protection Fund to help buy environment friendly technology worldwide and make it available to any country seeking access to it at the Rio Summit. World Bank sought support of developed nations to set up Earth Increment Fund as part of International Development Association. Agenda 21 Comprehensive document that will set the planet on a new course of sustainable development adopted at Rio Summit. Mr. Fidel Ramos declared elected President Philippines. Slovak nationalist leader Mr. Vladimir Meciar and Czech conservative Mr. Vaclav Klaus announced an agreement on the break up of Czechoslovakia. \$850 million Japanese aid this year for India. The All India Consortium of Western donors pledged an enhanced aid package of \$7.2 billions to India for the year. The caretaker President Mr. Sibaotullah Mujaddidi hands over power to leadership council in Kabul Afghanistan. Israel's Prime Minister Mr. Yitzhak Rabin formed a coalition with moderates, a good augury for the West Asia Peace process. Mrs. Hanna Suchoka became the first woman to head the Polish Government. The ousted Panamanian dictator Mr. Manuel Noriega sentenced to 40 years in jail on drug and racketeering charges. Cuba's Parliament increased the

Constitutional powers of the President, Dr. Fidel Castro. Pope John Paul II appeared in public on Sunday for the first time after undergoing intestinal surgery on July, 15. Across a 2,415 Km. from the Indian ocean coast to Sudan's Western deserts, millions are threatened with starvation. The region encompassing Sudan, Kenya, Ethiopia, Eritrea, Somalia and Djibouti is mired in famines and warfare that orphan increasing number of people each year. The British Government decided in conjunction with France and the U.S. to impose an air exclusion zone to protect shias against alleged atrocities of the Saddam Hussein regime. Indonesia to take over the chairmanship of the non-aligned movement before the start of the summit. The tenth non-aligned summit opened at Jakarta. President Suharto of Indonesia the new chairman gives the lead in expressing the widespread feeling within the NAM that it should reaffirm its validity in the new international context. French vote narrowly in favour of the Maastricht Treaty. India and Britain signed a historic extradition treaty and an agreement on confiscation of extremists assets. The British Cabinet Minister Mr. David Mellor resigned after an extra-marital affair with an actress was plastered all over the tabloid press. The Prime Minister Mr. P. V. Narasimha Rao held talks with the French leaders in Paris. India concluded a deal for purchase of about one million tonnes of wheat from U.S. at subsidised rates. China agreed to open markets to the U.S. The OPEC deadlocked over ways to curb high production and support weak oil prices. Ecuador became the first oil producer to leave the OPEC in its 31 year history.

National:

So far as our country is concerned, so many important changes, for political and otherwise have taken place and it is for the people of our country to decide whether it is good or bad. Some of the political parties have become stronger and form a strong opposition to the ruling party while some others have become weak and have become non-recognised parties.

Ayodhya and B.J.P.: Mr. L.K. Advani of B.J.P. started his Ratha Yatra to reach the Ayodhi, the birth place of Sri Rama where a construction of a temple for Srirama was under consideration. The Jammu and Kashmir Government invited Ekta Yatra Participants to join the official republic day celebrations at Srinagar. Ekta Yatra ended abruptly on the outskirts of Udhampur and Dr. Murali Manohar Joshi was flown by I.A.F. helicopter to Srinagar. Dr. Murali Manohar Joshi, B.J.P. President hoisted the National Flag amidst tight security at the Lal Chowk in Srinagar. The Lucknow Bench of the Allahabad High Court stayed construction work at Ayodhya on 16th July, 1992. The activities continued at Ayodhya despite the Court's stay order. But thereafter construction work at Ayodhya site came to a halt and U.P. Government took control of it. The Supreme Court appointed a commission headed by its Registrar General Mr. S. Rai to report *inter alia* on the nature, size and alignment of all structure (including the platforms existing on the 2.77 acres of the acquired land adjacent to Ram Janmabhoomi Babri Masjid complex at Ayodhya. The Babri panel agreed to attend Ayodhya talks. After a gap of 19 months representatives of the Vishwa Hindu Parishad and the All India Babri Masjid Action Committee met on the 4th October, 1992 to discuss about the construction of a temple for Sriram at the disputed place. The third round of talks on the Babri Masjid-Ramjanmabhoomi issue derailed with the Vishwa Hindu Parishad refusing to withdraw its call for Kar Seva from December 6th was held on the 9th November, 1992. The National Integration Council gave green signal to Government take steps to uphold the Constitution and the Rule of Law to ensure that the orders of the Court in the Ayodhya dispute are implemented. The U.P. Government assured that no construction material men and machinery would be moved to the 2.77 acres of acquired land adjacent to the Ramjanmabhoomi-Babri Masjid complex. B.J.P. Assured Kar Seva without construction work. But the saints deferred face-off in Ayodhya. On 6th December, 1992 which is considered as a black letter day in the history of India. karsevas demolished 450 years old Babri Masjid which was condemned by all the political parties throughout India. As a result of it there was a bitterness between Hindus and Muslims. Bombay witnessed big riots. Central rule was proclaimed in the U.P. State and curfew was imposed in the U.P. Town and army was alerted. B.J.P. leaders L.K. Advani, Ashok Shinghal, M.M. Joshi and V.H.P. leaders arrested. The Allahabad High Court invalidated land acquisition by the Government at

Ayodhya. Ayodhya related violence toll 1,150 and Mr.Vajpayee, B.J.P. leader detained briefly started his fast.

Scam: Another interesting and important event which has become very notable and a day-to-day word is "Stock Scam". The Stock Scam was deducted in the month of May and the Central Bureau of Investigation was asked to inquire into and investigate the same. Mr.K.Margabandhu, Chairman and Managing Director of the United Commercial Bank and the Deputy Managing Director of State Bank of India Mr.C.L.Khemani incharge of Bank's treasury and investment portfolio asked to leave in connection with the stock scam. On 16th May, 1992, the Bombay Stock Exchange authority announced a closure of the market. The Janakiraman Committee of the Reserve Bank of India which was investigating the stock scam put the amounts of bank funds involved in the scam at Rs.3,078 crores. Another victim that was asked to go on leave is the Chairman of the State Bank of India Mr.M.N.Goiporia. Mr.Harshad Mehta, who is described as the big bull and his brother Mr.Ashwin and their three associates and three bank officials were arrested in connection with stock scam. The multi crore stock scam claimed its first victim. Mr.P.Chidambaram, who was the Minister of State for Commerce, resigned and the Government agreed to set up a Joint Parliamentary Committee to probe into the stock scam. The Lok Sabha Speaker Mr.Shivraj Patil designated Mr.Ram Niwas Mirdha as Chairman of the Joint Parliamentary Committee set up to probe the securities scandal. Mr.Harshad Mehta who is familiarly known as the 'big bull' returned as free man on the order of the Bombay High Court since he is arrested as prime accused in the security scandal. Mr.Harshad Mehta the big bull admitted that payment as large as 1 crore was made in Bombay to well connected companies.

TELUGU DESAM: Telugu Desam party split with eight of its M.Ps. in Lok Sabha formally requesting the Speaker Mr.Shivraj Patil, to recognise the group led by Mr.B.Vijayakumar Raju as the real 'Telugu Desam' and allot it a separate block in the House. Lok Sabha speaker Mr.Shivaraj Patil accorded formal recognition of TDP break up and allotted separate seats to six members led by Mr.B.Vijaykumar Raju and with the admission of six members break away Telugu Desam group in the Lok Sabha, the Congress (I) secured a simple majority in the Lok Sabha. Mr.P.Upendra, former Union Minister of Janata Dal and an important leader of Telugu Desam Party was expelled from the party.

Miscellaneous:

Bharat Ratna title was conferred posthumously on Nethaji Subash Chandra Bose and Maulana Abul Kalam Azad, India's first indigenously built submarine INS Shalki was commissioned by the Defence Minister Mr.Sharad Pawar. Mahamakam festival was celebrated at Kumbakonam. The State Government made elaborate arrangements at a heavy cost. Chief Minister Selvi J.Jayalalitha attended the festival. Bharat Ratna was conferred on Satyajit Ray the film mastro. Oscar for life achievement was also presented to him. Justice Kanthakumari Bhatnagar was appointed as the Chief Justice of Madras High Court. It was decided to have a separate police force to protect temples and idols in Tamil Nadu. First all woman police station was opened in Madras. The Augmented Satellite launch vehicle (ASLV) was launched from Sriharikota. Indira Gandhi prize for peace disarmament and development for 1991 awarded to Rajiv Gandhi posthumously. Bengal Poet Subash Makhopathiyay was awarded Jnanpith award for 1991. India's second intermediate range ballistic missile Agni was successfully test fired with a higher payload. Dr.Mrs.Najma Hephthullah was re-elected as Deputy Chairperson in the Rajya Sabha. Vice President Mr.Shankar Dayal Sharma was elected President of the country. The Prime Minister Mr.P.V.Narasimha Rao's Government won confidence vote. Supreme Court held that levy of capitation fee by any educational institution is illegal. Delhi High Court quashed both the First Information Reports (FIR) against *Win Chanda* and two letters regotory issued in 1990 in Bofors case. A Full Bench of the A.P. High Court quashed as unconstitutional Sec.3-A of the A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee Amended Act), 1992. The Defence Research and Development organisation scientist successfully sent three flights of the indeginomously

designed and development piloted target aircraft "Lakshya" at the interim first test range near Chandrapur in Orissa on September 16, 17, 18. Mr.K.R.Narayanan was sworn in as the Vice President of India. Karnataka Chief Minister Mr.Bangarappa staged a 'Sadhana Samavesha' for a show of strength. Some of the Ministers resigned from the Karnataka Ministry. Mr.G.Ramaswamy, the Attorney General of India resigned in the wake of the controversy relating to his remarks on an 'anti south' bias at the centre. Mr.S.Bangarappa, Karnataka Chief Minister resigned. Mr.Vecrappa Moily was chosen as Karnataka Chief Minister. Mr.Milan Kumar Banerjee has been appointed as Attorney General of India. The A.P. Chief Minister Mr.Janardhana Reddy resigned and Mr Vijayabhaskara Reddy has been appointed as new Chief Minister.

Sports:

Bhuvaneswari won national award for the 16th time and equalled guiness record. Tamil Nadu men took national Volley Ball Battle. India claimed Indira Gandhi World Cup in Hockey. Anupama Gokhale regained national chess title. Kamallesh Mehta won men's national title tennis for a record seventh time. Niyal Shah regained women's carem. Kerala won Santosh Trophy Foot Ball. Denmark the Giant-killer, lifted European cup football. Steffi Graf won at Wimbledon. Agasi became the new man's champion at Wimbledon. Barcelona Game concluded on 10th August and the United team topped the medal take. *Geet Sellu* won world professional billiard title. Ganrav Natekar and K.V.Nirupama claimed national tennis. United States defeated Switzerland to win the Davis Cup Tennis title

Notable Deaths:

Former Union Minister and the President of T.N.C.C. Mr.O.V.Alagesan passed away at the age of 81. *Bharat Bhushan* noted Hindi Film Actor died. H.C.Kothari noted Industrialist died at Madras. Satyajit Ray, the veteran film maker died at Calcutta. Marlene Dietrich, film actress died at the age of 90 at Paris. Maharajapuram Santhanam, the foremost Carnatic Musician died in an accident at the age of 69. *Shivaji Rao Bhawe* Gandhian and younger brother of *Vinoba Bhawe* died in Wardha. Kannan Devi legendary film glamour queen died in Calcutta. Britain's most decorated pilot Lord Leonard Cheshire World War II hero died at the age of 74. *Sri Azhagia Singar* the 4th head of the Ahobala Mutt in Srirangam died at the ripe old age of 97. Mr.N.Subramania Iyer aged 97 years, President Ramakrishna Mutt Students Home died. Mr.P.Neelakantan aged 76years, Tamil Film Director and script writer died in Madras. The dayon of Hindustani Music Mr.Malikarjuna Mansoon died at 82 in Dharwar. The former Chief Justice and Vice President of India Mr.Hidayathullah died in Bombay at the age of 87. Mr.K.V.K.Sundaram, former Election Commissioner died. Mr.Honappa Bhagavatar, musician and film actor and producer died on the 1st day of October in Bangalore at the age of 78. Mr.Prem Nath, film actor died at Bombay when he was 67 years. Mr.Alexander Dubeck former Czechoslovak leader of the 1968 Pargue Spring Liberation Movement at Pargue died. Mr.Jothi Venkatachalam, former Governor of Kerala and Minister of Tamil Nadu died at the age of 87 at Madras.

Thus ends 1992, an eventful year both at the home and abroad and on to 1993

BOOKS REVIEW

PUBLIC LAW IN BRITAIN AND INDIA By *William Wade*. Published by *N.M.Tripathi Private Ltd.* Price **Rs.90.**

This book under notice contains the lectures delivered in connection with late M.K.Nambiyar Lectures. There are four lectures in this book. The first lecture under the heading *Constitutions - Bedrock or quicksand* was delivered by the Hon'ble of His M.H.Kania, Chief Justice of India. The second lecture was delivered by the Hon'ble of his P.D.Desai the topic being *Judicial Review - The Foundation*. The third lecture was delivered by Sri S.P.Barucha, Chief Justice of Karnataka High Court on the topic *Judicial Review New Horizons*. The fourth and last lecture was delivered by the Hon'ble Sri N.P.Singh, Chief Justice of West Bengal on the topic *Government Judiciary and Profession*. The author has given a brief note about late M.K.Nambiyar. This book under notice dealing with lectures will be a good addition to any library and will be useful to those who are interested in knowing Constitutions.

THE POWERS OF ATTORNEY ACT (VII of 1882), second edition, by *D.P.Shah*. Published by *N.M.Tripathi Private Ltd.* Price **Rs.60.**

Almost all educated people know as to what is Powers of Attorney. But many do not know about the provisions of Powers of Attorney Act. Therefore, a good book dealing with Powers of Attorney Act is absolutely necessary.

The book under notice is a concise book dealing with Powers of Attorney Act. There are only six sections in this Act. The author has given a critical notes. Important case laws are also referred to. The author of the book under notice has given the forms and precedents. A table of cases is given in the beginning. This book under notice will give an idea of the Powers of Attorney Act. This book will be a welcome addition to any library.

PROFESSION TAX (Tamil Nadu Act 24 of 1992 with Rules). By *K.S.Mahalingam, Advocate*. Published by *Tamil Nadu Law Notes Journal*. Price **Rs.30.**

This book under notice deals with Profession Tax. Mr. Justice P.S.Mishra of the Madras High Court has written the foreward. The text of the Act and the Rules are given. Few important cases are also given at the end. The book under notice contains corresponding provisions in other enactments. For the people engaged in Professions, Trades, Calling and Employments it is necessary to know about the law relating to that. This book gives a ready answer. People who carry on Professions, Trades, Callings and Employments will find this book useful. It will definitely serve the purpose for which it is written. The author of the book K.S.Mahalingam a practising lawyer this the City of Madras has taken pains to bring about this book with necessary details.

SATTA KADIR. "*Satta Kadir* is a Tamil Law Journal edited by Sri V.R.S.Sampath and published by Madras Education Trust. The first issue of the journal was published November, 1992. The journal contains the judgments of the High Court and the Subordinate Court in the vernacular language. The meaning of the words such as "attestation", "receipt", are briefly explained. Articles on different topics are also published. The law on various topics is explained by means of a drama.

This journal will be popular among the lawyers practising in the City as well as in the Districts.

COMMISERATIVE COUNTENANCE FOR COMPASSIONATE APPOINTMENTS.

By

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1. The Scheme: The fate of a Government servant who dies in harness, leaving his family in agony is akin to a rudderless ship abandoned by the captain. To mitigate this agony, schemes had been devised by Governments to help the family by providing employment to the heir of the deceased employee. The Government of Tamil Nadu in G.O.Ms.No.225, Labour Department, dated 15.2.1972 introduced a scheme providing employment assistance to a dependent of a Government servant who dies in harness, leaving his family in indigent circumstances. Government in G.O.Ms.No.73, Employment Services dated 26.10.1983 redrafted the scheme with the amendments made to the scheme till that date. The appointment will be on regular basis, in relaxation of the normal procedure for recruitment. The dependents of the deceased, eligible for employment are the widow or the husband, son, unmarried daughter, legally adopted son, and legally adopted unmarried daughter. The candidate should possess all the prescribed qualifications for the posts concerned. For Masalchis of class III and categories in class IV of Tamil Nadu Basic Service Rules the educational qualification is "ability to read and write Tamil" vide Government Letter No.5484/N1/82-9 Labour Employment Department, dated 16.6.1983. The upper age limit for consideration of appointment is 30/40 on the date of death of the deceased. The dependent can be considered for appointment in any Department and not necessarily in the Department where the deceased worked. Government in the subsequent G.Os. had given many clarifications. The concession will be available even in case the Government servant dies during the period of extension of service and not during the period of reemployment. (G.O.Ms.No.41, Employment Department, dated 23.3.1988).

In the implementation of this scheme, many questions had cropped up, warranting judicial scrutiny. In many cases administrative or procedural delays cause hardship to the claimants of compassionate appointments. Whether economic prosperity of the family can be a reason to reject employment on compassionate grounds? When one son is already in employment of the same organisation can employment to the other son be denied? These and other questions settled by law will make an interesting reading.

2. Existence of vacancies-Is it a prerequisite?: Compassionate appointment cannot be denied on the plea that there is no vacancy. In case there is no vacancy a temporary candidate sponsored by Employment Exchange, with less than 1 year of service can be ousted, to accommodate the compassionate candidate, according to the instructions of the Government of Tamil Nadu vide G.O.Ms.No.2521, Labour and Employment Department, dated 7.11.1981. The Supreme Court which deprecated delay in making compassionate appointments, explained that the purpose of giving appointments on compassionate grounds is to mitigate the hardship due to death of the bread-earner in the family. The Government of Tamil Nadu has in G.O.Ms.No.314, Labour and Employment Department, dated 13.11.1991 directed that the Officer should forward the application for compassionate appointment, to the Head of the Department within a month and the latter should issue orders of appointment within 15 days. Justice M.P.Singh and B.P.Singh of Allahabad High Court in the case of *Dinesh Ravi v. District Inspector of Schools, 1991 Lab.I.C. 739*, decided that it was mandatory on the part of State Government to create a post and appoint the heir.

However, Justice B. Dikshit of the Allahabad High Court in the case of *Dinesh Kumar Mishra v. State of Uttar Pradesh and others*, (1992) 2 L.L.J. 527, held that the Government could deny employment on the ground that there was no vacancy.

If there is no suitable post for appointment, super-numerary post should be created to accommodate the candidate. (*Smt. Sushma Gosein v. Union of India*, 1989 Lab.I.C. 2014; A.I.R. 1989 S.C. 1976).

3. When family is not indigent?: According to the order of the Government of Tamil Nadu in Letter No.36907/N1/81-6, Labour and Employment Department, dated 5.5.1982, the concession is not admissible even in cases where the earning member of the family of the deceased Government servant is married and living separately and or not extending, his full support to the family of the deceased Government servant. If a member of the family is regularly or permanently appointed in State Government service, or public Sector Undertaking of Central or State Government or in Local Bodies or in co-operative societies or in private industries other members are not eligible for employment on compassionate ground. (G.O.Ms.No.40, Labour and Employment (Q1) Department, dated 5.1.1990).

The Central Administrative Tribunal New Bombay Branch (M.B. Myumdar Member (J) and M.Y. Prolkar Member (A)) in *Arunfakirnath Sonavane v. Union of India and another*, 1990 Lab.I.C. 443, held that younger son could not claim appointment, on compassionate ground if the widow receives pension of Rs.535 p.m. and substantial lump sum amount of Rs.33,000 and the elder son is also employed in Government Fakirnath Sonavane was a Plater in the Naval Dock Yard Bombay.

The Kerala Government's Scheme for giving employment for the heirs of Government servants dying in harness, laid down income qualification for family. That qualification applies to cases upto 1.7.1983. In respect of those who died after 1.7.1983 no such income qualification was prescribed. It was held by Kerala High Court in the case of *Suresh Kumar v. State of Kerala*, (1991) 2 L.L.J. 833, that once the limit has been taken away, there is no justification for further classification in respect of persons who died before a particular date.

The G.O.Ms.No.1044, Labour and Employment Department, dated 23.11.1990 of the Government of Tamil Nadu clarifies that if any of the dependent of the deceased Government servant is or are employed in Military Service, any one of the other dependent is eligible for appointment in Government Departments and Government Undertaking on compassionate grounds.

In one case the son of the deceased employee was already employed with the Board where the deceased was working, before his death. After the death whether employment to the second son could be denied? It was answered by the Karnataka High Court (Justice N. Venkatachala and Justice N.D.V. Bhatt) in the case of *K. Raj v. Karnataka Electricity Board and others*, 1991 Lab.I.C. 778, holding that the second son was eligible for employment.

One A.V. Krishnamurthy, employee of L.I.C. died in 1989. His wife filed a petition to the L.I.C. to appoint his son A. Seshagiri. The L.I.C. rejected the claim stating that Thiru Seshagiri's brother A. Babu Rao was employed in L.I.C. The latter joined L.I.C. before the death of the deceased. He severed all the connections with father's family. His another brother was securing employment on casual basis. It was held by Justice Bhaskara Rao of Andhra Pradesh High Court in *A. Seshagiri v. L.I.C.*, (1992) 2 L.L.J. 326, that before rejecting the request for appointment on compassionate grounds, the employer should consider whether the gainfully employed son or unmarried daughter are members of the family. When the employee died during service, it is for the person claiming job on compassionate ground to prove that his eldest brother is separated from the joint family and living separately and has no connection with the family.

4. When death is disputed?: Justice B.N.Kripal and Justice D.K.Jain dealt with the case of *Sashi Mittal v. Union of India*, (1992)2 L.L.J. 438. In that case the wife claimed employment on compassionate grounds saying that her husband was presumed dead. But the employer contended that her husband was alive and was dismissed from service. The Labour Court came to the conclusion that her husband was alive and he was not interested in continuing the dispute. It was held that her husband's services were terminated and that she had no right for employment on compassionate grounds.

5. Is attainment of majority a necessity?: In the case of *Rajendra Prasad Poodar v. State of Bihar and others*, 1991 Lab.I.C. 959, the Patna High Court had to consider an interesting case. The applicant's father died in harness on 28.12.1980. At that time the applicant was 17 years and few months. The application was turned down because the petitioner did not attain the age of 18 years. His date of birth was 10.2.1966. On 9.4.1985 within five years of the death of his father, he having attained majority, sent another application. To his fluster and dismay it was rejected on 16.8.1985 on the ground that two years limitation from the date of death was expired. The personnel and Administrative Reforms Department had fixed the period of limitation as two years for filing the application for appointment on compassionate grounds. It was held that such persons are to be saved from the critical condition of life on account of economic backwardness and it was only with a view to save such person from difficulty that the person concerned given appointment on compassionate grounds. In this case when he presented an application, he was under-aged and did not fulfil the prescribed age of 18 years. When he attained the age of 18, his application was turned down stating that he was beyond the period of two years limit. The situation was beyond the control of the petitioner. Any technical objection will be a fly in the appointment defeating the object behind such appointment on compassionate ground. Hence the Regional Deputy Director was directed to appoint the petitioner for suitable post in accordance with law and on compassionate ground within a period of two years from the date of the order.

As far Tamil Nadu Government is concerned, there is no bar in appointing a candidate under compassionate grounds below the age of 18 years. *Vide* Letter No.66813/Q1/91-3, dated 22.11.1991 of the Labour and Employment Department.

6. Give opportunity before cancelling Order: The Madras High Court in *P.Chinnasamy v. Tamil Nadu Electricity Board*, (1992)2 L.L.J. 51, held that once the legal heir is appointed, subsequent cancellation of the order of appointment on the ground that their family is not in indigent circumstances is the violation of '*audi alteram partem*' rule and hence the cancellation order was set aside.

7. Competence to the post: Justice Nainar Sundaram and Justice Somasundaram of Madras High Court held that a concession must certainly go by the terms by which it is granted and not beyond or besides it. In that case, the petitioner was appointed temporarily and before regularisation of the services, before the lapse of one year, the irregularity and infirmity in his appointment was found out and if there had been a termination on that basis, there is no scope of bringing in any theory of equitable estoppel.

Can a person be given appointments in a post which is lower than the one to which he is eligible? The Allahabad High Court in *Shailesh Kumar Panday v. State of U.P.*, (1992)2 L.L.J. 237, held that the intention of the rules is that persons are not only given appointment, on the death of the breadwinner, but such appointment should be to such posts for which the person applies is really eligible and competent. Even if no post is available, super-numerary post should be created to accommodate the person.

**The right of a female heir to claim partition in a Dwelling House
Under Sec.23 of the Hindu Succession Act, 1956.**

By

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The process of conferring right to property on Hindu women is very gradual, through various legislative measures. Under the Hindu Women's Right to Property Act, 1937, a Hindu widow of a deceased coparcener had a right to demand partition but the exact share, that she would receive cannot be ascertained till partition is made. The property cannot be alienated without the concurrence of all the members of the family except for legal necessity. In short, it was only a 'restricted or limited estate'. Next, Sec.6 of the Hindu Succession Act, 1956, is another step in conferring a right to property on Hindu women in the coparcenary property. By means of 'Notional partition', as contemplated by virtue of the proviso to Sec.6, Hindu women have come to acquire shares in the coparcenary property. It is remarkable to note, that not only a widow but also mother and daughters of the intestate are given equal shares. Anyhow, the status of 'coparcenership' was not conferred upon a daughter of a Hindu coparcener.

By virtue of Sec.14(1) of the Hindu Succession Act, 1956, the concept of 'limited ownership' has been wiped out in regard to the property acquired in the modes described therein, except those that are specifically provided under Sec.14(2) of the Act.

Yet another move under the Act I of 1990, was made in the matter of improving the status of women, especially a daughter of a Hindu coparcener, which is, though a very serious inroad into pure Hindu Law, certainly a drastic, rather beneficial provision for Hindu women. Till the passing of the Act I of 1990, in view of several judicial pronouncements under Hindu Law, the position of a daughter of a coparcener was not equated with a son, who gets a right by birth in the coparcenary property. Under Sec.29-A of the Act I of 1990, that a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son.

At this juncture, a question arises as to how Sec.23 of the Hindu Succession Act, 1956 has escaped from the scrutiny of the 'Law Makers' even after such drastic changes were made, altering the basic tenets of Hindu Law.

As per Sec.23 of the said Act, 'where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house, wholly occupied by members of his or her family, then notwithstanding anything contained in the Act, the right of any such female heir to claim partition of the dwelling house shall not arise, until the male heirs choose to divide their respective shares therein.

The effect of this section is to suspend the right of a female heir, to claim partition in a dwelling house, wholly occupied by the members of intestate's family, during the period when the male heirs keep 'mum' without claiming their respective shares by way of partition. For the purpose of depriving a female heir of her right to claim partition, the male heirs may not choose to divide the house between themselves. Thus, the right of a female heir to claim partition, in the dwelling house rests with the choice of the male heirs. Further, the phrase 'a dwelling house, wholly occupied by the members of his or her family' is susceptible of various interpretations according to the facts and circumstances of each case. If this section is literally construed, that in case, a part of the house is tenanted out, the other portion, being occupied by the members of the intestate's family it would constitute a ground for a female heir to claim partition in the house, on the pretext, that it is not wholly occupied by the members of the family.

Where the intestate has only one property, viz., a dwelling house the female heirs are left without any remedy or relief and it is totally unfair to deprive them of their statutory right of claiming partition in view of certain conditions imposed by the section. In fact, she has been given the 'right of residence' which cannot certainly be equated with 'her right' in the house. My suggestion is that suitable legislative changes in the said section should be made, however drastic they might be, so as to make the female heirs not dependant upon the 'choice' of the male heirs in the matter of claiming partition in a dwelling house.

A JUDGE PASSES AWAY

The news of the passing away of *Justice S. Govindasamy* on 12th February 1993 at Madras was received with sincere regret by the members of the Bench and the Bar alike as well as by those who had come into contact with him. Born on 8th August 1934 in an Agricultural family in Meimathur Village of Thanjavur District, *Justice S. Govindasamy* had nearly three and a half years service at the Bench as a judge of the High Court. Having practised at the Bar for many years and served in the chambers of the Former Chief Justice *Mr. M. M. Ismail*, *Justice S. Govindasamy* was appointed judge of the High Court of Judicature at Madras on 15.2.1990. Throughout his judicial career *Justice S. Govindasamy* had the reputation of being a patient, considerate and courteous judge. He was practically at home while disposing of Writ Petitions. He was conscious of the fact that the Administration of Justice has a social function and that the judicial process is only a part of larger social process. He was fully alive to the dangers of hard constructions and strained inferences. His judgments are marked by thoroughness in appreciating the facts bearing the law. He shunned the limelight of publicity and took no particular interest in publication of his judgment. He was a pious, soft spoken, gentle warm hearted man. He was humane in his approach and conscientious in the discharge of his duties. **MAY HIS SOUL REST IN PEACE!**

Some Reflections on Sec.8 of the Hindu Minority and Guardianship Act, 1956.

By

R. Govindarajan, B.A., B.L., Advocate, Madurai.

The triple enactments in the year 1956, though they have made phenomenal changes, have not abrogated the basic concepts of Hindu Law. One such enactment is Act XXXII of 1956.

Prior to 1956, the father, kartha-manager or the manager of a coparcenary or Hindu joint family, can alienate the property of the minor, either his share in the coparcenary of joint Hindu family or his separate property. The said transaction is only voidable at the instance of the minor and this has not been put an end to by Act XXXII of 1956.

The Act while keeping in tact powers of natural guardian of a minor to do all acts necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate, but circumscribes the alienation of the minor's property with the permission of the Court. The natural guardian in no case can bind the minor by a personal covenant. The alienation by the natural guardian sans Court's sanction is only voidable under Sec.8(3), at the instance of the minor or any person claiming through him. The section further restricts the sanction of the Court only to cases of necessity or for an evident advantage to the minor and in no other transaction.

The first question that confronts one is whether the permission of the court is a *sine qua non* for the alienation and if so whether such an alienation *ipso facto* becomes *non est* in law or void. The second question is what is the mode of avoidance of the alienation either by conduct or otherwise and does the avoidance make the transaction void either from its inception or from the time of avoidance.

The third question is whether any transferee from the minor after attaining majority steps into the shoes of the minor and can he ignore the alienation *in toto*. The fourth question will be whether the alienee can defend the transaction and justify it in case the minor avoids it or is avoided by any other person claiming through him?

To answer all the above questions one has to bear in mind the basic difference between a void and voidable transaction. This is best explained by Chief Justice Rajamannar and T.L. Venkatarama Iyer, J. in *Appanna v. Jami Venkatappadu and others*, 1953 Mad. 611, as follows: "Now the authorities have

established that for this purpose there is a distinction between voidable and void transactions and that while the former class of transactions should be set aside, the latter need not be. The reason for this distinction is that in the case of a voidable transfer, the title to the properties vests in the transferee on the execution of the deed and that it can revert in the transferee only by a decree of court rescinding the transfer". In a void transaction, it does not vest title in the transferee. In an earliest case in *I.L.R. 59 Mad. 687 Justice Stone* has said "it is preferable to regard such an alienation as perfect unless and until it is set aside".

Because of the distinction in the concept, the legislature has thought fit to make the transaction sans court's permission as voidable and not void in Sec.8(3) of Act XXXII of 1956. We find a different interpretation against the statute has been given in some of the judicial precedents. I will give a short resume of some of the decisions for consideration.

In *Thilakam v. Radhika*, (1985)1 M.L.J. 407, Justice P.R. Gokulakrishnan and Maheswaran, has held as follows: "So far as the present case is concerned, the plaintiff by her lawyer notice Ex.P-5 dated 11.2.1980 has clearly stated that the agreement Ex.D-21 is not binding on her. This is a clear repudiation and as such the agreement Ex.D-21, even assuming for the sake of argument that the same has been executed by a natural guardian is void from its inception". The case deals with the lease by the mother, who is a *de facto* guardian only. The learned judges follow the principles laid down in 1984 T.L.N.J. 403, which is a case of lease by the father who is the natural guardian. Perhaps the learned judges have in mind the definition of a natural guardian under Sec.6 of the Act, which lays down that after the father, the mother is the natural guardian. In this connection I would invite the readers' attention to my article reported in (1992)2 M.L.J. 12 (Journal section). A similar view has been expressed in *G. Annamalai Pillai v. The District Revenue Officer, South Arcot*, 1984 T.L.N.J. 403 consisting of by Justices Ramaswami and David Annusami and they have not followed the principles laid down in (1976)2 M.L.J. 243 (F.B.), wherein the learned Judges have upheld a transaction which is valid at its inception. In voidable transactions they are valid at its inception and the same has to be set aside by a judicial process.

In a recent judgment reported in (*Nallathambi Gownder v. Gopalakrishna Gownder and others*, (1992)1 M.L.J. 259, Justice Abdul Hadi has held as follows: "In the present case, admittedly the previous permission from court as contemplated under Sec.8(2) has not been obtained. So the plaintiff can avoid the transaction. In this context the trial court has erred in stating that in order to succeed the plaintiff has to prove that the transaction is tainted with immoral or illegal purposes or that it must be shown that there is no family necessity. The trial court has erred because no such proof by the plaintiff is necessary under the abovesaid Act". The learned Judge has further said "he could avoid the alienation in this regard by any act or conduct on his part showing his intention to avoid that following *Santha v. Chennukutty*, A.I.R. 1972 Ker. 71'. In the Kerala case Justice Krishna Iyer has held "when a minor is entitled to avoid a transfer effected by his guardian on the ground of absence of permission of the court it becomes a nullity on his unilateral act. He can merely avoid it by his conduct and there is no need to file a suit for avoiding the transfer". The case deals with the transfer by a mother, a *de facto* guardian.

If this extreme view is permitted to stay on, I would submit that an alienee will be estopped from putting forward his defence in any manner known to law to justify the transaction, which right he has under general law as laid down in the evergreen *Hanumanprasad's case*.

In this state of judicial thinking, the twin transactions, one excepted by Sec.8 and the transaction sans judicial permission, both are voidable and different yardstick is applied as regards its binding nature with regard to a minor. In the excepted transaction regarding a minor's undivided share in a joint family property, the alienee has a right to uphold the same and period is definitely 3 years within which a minor has to avoid the transaction on attaining majority. In the other type of transaction though voidable under the Section, is held to be void and can be avoided by the minor only by conduct and not by any other mode.

If this dichotomy is not put an end to by an authoritative pronouncement, it will cause unnecessary and endless litigation which is sought to be put an end to by the enactments and the beneficial aspects will pale into insignificance.

Late Mr.M.R.Narayanaswamy

By

Mr.R.Srinivasan, Editor, M.L.J.

We record with deep regret the passing away of Mr.M.R.Narayanaswamy, Senior Advocate on 9th April, 1993 at Madras. He was 77 and died after a brief illness.

It was barely two years ago that I was privileged to write a few words about our dear and most respected Senior Advocate Mr.M.R.Narayanaswamy, published in our esteemed Law Journal to felicitate him on his completion of 50 years at the bar. I had the least idea then that I was to lose him within a short period. This is no occasion to dwell at length on the life of the departed soul. His life as a practising lawyer, as a Social Reformer and worker, as a Philanthropist entertaining conversationalist and sociable person is well known to all the members of the bar and the bench.

Tall and well built fair complexioned with sharp features, with a voice that commanded respect and bearing that instilled deference the Late Mr.M.R.Narayanaswamy will be remembered as one of the most impressive and popular Advocate. Almost everything about him, his stately deportment, measured steps steady and resonant voice, full and complacent posture, measured conversation, sharp and pleasant look made him a respectable Senior Advocate and a gentleman *inch by inch*. Himself being meticulous in every detail he was thorough in his preparation of cases and effective in his submissions. He kept up the high tradition of the bar both in advocacy and professional conduct. Whoever was the judge and whichever was the Bench Mr.M.R.Narayanaswamy never hesitated to make his submissions.

Looking back on the years it could be said without any hesitation that Mr.M.R.Narayanaswamy had many friends and no enemies. He had a *winning smile* on his face. Spotlessly clean and meticulous in his dress, distinctive air of *care-free* life, everything about Mr.M.R.Narayanaswamy had a style of its own which was admired by everybody. A gentleman from *top to toe* he envied nobody and his pleasant manners were liked by everyone.

Mr.M.R.Narayanaswamy has earned a high place among the lawyers of this country and his name would be long remembered by the posterity. In recent years, the profession of law was his all absorbing interest. The reported cases in the volumes of the Law Reports would bear *ample testimony* of to Mr.M.R.Narayanaswamy's ability as a Lawyer. He was well versed in every branch of law though Labour Law was his favourite. He was held in high esteem by both the Junior and Senior members of the bar. He was the President of both *Madras Advocates' Association* and the *Bar Association*.

Mr.M.R.Narayanaswamy had a great liking for Carnatic Music and was actively connected with the Music Academy, Lady Sivaswamy Iyer's Girls' Higher Secondary School, Mylapore Club, Dr.Venkataraman's Sathabishakem Trust are the other Institutions with which Mr.M.R.Narayanaswamy was closely knit. Mr.M.R.Narayanaswamy was pious, religious and god fearing.

A great and good man who lived a rich, full and useful life has now left us. His death has created a void which cannot be filled up. I conclude by quoting Thiruvalluvar, the great Saint "சென்றவர் புகழ் மறையா" Mr.M.R.Narayanaswamy lived with fame as an *ideal man*.

May his soul rest in peace!

**Certificate of Registration of Trade Mark Ist Purport and Import
and What it is not?**

By

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Advocate, Madurai-625 001. (TAMIL NADU).*

1. Laws, relating to Trade and Merchandise Marks, Copy Right, Patents and Designs, Video Piracy etc., have in Modern times assumed much importance.

2. Trade Marks Law, as enacted in Indian Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958) totalling 136 sections, with its schedule of amendments upto date, rules and notifications, does not exhaust all the situations that confront the traders in their day to day commercial activities. Gaps and Lacunae in it are getting resolved by our Superior Courts from time to time.

3. In the above backdrop, I am now confining to a close discussion of *the scope and utility of the certificate of Registration of Trade Marks issued by the Trade Mark Registry, popularly known as, T.M.R., in commercial circles and what it connotes to its holder and the trading public.*

4. I have brought out the essence of the contents of the T.M.R. certificate, and also ventured to disabuse some misapprehensions entertained by a few among business and legal circles in regard to some particulars found therein.

5. T.M.R. is concerned only with the recording in its certificate, of a particular symbol, or label, or name, or pictorial representation and the like, (any one or more of them), connected with the particular class of Trade goods, or wares alone, *as the Trade Mark annexed to the certificate, Vis-a-Vis*, its or their owner, or Proprietor, described therein acquiring reputation for the above annexed symbol/Trade Mark associated with their goods in the market.

6. T.M.R. assigns also a particular Number or Numbers to that symbol/Trade Mark, and registers the same in its Certificate in the name or names of the applicants who are entitled to trade with or under that, symbol/Trade Mark supported by the Trade Mark Number. Thus, the T.M.R. Certificate, is solely and only concerned with the descriptive symbol/Trade Mark alone annexed thereto, and the persons entitled to use it in the market.

7. There is no difference, in the import of the certificate, as set out above be it one issued generally and usually under Sec.23(2) read with Rule 65(1) or under Sec.24, where the applicants declare in terms of their joint ownership of their trade assets.

8. Secs.29(2) and 106 and other Provisions in the Act deal with the delinquent trader (new or old) who offends the holders of the certificates issued by T.M.R. and protects them (holders) with grant of injunctions (Preventive and mandatory) damages, and other reliefs by civil courts (mostly District Courts-Vide Sec.105 of the Act.)

9. *The mere fact, that the T.M.R. Certificate, after the enumeration of the name, or names, entitled to trade with the Trade Mark contains the address of the said persons or holders of the certificate, it does not suggest or signify, that those persons are conditioned by the T.M.R., to carry on their business only at that place along and no where else in the whole world.*

10. Such an interpretation, is obnoxious and violative to the freedom of trade guaranteed to every Indian Citizen under Art.19(g) of the Constitution. Further it offends the basic common sense of every Indian trader not to better himself over his place of commercial activity. It is also neither fair nor proper, to attribute such a stringent invalid stipulation to the Trade Mark registry which is headed and manned by the Registrar, Deputy and Assistant Registrars, who all are equipped with legal and judicial talent and experience.

11. *Last but not least*, is the N.B. found in the end of the T.M.R. certificate itself to the effect.

"Upon any change of ownership of the Trade Mark, or change in address of the principal place of business, or address for service in India, application should at once be made to register the change."

The above proclaims clearly that the insertion of the address in the certificate, is only an official routine of the place of the business, of the applicants as found in their petition. It has no other significance of any substantial nature at all.

12. It is unfortunate that such a wild and untenable meaning should have been ventilated over the place or address of the business found in the T.M.R. certificate by Commercial folk in their Trade Mark bulletin etc. *The certificate concerns and confines itself only, to the symbol/Trade Mark with its number, and the names of person entitled to trade with that Mark; Any or all other particulars, if any, found in the certificate will be only superfluous and non-est in law and has no legal validity at all.*

Can a Statutory Right be Nullified by Acquiescence or Waiver?

By

R.Govindarajan, B.A., B.L., Advocate,
Madurai-625 001.

It is well settled that a statutory right cannot be given up either by acquiescence or waiver. It is also well settled that there is no estoppel against statute. While so we have before us the decision of the Apex Court reported in (1992)1 S.C.C. 370, presided over by Chief Justice Renganatha Mishra and Justice T.K.Thommen. The facts briefly stated is that a landlord files an application on the ground of wilful default and change of user of the residential building into non-residential without his written consent. The tenant has lost throughout and came before the Apex Court, where he succeeds. The court while holding there is no wilful default, has allowed the appeal on the ground of acquiescence on the part of the landlord regarding change of user. In para 6 of the judgment the following is the crisp utterance that is found. "Counsel for the respondent does not dispute that from 1973 there has been a change of user. The petition for eviction is in 1980. It follows that for seven years no objection was raised for change of user and for the first time when eviction was sought, conversion was made the second ground. In these circumstances, we are prepared to accept the submission advanced on behalf of the appellant that the landlord accepted the user to be also other than residential". I have taken this crisp observation of the Apex Court for discussion. Can this be taken as a correct statement of law as it goes against the statute?

A look at the Sec.10(2)(ii) of the Tamil Nadu Rent Control Act, under which the appeal has arisen will be useful in appreciating my view in the matter. The section reads as follows: That the tenant has after 23.10.1945, without the written consent of the landlord (a) transfer his right under the lease or sublet the entire building or any portion thereof if the lease does not confer on him any right to do so or (b) used the building for purpose other than that for which it was leased. If the above conditions are satisfied the landlord is entitled to eviction. From that it is clear that the "*written consent of the landlord*" is a *sine qua non* for subletting and change of user. This is a statutory right in the landlord by virtue of the statute. This right cannot be denied to the landlord even if he had knowledge of the subletting or change of user and the non-exercise of this right by the landlord for some length of time, will not disentitle him to get the order of eviction. The mandatory nature of the section prohibits the tenant from pleading waiver, acquiescence or estoppel.

Viewed as above, the decision of the Apex Court is not sound and cannot be acted upon by the subordinate judiciary. I am going to place before the readers several judgments of the Apex Court itself laying down a contrary view and also the dictum of the Madras High Court construing Sec.10(2)(ii) of the Tamil Nadu Rent Control Act.

In A.I.R. 1959 S.C. 689, while dealing with the Bombay Rent Act, the Apex Court has held "The Bombay Rent Act prohibits subletting and so any agreement permitting subletting would be void and the plea of waiver cannot be raised because as a result of giving effect to that plea the court would be enforcing an illegal agreement and this contravenes the statutory provision of Sec.15 based on public policy and produce the very result which the statute prohibits and makes illegal. By enforcing the contract, the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of parties. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same

reason. Wherever the contamination reaches, it destroys”.

In a case which arose under the Delhi Rent Control Act and came, before the Apex Court in (1988) 1 S.C.C. 70, it has been held “though every one has a right to waive and agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity, but here there was no case of waiver. Moreover, in view of the statutory requirement, which is in public interest there cannot be any question of waiver of a right dealing with the rights of the tenants or the landlord”. In that case, the learned Judges followed what has been laid down in *A.I.R. 1964 S.C. 1305 at 1312* as follows: “mere knowledge of the landlord that a person other than the tenant is in possession does not lead to the inference that he had knowledge of the subletting”. In (1990) 1 S.C.C. 169, Justices G.M.Sharma and V.Ramaswami has held, “the mere permission or acquiescence will not do”. “The words used in the section are “without obtaining the consent in writing of the landlord”. If the words were “without consent of the landlord”, it might mean without consent express or implied and in that sense question of waiver may arise. The question of implied consent will not arise, if the consent is to be in writing”. In (1991) 1 S.C.C. 422, Justices B.C.Ray and R.M.Sahai have held a similar view following several prior decisions of the Apex Court. All the cases referred to above arose under the Rent Control enactments of different states containing the same provision as in the Tamil Nadu Act. It will be useful to refer to the observation of R.S.Pathak and O.Chinnappa Reddi, JJ., in (1980) 4 S.C.C. 88, wherein they have opined “if a State Rent Act makes provision for eviction on certain specified grounds, eviction cannot be refused on the basis of right conferred by the T.P. Act.”.

Now I will also refer to some of the decisions of the Madras High Court, which will also lay down the law in consonance with that of the Apex Court referred to above.

In an earliest case reported in (1956) 2 M.L.J. 282, Justice Somasundaram has held “merely because a landlord had knowledge of the subletting by the tenant, he cannot be deemed to have given any consent or implied permission. Nor could it be said that he is estopped from availing himself of the provisions of the Act. The act curtails and modifies the ordinary law and has to be construed strictly. Merely because the act is intended to benefit the tenants, there is no reason that every section must be construed in favour of the tenant and against the landlord”. The learned Judge has further held following 60 M.L.J. 441 (P.C.), “there is also the well known proposition that there can be no estoppel against the provision of a statute”. In (1978) 1 M.L.J. 536: 91 L.W. 231, Justice Nainar Sundaram, held a similar view following the dictum of Justice Ramamoorthy in (1964) 2 M.L.J. 281: 77 L.W. 503. In 1973 T.L.N.J. 70, it has been held “it has to be observed that there is no estoppel against the provisions of a statute and there cannot be acquiescence by the landlord which could override the plain requirements of the statute”. In 1978 T.L.N.J. 538, it has been held, “a written consent cannot have a substitute or an equation”. “So long as such a written consent is not there, it would be difficult to find that, such a prescription in the act can be substituted by long user and acquiescence by the landlord”. The view of the Andhra Pradesh High Court is seen in *A.I.R. 1985 A.P. 38*, “mere oral consent or waiver is not a substitute for the written consent of the landlord to avoid eviction on the ground of subletting. The section clearly states that a tenant will be liable to be evicted if he sublets the premises without the written consent of the landlord”. In an earlier judgment reported in *A.I.R. 1972 A.P. 335*, Justice Parthasarathi, has opined “A breach of covenant in regard to the user of the premises is a continuing breach. If a landlord takes no exception for the changed user but acquiesces in the breach, it would not constitute an irrevocable sanction to the changed user at a later period or for all times to come”. The Bombay view is expressed by Justice Jahagirdhar in *A.I.R. 1980 Bom. 270*, as follows: “The concept arising under the general law including provisions under Sec.111, T.P.Act are not relevant for working out the rights and liabilities of the parties under the Bombay Rent Act. The rights and obligations of the landlord and tenant must be found within the four corners of the Rent Acts. The acquiescence or waiver does not save the tenant from the decree of eviction if he used the premises for a purpose other than that for which it was let”.

When such judicial dictum galore with diametrically opposite view, the judgment of the Apex Court under review will place the subordinate judiciary in a dilemma to follow it. This crisp decision sans reasoning and devoid of any reference to the earlier view of the Apex Court noticed above requires reconsideration, so that this kind of volatile judicial thinking is put an end to.

THE MADRAS LAW JOURNAL

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MARCH OF LAW

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Introduction: Law must be stable and yet it cannot stand still (Roscoe Pound Interpretation Legal History Page 1). It must march on. It ought to give answers which everywhere fit the facts to be a glare and be reasonable certain and predictable. Yet it often appears arbitrary. (Prof. H.S. Lawson Hanlegn Lecturers third series). Law has necessity to bear many burdens of human life. Law making is exclusively the function of the Legislature. Judicial legislation is interstitial but nevertheless appreciable. Law expands and grows through interpretation. Interpretation can be said to accelerate the development of law. No doubt the function of the Judges is to interpret the laws. But interpretation must be done in such way that by that process the settled laws should not be unsettled or lead to absurdity. By interpretation it can be described as law broadening from precedent to precedent. The pace and degree of the broadening of law depends largely on the psychology and outlook of the judge dealing with particular fact situations. There can be no precedent on questions of fact. A case is decided on its own facts, but when the facts materially vary the law selectively shifts its focus.

Time was when the apex courts had come to be looked upon as infallible and their statements of law as final. According to justice S.M.N. Raina (Law Judges and justice P.66) judges are of two kinds constructive judges and liberal judges. A constructive Judge takes the law as it stands and prefers to follow the beaten track. To him justice is merely a synonym for what is lawful, and therefore he assumes that justice automatically follows when a case is disposed of in one of the ways known to law. There is no doubt justice according to law but it is technical justice. A liberal Judge too has to do justice according to law but he finds a way to

mitigate the rigour of the law so as to avoid hardship to a party and thus strives to do substantial Justice. Thus while a constructive Judge is merely concerned with deciding a case according to law, but a liberal judge in his just for justice finds ways and means to do substantial justice taking care his decision does not go against the existing law. Apart from anxiety to do "substantial Justice" the need for rationalisation may also motivate interpretation of law whether judicial activism amounts to legislation or not, it is to be noted that the Supreme Court has been striving during the last three or four years through judicial process to transform and reorient legal ideology and to make law serve social justice. Since it is now generally held that judicial process must even be linked with social change the outlook in regard to precedents has necessarily to change. While respect for precedents affords a certain amount of certainty, its weight should not become unduly burdensome and shall not have a crushing effect. The discipline of precedent should not become a mere tyranny and loyalty should not degenerate into perpetuating blindly what a court believes to be a bad or out worn law.

The following review considers the march of law through decisions rendered chiefly by our High Court during the year 1992-under some of the relatively more important titles of law.

Civil Procedure Code: In *Sameera Rasheed by her power Agent M. Abdul Rasheed v. Amina Bai*, (1992) 1 M.L.J. 420, it is held Sec.50 of the Civil Procedure Code uses the word 'may'. The option is given to the decree holder to file an application before the court which passed the decree. But nothing prevents him from filing an application before the executing court to implead the legal representative as parties to the execution proceedings as he is concerned only with the execution of the decree. In *Kamalam v. Gopal*, (1992) 1 M.L.J. 292, it is held

that the order made in an appeal against an order is unsustainable as it is one allowing an appeal at the admission stage without any notice to the respondents or giving an opportunity to him to be heard. Such an order cannot bind the respondents. In *Natesan Pillai v. Sethumani Ammal*, (1992)1 M.L.J. 8, it is again stated that a question of law relating to jurisdiction of court can be raised in appeal though not taken in a trial court. While dealing with the scope and applicability of Sec.100, Civil Procedure Code, the court has stated in *S.Raju Pillai v. Paramasivam*, (1992)1 M.L.J. 467, that the lower appellate court is final court and even if there is any grievous error committed by the lower appellate court it is not open to the High Court in second appeal to interfere with the findings of fact arrived at by the lower appellate court. It is stated in *S.P.Manickavasagam v. Special Tahsildar, (L.A.) Aruppukottai*, (1992)1 M.L.J. 2, that the court had no jurisdiction to *suo moto* pass an order cancelling the direction to issue cheque. The direction to issue cheque was made pursuant to the order of this Court permitting the petitioner to withdraw the amount. If the petitioner advocate has got a claim as against the petitioner he should have taken appropriate orders preventing the petitioner from withdrawing the amount. In the absence of such orders, it is not open to the court to pass a *suo moto* order of cancellation of the direction made earlier to issue cheque. In *Smt.Ayyanmal v. Vellappa Gounder*, (1992)1 M.L.J. 208, it is held that unless sufficient cause is shown for non-appearance on the date on which the suit is fixed for hearing, there will be no jurisdiction or justification for the trial court to set aside the *ex parte* decree. If this principle is applied, the court below has no jurisdiction to condone the delay of 104 days in seeking to set aside the order of dismissal for default. The court below completely ignored the provisions of O.9, Rule 9, Civil Procedure Code and proceeded to dispose of the application before it on wrong notions of principle of natural justice. When the court below overlooked the express provision of law by which it is bound, the High Court is certainly entitled to interfere under Sec.115, Civil Procedure Code. It is held in *Lakshmikantam v. Thiruvengadam*, (1992)1 M.L.J. 297, that no party can dispossess the other party during the pendency of the suit and claim an

advantage on the face of it. When the plaintiffs were in possession of the suit property on the date of filing of the suit and prayed for injunction for protecting their lawful possession and interim injunction has been granted, it is not open the other side to forcibly enter into possession of the suit property and then when the plaintiffs come forward with the absolute prayer for recovery of possession resist it stating that the petitioners are not cultivating tenants of the property. Once they are proved to be lessees having been in possession of the land under a contractual lease or as cultivating tenants, their possession as on the date of suit is bound to be protected and if during the pendency of the suit, the possession was forcibly removed, even without an amended prayer for recovery of possession. By virtue of the inherent powers of the court the court is competent and the court is obliged to put back the parties in their original possession by restoring possession to the plaintiffs and court should not allow anybody to take the law in his own hands and dispossess the plaintiff when the court is seized of the matter. In *Ramachandran v. Vellianimal*, (1992)1 M.L.J. 188, it is held that the suit by one co-owner can certainly be maintained for ejecting them and recovering possession. The suit for recovery of possession was only for the benefit of all co-owners in the event of there being other co-owners. The position of law is also well settled that one of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. The court has observed in *C.M.S.Mohammed Jaffar v. C.M.A.Mohammed Ibrahim*, (1992)1 M.L.J. 405, that the first court rightly pointed out that in the absence of any details or particulars of the alleged coercion, undue influence and fraud as required under O.6, Rule 4, Civil Procedure Code in the pleadings the defendants were not called upon by the pleadings to meet any case of the alleged fraud, undue influence and coercion and that the plaintiffs cannot now be allowed to raise such plea at this belated stage. This view of the first court appears to be quite correct on the basis of the earlier decision on this point. It is held in *Jayakanthi Rathinasabapathy v. G.S.D.Prasad*, (1992)1 M.L.J. 565, it cannot be stated in the case on hand, but the amendment sought for and allowed by the court

below, introduced any cause of action and all that the plaintiff sought to do was to complete the cause of action for specific performance for which relief he had already prayed for and have no question of causing any injustice to the first defendant on that account would arise. It is stated in *Sumitra Bai v. V.G. Shyamasundar Sah*, (1992)1 M.L.J. 595, that O.9, Rule 13, Civil Procedure Code contemplates that if a party is prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs. That section does not contemplate the conduct of the party or of the advocate previously appeared for him when the party was called upon to answer as to how he was prevented from appearing before the court by giving sufficient cause, the court has to restore the application upon such terms and costs only and nothing else. The court has held in *Sainab Bibi v. Syed Bhaudeon Sahib*, (1992)1 M.L.J. 446, a share of income from the properties which is due to a co-sharer cannot be treated as mesne profits. It is really a part of the divisible properties. When the petitioner seeks to execute a decree and realise the amount, there is no necessity to attach the properties allotted to the share of the accounting party. It is automatically a charge over the property which can be allotted to the accounting party. Hence the decree can be executed straightway for realising the amount by bringing to the properties which are allotted to the accounting party under the decree. The court below is in error in dismissing the petition for execution on the ground that no attachment had been prayed for by the petitioner. In *Balasubramaniam v. A. Mariammal*, (1992)1 M.L.J. 271, the court has stated that it is seen from O.43, Rule 1(j) of the Code of Civil Procedure that an order under Rule 72 or Rule 92 of O.21, Code of Civil Procedure setting aside or refusing to set aside a sale, is made appealable. In this case, the order is one of rejection of the application even at the threshold. That would, certainly, amount in law to refusal though it is one of rejection in form. The rule does not refer to 'dismissal' or 'rejection'. Hence the expression refusing to set aside the 'sale' would cover the rejection of the application without numbering the case and taking it on file. Further, it is seen that though the application was

not numbered formally, both sides were heard by the court below. Even when the application was filed, a copy was served on the advocate for the first respondent decree-holder who made an endorsement acknowledging receipt of copy and prayed for time to file counter. The court passed the order after hearing both sides. Hence, there is no substance in the contention that the application not having been numbered by the court below the order passed by the court below is a revisable one and not appealable under O.43, Rule 1(j) of the Code of Civil Procedure. In *Jubodubai v. Lakshmi Ammal*, (1992)1 M.L.J. 479, it is stated that O.21, Rule 98 contemplates an adjudication of the questions referred to the Rule 101, Civil Procedure Code unless an order amounts to an adjudication it cannot be treated as a decree and no appeal can be filed against it. In the present case, the order of dismissal is only on the footing that the petitioners counsel reported no real evidence. It is not an order in any sense or the terms within the meaning of O.21, Rule 98, Civil Procedure Code. Hence it has to be treated only as a closure of the application for statistical purpose. By filing the present application for removal of obstruction the decree-holders are only reminding the executing court of its duty to adjudicate the question and decide the matter one way or the other. It is really, in effect an application for revival of the earlier application and continuation of the same in the eye of law. The present application for removal of obstruction is maintainable. In *Kalaiyaran v. Gnanambal Achi*, (1992)1 M.L.J. 425, while considering the scope and applicability of O.33, Rule 15-A of the Code introduced in 1976 certainly enables the court while rejecting the application, to grant time to the applicant to pay the requisite court-fee within such time as may be fixed by the court and upon payment of the cost of the application. The expression 'appears' occurring in clause (d-1) inserted in the State of Tamil Nadu in O.33, Rule 5 of the Code, clearly indicates that the enquiry as to the bar of limitation is a limited one and not a final one. Equally so, the language of clause (f) or O.33, Rule 5 of the Code bears out that the enquiry and finding are only *prima facie* and not conclusive. In *T. Srinanga Nachiyar v. G.V. Srinivasa Naicker*, (1992)1 M.L.J. 449, it is held that the relief of injunction is an equitable

remedy and the person who seeks the same must come to court with clean hands. He who seeks equity must do equity. The Bench has held in *K.Appa Rao (died) v. State Bank of India, Hyderabad*, (1992)2 M.L.J. 15, Sec.34 of the Code of Civil Procedure provides that in so far as the decree is for payment of money the court may, in the decree order interest at such rate as the court from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate and exceeding six per cent as the court deems reasonable on such principal sums from the date of the decree to the date of payment or to such as to earlier date as the court thinks fit, provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate of interest, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. On the question of *res judicata* in *Ambiah v. Rev.J.George Robinson*, (1992)2 M.L.J. 38, it is stated that once the court has found that the suit was incompetent for defect of want of leave under Sec.92, Civil Procedure Code the court ought not to have considered the other issues in the suit and instead it should have rejected the plaint. Therefore, the findings given on other issues have to be taken as no findings at all and as such they cannot operate as *res judicata* in the present suit against the defendants. While considering the scope and applicability of O.21, Rules 64, 66 and 90, it is stated in *P.L.V.Giri v. A.Subramanian*, (1992)2 M.L.J. 75, that the so-called mis-description of the property as well as bringing more extent of property than what is required for purposes of satisfying the decree, to say, offending respectively. Rules 64 and 66 of O.21, Civil Procedure Code cannot at all be construed as vitiating or nullifying circumstances rendering the sale itself invalid and if at all such factors can be termed as irregularities which would be taken into consideration in an application filed under O.21, Rule 90, Civil Procedure Code. In *G.Swaminatha Mudaliar v. The Land Acquisition Officer-cum-Revenue Divisional Offi-*

cer, Tirunelveli, (1992)2 M.L.J. 203, it is held when the claimants are entitled to interest on compensation awarded that interest must be directed to be paid to them in the order of the court. And if there is no such direction that will be indeed an accidental slip or omission. Therefore, it clearly comes within the purview of Sec.152, Civil Procedure Code. Even otherwise, if for any reason it is to be held that Sec.152, Civil Procedure Code is not attracted, even then the court is bound to order payment of interest atleast under Sec.151, Civil Procedure Code. In *Ramachandran v. Janardhanam*, (1992)2 M.L.J. 214, it is held that O.31, Rule 2(1) is mandatory and it says that documents shall not be received unless good cause is shown to the satisfaction of the court for the non-production thereof at an early stage. A similar rule is found in O.7, Rule 18, Civil Procedure Code. Under that Rule a document which ought to be produced in court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly shall not, without the leave of the court, be received in evidence on behalf of the plaintiff at the hearing of the suit. Thus, the Code of Civil Procedure compels the party to file a list of documents either along with the plaint or at an early stage within the time prescribed therefor. It is brought to the notice of the court that in spite of the Rules, courts are taking it for granted that as and when documents are produced before the court before the conclusion of the trial, then can be taken on file. The courts should desist from doing so. The courts should Keep in mind the mandatory rules of the Code of Civil Procedure and act strictly. It is held in *Sathya Engineering Contractors, Madurai v. S.Nachammal*, (1992)2 M.L.J. 221, a Commissioner's report can be accepted and acted upon unless it appears to the court that the Commissioner shall be examined. In *Nallathambi Udayar (died) v. Jayaraman*, (1992)2 M.L.J. 362, it is held that after the 1976 amendment, an order passed under Sec.47, Civil Procedure Code is not a decree and is appealable only if it falls under Sec.104(1), Civil Procedure Code. Otherwise only a revision would lie. However, on that ground along an order under O.22, Rule 5, Civil Procedure Code cannot be equated with an order under Sec.47(3), Civil Procedure Code. At

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the time when the fruit of any decree has to be given to the decree-holder, it has necessarily to be conclusively determined whether any party claiming to be the representative of the decree-holder is entitled to claim the fruit of the decree. Therefore, the determination under Sec.47(3), Civil Procedure Code is a conclusive one and cannot be called a summary determination as it is a case in enquiry under O.22, Rule 5, Civil Procedure Code. Further it must be noted the term used in Sec.47(3), Civil Procedure Code is 'representative' of a party while the term used in O.22, Rule 5, Civil Procedure Code is 'legal representative' of a deceased plaintiff or a deceased defendant. The latter term legal representative has been given a specific definition in the Civil Procedure Code. While it is not so in the case of the term 'representative'. The term 'legal representative' is defined under Sec.2(11), Civil Procedure Code. According to the said definition, the said term means a person who in law represents the estate of a deceased person and includes any person who intermediates with the estate of the deceased. Thus, even a person who intermediates with the estate of the deceased comes under the definition. So when a party to a proceeding dies, even a person who intermeddles with the estate of the deceased party could be brought on record as legal representative for proceeding further without allowing it to be abated. But this legal position cannot be attributed to the term 'representative' used in Sec.47(3), Civil Procedure Code. The court has stated in *Kuttiappa Gounder v. P.M.Ranagasami*, (1992)2 M.L.J. 362, that under O.5, Rule 15, C.P.C., if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process server must be satisfied, (1) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he has no agent empowered to accept the service of summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him. O.5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the

residence within a reasonable time and if there is no agent or other person to receive the summons, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house, in which the defendant ordinarily resides and shall then return the original to the court with report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed. In *V.Ganthimathi v. The Commissioner, Pudukottai Municipality, Pudukottai*, (1992)2 M.L.J. 488, under the amended provision of Sec.115 of the Code of Civil Procedure, revisional jurisdiction can be invoked, only if the order under revision amounts to a 'case decided'. The clauses (a) to (d) of the said section set out the circumstances in which the jurisdiction is to be exercised. The two parts of the section are not only separate and distinct but have entirely different ambit and rule. The first part enumerates the circumstances in which the jurisdiction may be exercised. Although for invoking the revisional jurisdiction the condition prescribed in the first of the section would suffice, yet for exercising the jurisdiction, in addition to the satisfaction of the condition laid in first part, the attraction of any one or more of clauses (a) to (d) is also required. The term 'case decided' is not confined to the decision of the case as a whole but would also include part of a case which decides a substantial question in controversy between the parties. The touchstone, therefore, would be to find out if the order under revision has determined some right or claim between the parties which is legally enforceable. If it has, it would be a case decided and jurisdiction under Sec.115, Civil Procedure Code may be invoked and not otherwise.

In *Kuttiappa Gounder v. P.M.Rangasami*, (1992)2 M.L.J. 362, while discussing the question of service of summons it is held that under O.5, Rule 15, Civil Procedure Code, if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process server must be satisfied, (1) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he has no agent empowered to accept the service of

summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him. O.5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time and if there is no agent or other person to receive the summons, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house, in which the defendant ordinarily resides and shall then return the original to the court with report endorsed therein or annexed thereto stating that he has affixed the copy, the circumstances under which he did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed. In *H.M. Mahesh*, (1992)2 M.L.J. 444, it is held that Sec.15, Civil Procedure Code lays down that a suit shall be filed in the Court of the lowest grade competent to try the same. But this section enacts a rule of procedure and if does not affect the jurisdiction of a Court of a higher grade to try the suit entertainable by a Court of lower grade. When a suit triable by a Court of lower grade is instituted in a Court of higher grade, the latter Court is not bound to return the plaint. It is only discretionary on the part of such latter Court (*i.e.* to say, the Court of higher grade) either to try the suit itself or return the plaint for presentation in the Court of lower grade. Clause 12 of the Letters Patent expressly confers jurisdiction on the Original Side of this Court to try all suits other than suits of a small cause nature of the value of Rs.100 and below. Now only has this jurisdiction not been taken away by subsequent legislation but the course of subsequent legislation has recognised and proceeded on the basis that the jurisdiction of the High Court even small cause suits of the value of over Rs.100 is concurrent with that of the Small Causes Court. Thus, it is seen that Sec.15 of the Civil Procedure Code has no application to the High Courts exercising Ordinary Original Jurisdiction when there is conflict between the Original Jurisdiction of this Court and the City Civil Court constituted under the Madras City Civil Courts Act. Hence, the question as to whether Sec.15 of the Code of

Civil Procedure governs Chartered High Court has to be answered in the negative. The Original Jurisdiction of this Court is derived under Clause 12 of the Letters Patent which empowered this Court in the exercise of its Ordinary Original Civil Jurisdiction. In *Yakub Rowther v. Poongavanam*, (1992)2 M.L.J. 419, it is held that a decision rendered in a claim suit filed under O.21, Rule 63, where the claimant is plaintiff and the judgment-debtor is defendant or one of the defendants that decision will operate the *res judicata* if the requisite conditions laid down in Sec.11, Civil Procedure Code, *viz.*, the subject matter of the suits and the issue involved for decision being the same are present. In *Nachayee Ammal v. Pichaimuthu*, (1992)2 M.L.J. 498, it is held that under O.21, Rule 22 of the Code of Civil Procedure the executing court shall issue a notice to the person against whom execution is applied only if the execution petition is made more than ten years after the date of the decree or it is made against the legal representative of a party to the decree or it is made against the assignee or receiver in insolvency. If the execution petition is filed within two years after the date of the decree, there is no necessity for the executing court to issue notice to the judgment-debtor. However, the Court has if appears as a matter of practice, issued a circular to the Subordinate Courts that execution shall not be granted without notice to the judgment-debtor. In *V. Ganthimathi v. The Commissioner, Pudukottai Municipality*, (1992)2 M.L.J. 488, it is held that under the amended provisions of Sec.115 of the Code of Civil Procedure revisional jurisdiction can be invoked only if the order under revision amounts to a 'case decided'. The clauses (a) to (d) of the said section set out the circumstances in which the jurisdiction is to be exercised. The two parts of the section are not only separate and distinct but have entirely different ambit and role. The first part prescribes the basic conditions for invoking the revisional jurisdiction while the second part enumerates the circumstances in which the jurisdiction may be exercised. Although for invoking the revisional jurisdiction the condition prescribed in the first part of the section would suffice, yet for exercising the jurisdiction, in addition to the satisfaction of the condition laid in the first part, the attraction of any one or more of Clauses (a) to (d) is also required. The term 'case decided' is not confined to the decision of the case as a whole but would

also include part of a case which decides a substantial question in controversy between the parties. The touchstone therefore, would be to find out of the order under revision whether has determined some right or claim between the parties which is legally enforceable. It has, it would be a case decided and jurisdiction under S.115, Civil Procedure Code may be invoked and not otherwise. In *A.P.S. Bahurdeen v. Antony*, (1992)2 M.L.J. 563, it is observed that it has been accepted by the courts the permission to withdraw a suit with liberty to file a fresh suit can be granted if the suit has to fail by reason of a formal defect or a ground analogous thereto. But courts are uniform in holding that plaintiff who has failed to establish his case on merits, is not entitled to as of a right to withdraw the suit and file a fresh suit. On a reading of the two clauses in Sub-rule (3) of O.23, Rule 1 of the Code of Civil Procedure is clear that the legislature has advisedly used a distinctly different language. While clause (a) refers to the pending suit which must fail by reason of some formal defect. Clause (b) refers to the suit to be instituted with the leave of the Court. If a matter falls under Clause (a), the Court is concerned only with the question whether the suit must fail by reason of a formal defect. On the other hand, if Clause (b) is invoked by a party, then the Court must address itself to the question whether there are sufficient grounds for allowing the party to institute a fresh suit for the same subject matter or part thereof. Hence, it is not correct to say that sufficient grounds should be read *ejusdem generis* with formal defect or that they should be analogous thereto. Sufficient grounds would cover a wider field and not restricted to formal defect or a similar defect. However, when the question arises before an appellate court after the adjudication of the matter on merits by one court or two courts, the test will be whether the court is justified in depriving the defendant of the benefit of a finding rendered in his favour after a full trial. It is well known that when a court grants leave to file a fresh suit on the identical cause of action, the withdrawal of suit had no existence in the eye of law. It is not available for any purpose and the parties are relegated to the same position which they occupied before the suit was brought. Hence, the Court has to consider in each case when an application is filed in the appellate stage for withdrawing the suit with liberty to file a fresh suit, whether the defendant should be drawn back

to original position in which he was prior to the filing of the suit, even though he has come out successful after a full trial. Non-joinder of necessary parties is not a formal defect. Permission to withdraw a suit cannot be granted for the purpose of enabling the plaintiff to adduce fresh evidence or more evidence in a fresh suit. In *Dr. Kamala Dakshinamurthi v. The Board of Trustees*, (1992)2 M.L.J. 604, while considering O.1, Rule 8, Civil Procedure Code, it is held that O.1, Rule 8, Civil Procedure Code notice into a benefit, the other persons who have some interest as that of the plaintiff in the suit. The plaintiff and other applicants have mentioned in the plaint that they are having a common interest in the sense all of them have interest in the matter of allotment of plot to the notice issued on 9.9.1992. They acquired common interest by virtue of that notice. Hence, the suit is maintainable under O.1, Rule 8, Civil Procedure Code. It is stated in *Duraiswami v. Munisami*, (1992)2 M.L.J. 638, that once the Court declares the possession of one party and grants permanent injunction restraining the other party from interfering with such possession on the ground that the party was entitled to be in possession under Sec.53-A of the Transfer of Property Act, it is not open to the defendant in that suit to file a separate suit and claim recovery of possession. In *D. Nityanandam v. M.D.S. Habeen Aysha*, (1992)2 M.L.J. 640, it is held that the general rule is and this should not be lost sight of or blurred that the evidence of a witness is an action, be he or she a party or not should be given in a public court and tested by cross-examination. Inability to attend court on ground of sickness, or infirmity or detriment to the public service would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in court whether the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. This discretion may be exercised even if a person happens to be no other than the defendant. There can of course, be no rule of law demarcating the boundaries and the areas of the discretion to be exercised in these matters. What can however, be stated is that the Court of *nisi* prices must be set judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in Court to enable is to observe his or her demeanor and not unusual fact that convenience and economy of expenses for the

application may involve his opponent in great inconvenience and considerable expense.

Constitution of India: In *A.Natarajan v. The Registrar of Co-operative Societies*, (1992)1 M.L.J. 63, the Court has held that it is well settled that Art.226 of the Constitution makes no distinction between various kinds of writs to hold that in one case, a writ of *mandamus* will issue but a writ of *certiorari* will not issue, or in another, a writ of *certiorari* will issue but a writ of *mandamus* will not issue. All the writs, directions, orders that can be issued by this Court in exercise of its power under Art.226 of the Constitution. In *Tamil Nadu Electricity Board v. N.K.Shanmugasundaram*, (1992)1 M.L.J. 499, the Bench has held that though the employees of the Board are not members of the Civil Service of the State, the appellant Board is indisputably 'State; within the meaning of Art.12 of the Constitution of India and thus the action of the appellants shall answer the requirements of Arts.14 and 16 of the Constitution of India which in turn will ensure compliance with the principles of reasonableness, fairness and justness as opposed to arbitrariness and action at whimsically and capriciously. In *Dravidar Kazhagam represented by the General Secretary, K.Veeramani v. The Chairman, United India Insurance Company Limited*, (1992)1 M.L.J. 530, it is held that Secularism does not mean irreligion or anything anti religious. To say so is negative and neither positive nor constructive anti religious. To say is negative and neither positive nor constructive meaning of the same. Secularism merely implies "sarva dharma sambhava" that is a believer in secularism while remaining an ardent follower of his own religion looks upon all other religious as different pathways to the same goal God. Thus, in substance, it is only a modern term for the old phrase 'religious tolerance' or 'sarvamatha sammathe'; So far as the State is concerned it implies that our State does not identify itself with any particular religion. The Gayathrimantra is said to be "Shabda Brahman" and is said to appear in the Rig Veda, as the tenth mantra in the sixth sutra of the third mandala. It is considered to be all pervasive, synonymous with divinity and valued as an universal prayer which does not ask for any mercy or pardon but seeks for a clear intellect so that truth may be reflected therein without distortion. It therefore, is supposed to purify, rescue or protect the chanter

who contemplates the glory of light that illuminates the three worlds or the religious experience as they are called with a prayer for final liberation through the awakening of the immate intelligence that pervades the Universe as light. As one having its origin in Vedas and Vedic times, it will be anachronistic for any one to contend that it signifies or relates to any particular religion. Gayatri Mantra is the key to Vedic wisdom. The Vedas have been in existence long before any of the present day organised religions came into being. They do not preach any religion nor are concerned with propagating religion. In *R.Kanuppannan v. The Tamil Nadu Water Supply and Drainage Board*, (1992)1 M.L.J. 303, it is held that it is one of fundamental principle of natural justice that merely because facts are admitted or are indisputable, it does not follow that natural justice need not be observed. The Court has stated in *Tamil Nadu Markergal Sangam v. The Government of Tamil Nadu*, (1992)1 M.L.J. 348, that Art.23 of the Constitution of India strikes at every form of forced labour. It prohibits begging. It also prohibits other similar forms of forced labour. The element of compulsion in forced labour need not necessarily be by reason of enforcement of contractual obligations. Social or economic compulsion, may also be the basis of forced labour. The word 'forced' used in Art.23 of the Constitution must be construed to include not only physical or legal force, but also force arising from the compulsion of economic circumstances which leave no choice or alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Every person who provides labour or service to another is entitled at the least, to the minimum wages and if anything less than minimum wage is paid to him he can complain of violation of his fundamental right under Art.23 and as the court to direct payment of minimum wage to him so that the breach of Art.23 may be abated. It is stated in *R.Ponnusamy v. The Registrar, Anna University*, (1992)1 M.L.J. 540, that it is well settled that the right under Art.16 of the Constitution of India is only to that a person should be considered for the appointment and he cannot insist that he should be appointed. The second respondent has been considered by the Selection Committee and the Selection Committee consisted of Educationists and Academicians

To be Continued

well versed in subjects and it is not for this Court to sit in appeal to interfere with the decision of the Selection Committee with regard to the suitability of the candidate for that particular post. In educational matters, it is for the Authorities concerned to decide about the suitability of the candidate and it is for the Court sitting under Art.226 of the Constitution of India to decide such issues unless there is infringement of fundamental right and also violative of Arts.15 and 16 of the Constitution. *The Madras Christian College, Madras v. The State of Tamil Nadu*, (1992)1 M.L.J. 544, the Bench has stated that when the provisions is found to be constitutionally *ultra vires*, it is no solace to advance a theory that appeal is a remedial measure and on that ground this Court shall not look into the grievance of the petitioner founded on violation of Art.30(1) of the Constitution of India. It is held by the Bench in *The Appropriate Authority, Government of India v. Naresh M. Mehta*, (1992)1 M.L.J. 572, that when the Supreme Court dismisses the special leave petition without assigning any reason, there may be no scope for saying that the Supreme Court has not, by such non-speaking order, affirmed the decision by accepting all the reasons given by the High Court. But where the Supreme Court gives its opinion that the conclusion reached by the High Court is correct and dismisses the special leave petition, then it cannot be said at all that the Supreme Court has not affirmed the decisions of the High Court. In *R.Kannan v. The Assistant Township Administration*, (1992)1 M.L.J. 214, it is stated that The Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Act (XL of 1971), provides for an appeal and the petitioner has not exhausted that remedy. So the writ petition has to fail on that ground. The Bench has held in *The Tamil Nadu Electricity Board Retired Officials' Association v. The Tamil Nadu Electricity Board*, (1992)1 M.L.J. 481, when once it has been found that the petitioners could not be denied the reliefs on the ground of laches, there cannot be a mutilation of the reliefs on the ground of delay in the disposal of the writ petition. That will be a very harsh rule, because no litigant need be put to prejudice on account of any act of Court. When that principle is remembered there is no justification for denying the pensionary benefits. In *Rajendran v. The Presiding Officer, Principal Labour Court, Madras*, (1992)1 M.L.J. 551, it is stated that

it is well settled that the High Court sitting under Art.226 of the Constitution is not an appellate forum as if sitting on appeal over the findings of the Labour Court. Under Art.226 of the Constitution of India, this Court's jurisdiction to interfere with the order of the Labour Court is very limited. In *S.Murugesan v. Bank of Tamil Nadu Ltd.*, (1992)1 M.L.J. 247, the Court held that the petitioner admitted the lapses on his part unequivocally. This the petitioner had done after the enquiry was over and after the second show cause notice was given. The petitioner having found that he cannot get any order in his favour from the authorities and cannot escape from the changes had admitted to make good the loss to the first respondent-Bank and wanted time so that the first respondent-Bank can consider about the quantum of punishment. Having taken such a stand after the issue of notice with regard to the punishment, the petitioner cannot challenge the enquiry itself now and plead that there is a violation of the principles of natural justice. As such, no principle of natural justice has been violated so that this Court can interfere with the impugned order as it is settled that in orders of dismissals, the jurisdiction of this Court is very limited in the sense that the Court cannot reappraise the evidence. In *Arulappa v. Union of India*, (1992)1 M.L.J. 631, it is held that the prescription of a minimum cut off mark is not at all indicated in the selection procedure given in the advertisement. The learned counsel for the second respondent is also not in a position to point out any rule or regulation which gives power to the Chairman of the Board to fix the minimum cut-off mark the reason given by the respondent in the impugned order and in the counter-affidavit found selecting the petitioner cannot be sustained and the impugned order is liable to be set aside. It is held in *M.Kannan v. The Director, Government (Cinchona) Department, Udhagamandalam*, (1992)1 M.L.J. 196, that the question whether there is a breach of contract and whether petitioner is entitled to refund as claimed by him are all matters to be agitated in a competent civil court on a properly laid suit. No writ can be issued under Art.226 of the Constitution of India to compel the respondent for refund security deposit and earnest money deposit. On the mere fact that the respondent happens to be an officer of the State Government, it is not open to the petitioner to invoke the writ jurisdiction. The

Full Bench has held in *R.Kannan and another v. The Director of Sugars*, (1992)1 M.L.J. 54, that the Court is of the view that a Co-operative Society is not an authority nor an instrumentality or agency of the Government to attract under Art.12 of the Constitution of India and therefore not amenable to writ jurisdiction under Art.226 of the Constitution. On the question of directive principles of State policy the Bench has in *Tamil Nadu Freedom Fighters Association v. The Government of Tamil Nadu*, (1992)1 M.L.J. 582, that the Courts in India found that something which is opposed to public interest cannot be claimed as a right by a citizen under Art.19 of the Constitution. The Supreme Court has said that freedom of trade, business or commerce cannot extend to freedom to indulge in crimes or to act against public interest. If such would be not the rule there may be many who would not see anything immoral in prostitution slavery or bounded labour. It is obvious that the State has to play a role by imposing reasonable restriction and if restrictions are warranted by the call of the interest of the public, court shall find it justifiable. If the State takes a reverse role and decides to revive or legalise prostitution, one may come and say that it is without the law making competence of the State Legislature and Parliament and since it is without the legislative competence courts would strike off without any demur. Once this legal position is understood it is no more in doubt, and that widespread, consumption of liquor has been noticed as an evil, it has to be conceded that anything done to encourage the production and trade in liquor will be opposed to public interest. One can understand a State taking shelter under the directive principle of the State policy. In *P.Pon Kailasan v. The Secretary, Saraswathi Narayan College*, (1992)2 M.L.J. 55, it is held that Sec.14(1)(c) of the Tamil Nadu Private Colleges (Regulation) Act specifies that the College Committee shall have the power to take disciplinary action against the teachers of the Private College. The said Act does not specify that such a power can be exercised by any other Authority other than the College Committee.

In *P.Madhavan v. Binny Limited*, (1992)2 M.L.J. 1, the Bench has stated that the basic rule has been settled without any antiquity that the condition for the issue of a mandamus is that there is one claiming it, a legal right to the performance of a legal duty by one against whom it is sought. The

rights, privileges and the significance of the post are those discernible from the statutory provisions and the petitioner, the incumbent in the post of a Welfare Officer is certainly entitled to those statutory rights, privileges and significance and correspondingly there is a duty cast upon the respondent, the management to preserve them without abrogating them except in the manner known to law. When there is a breach of terms certainly, this Court can issue the writ of mandamus to restore those rights and privileges and repair the damage done to them. In *P.Jayapal v. The Governor of Tamil Nadu*, (1992)2 M.L.J. 34, the Bench has stated that the law is well settled that the High Court has the exclusive disciplinary 'control' over the subordinate judiciary, which includes proceedings against an officer departmentally, and that if the High Court, while exercising disciplinary control over the subordinate judiciary finds after a proper inquiry, that the officer is unfit to be retained in service, it shall make a recommendation to the Governor to pass the appropriate order. In view of the all pervasive control of the High Court over the subordinate judiciary, the recommendation of the High Court should always be accepted by the Governor. It was at a meeting of the Judges of the High Court that the report of the enquiry officer came to be considered and a decision was taken in their collective wisdom to make a recommendation to the Governor for termination of the services of the appellant on being satisfied that the charges of corruption had been established against him. Allegations of *mala fide* against the collective body of judges of the High Court are totally meaningless. The Bench has held in *Dr.Alexander Educational Foundation, Tambaram v. University of Pondicherry*, (1992)2 M.L.J. 97, that the factual averments in the petitioner's affidavits having been disputed in the counter-affidavits of the 1st respondent, the Court cannot go into those questions of facts in the present jurisdiction under Art.226 of the Constitution of India. In *Indian Institute of Human Resources Development, represented by its Founder and Honorary Director, P.Govindarajan v. National Institute of Human Resources Development reprtd by its Proprietor S.Muthu*, (1992)2 M.L.J. 168, the Bench has held that any recognised activity including establishment and administration, of an educational institution will be a business and fall under Art.19(1)(g) of the Constitution. Such

activity to qualify for the right under Art.19(1)(g) must not be opposed to any public policy and must not be an act in the nature of an offence. There is yet another reason to take the view. It will always be correct to say that trade or business emanating from a contract will be a right guaranteed under Art.19(1)(g) of the Constitution. But no such right can be claimed under a void agreement such as an agreement void for uncertainty, void by way of wager, void in restraint of marriage, void in restraint of trade or void in restraint of legal proceedings etc., If, in a case, where a fraud is contemplated but not perpetrated, the Court may think that such a contract is fraudulent and shall never allow a fraud to be perpetuated. These illustrations give some insight to understand and the Court accordingly holds that the freedom under Art.19(1)(g) apart from and subject to the restrictions of law made under Article, that public policy would create and if some one is engaged in trade or business and contemplated a fraud or is regarded as immoral or opposed to public policy, he shall not have any fundamental right under Art.19(1)(g) to claim. In *Dr. Shivaram Raghuvaran Singh v. The Director General of Health Services*, (1992) 2 M.L.J. 216, it is held that it is settled law though the prayer asked by the petitioner cannot be given straightaway, to suit the occasion, the Court can mould the prayer. It is held in *A. Periasamy v. The State of Tamil Nadu*, (1992) 2 M.L.J. 229, that the writ of *mandamus* cannot be issued to enforce an illegal order. In *K. Muthuswamy v. The Chairman, Neyveli Lignite Corporation Ltd., Neyveli*, (1992) 2 M.L.J. 430, held that the writ of *mandamus* cannot be issued to compel the corporation to carry out the terms of the contract. It is settled law that no one can ask for *mandamus* without a clear legal right. In *P.S. Viswanathan v. The Union of India*, (1992) 2 M.L.J. 460, it is stated that there is no question issuing a *mandamus* striking down certain sections of a legislation nor a *mandamus* declaring that certain persons will be entitled to maintenance in the absence of a provision in a legislation to that effect. A writ cannot be issued in the absence or in the vacuum declaring any particular provision of law to be void or invalid. It is held by the Bench in the *Society of the Brothers of the Sacred Heart, Jesus, Palayamkottai v. The State of Tamil Nadu*, (1992) 2 M.L.J. 514, that if a particular provision of enacted law offends Art.30(1) of the Constitution of India, it is not possible to

sustain it on a theory that it is only a temporary phrase. The Court has stated in *A. Jothiv. The State of Tamil Nadu*, (1992) 2 M.L.J. 525, that it is well settled that a mere bald allegations of *mala fide* cannot be a ground for setting aside any proceedings. The Apex Court of the land has held that on the basis of mere bald allegations of *mala fides* a petition under Art.226 of the Constitution cannot be entertained. It is well settled that in a petition praying that for the issue of writ of *certiorari* if no counter affidavit is filed then records can be produced to prove that there is compliance of Rules. The Bench has held in *Thirubhuvanam Silk Handloom Weavers Co-operative Production and Sales Society Ltd. v. State of Tamil Nadu*, (1992) 2 M.L.J. 260, that even a plain reading of Art.213 of the Constitution would indicate that it has got two distinct aspects one being positively objective and the other being entirely subjective. The objective and the factual aspects is that the legislature, where it is a unicameral one must not be in session and where it is a bicameral one, both the Houses of the legislature should not be in session. If the legislature is in session, the power of the Governor to issue ordinance is negative. The other aspect which is purely subjective is with regard to the existence of circumstances which necessitate the immediacy of the promulgation of the Ordinance. Clause (2) of the Article declares that the ordinance shall have the same force and effect as an act of the legislature of the State assented by the Governor. Thus it is no less an Act of Legislature than an enactment by the legislature. What this may be the scope of judicial review of such legislative action, when it is not a dispute that when the ordinance was promulgated, the legislature of the State which is unicameral one was not in session and thus this factual requirement existed. A long time of unbroken precedent that the satisfaction of the Governor General or the Government with regard to the immediacy in the Ordinance making power under the Government of India Act, 1915 and 1935 in the pre Constitution era is available saying that the satisfaction was not justiciable. In the post-Constitution era, when the Court examined such contentions, it always accepted the necessity of immediate action for promulgating an ordinance being a matter purely the subjective satisfaction of the Governor who acted with the aid and advice of the Council of Ministers in promulgating the Ordinance is beyond the

judicial review and the validity of the ordinance cannot be examined on the grounds, *bona fides* and *mala fides* of the advice of the Council of Ministers or the satisfaction of the Governor. But the Court, however may examine whether in purporting the promulgate an ordinance, the executive has in sum and substance gone beyond its competence meaning the competence of the legislature and/or violated any provision in Part III of the Constitution (Fundamental Rights) or any other provision of the Constitution.

Companies Act: In *D.A.Swamy v. India Meters Limited, Ambattur Estate*, (1992) 1 M.L.J. 523, the Bench has held that to constitute a class members belonging to the class must form a homogeneous group with commonality of interest and those who have such common interest, thus must be found to constitute one class, whereas those whose interests of such a group have to be treated as a separate class. In *L.R.M.K.Narayanan v. The Puthuthotam Estates (1943) Limited*, (1992) 1 M.L.J. 253, the Company Court has held that when once a petition is validly presented, it is well open to a shareholder to ask for substitution and prosecute the proceedings even though such a shareholder by himself could not have presented a petition under Sec.397 for want of required share qualification. The court has to only consider whether the petition was a valid petition at the time of its presentation. If a valid petition has been presented any shareholder can ask for substituting himself as the petitioning creditor. It has been laid down by the Supreme Court that the validity of a petition must be judged on the facts as they were at the time of its presentation. When once there is a valid petition the shareholder who seeks to substitute himself wants to merely continue such a valid petition and such a shareholder need not hold 10 per cent of the share capital. The requirements to the share qualification is relevant and material only at the time of institution of the proceedings. Further, it is not incumbent on the court to dismiss a petition because a proceeding under Sec.397 or 398 of the Act is a representative proceeding. Even if the original petitioner does not want to continue the proceedings, the court cannot be compelled to dismiss the action. Even then it is open to the court to consider the merits of the case without dismissing the petition. It is well settled that the court has inherent powers to make such order as is necessary to do justice on the facts of the case.

Likewise the court has discretion to substitute any creditor who does not want to proceed. Rule 9 of the Company Court Rules, 1959 deals with inherent powers of court. Nothing in the said Rule can be deemed to limit or otherwise affect the inherent powers of the court to make such directions or orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Rule 9 of the Company Court Rules declaring inherent powers of the court gives the court authority to transpose the other party as applicant in the interest of justice. In *B.Viswanathan, Prop. Meenakshi Paper Mart v. M/s.Seshasayee Paper and Board Limited*, (1992) 1 M.L.J. 232, the court has held that under Sec.434 of the Indian Companies Act the deemed inability to pay the debts will arise when a creditor to whom the company is indebted in a sum exceeding Rs.500 has served on the company by causing it to be delivered at its registered office a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Unless the statutory notice is in conformity with the mandatory requirements of Sec.434(1)(a) of the Act the presumption of inability cannot be raised in the present case, the notice is addressed only to the Managing Director and not the company. The notice purporting to have been issued under Sec.434 is not only one addressed to the Managing Director, but also the *pin code* number given is 638007. Therefore, the statutory notice does not conform to the mandatory requirements of Sec.434(1)(a) of the Act. The consequence of the statutory notice being not in accordance with the mandatory requirements of Sec.434 of the Act is that the presumption contemplated under the said section cannot be raised against the respondent. But that does not preclude the petitioner from still proving by other evidence that the Company is unable to pay its debts. In the present case, there is no evidence at all to establish that the respondent-company is unable to pay its debts. Hence, the present petition is also liable to be dismissed on the ground that the statutory notice issued by the petitioner does not meet the requirements of Sec.434 of the Act. It is settled principle of law that the relief of winding up is a discretionary relief and the court has to find out whether winding up would be in the interest of justice and also public interest. In

S. Varadarajan, v. M/s. Venkateswara Solvent Extraction Private Limited and others, (1992) 2 M.L.J. 130, the court has held: a shareholder of a company possessing the numerical strength as required by the Act has the right to requisition an Extraordinary General Meeting. Such a shareholder cannot be restrained by injunction from calling the meeting and he is not bound to disclose the reasons for the resolutions proposed at the meeting. Nor are the reasons for the resolutions subject to judicial review. Though Sec. 169 uses the expression 'such number of members of the company in the plural yet the requirements of the provisions would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition. It is also well settled that words in the plural include the singular. *Companies Act (I of 1956)*, Sec. 173(2) notice of meeting explanatory statement to obligation to annexe - requisitionist calling for a meeting under Sec. 169 is obliged to annexe explanatory statement to notice. The obligation to annexe explanatory statement to the notice of the meeting is only on the company, when it called for a meeting to transact special business. When requisitionists call for an extraordinary general meeting under Sec. 169 there is no obligation on the requisitionists to annexe an explanatory statement to the notice of the meeting. *Companies Act (I of 1956)*, Sec. 284 scope and applicability. Sec. 284 of the Act deals with the removal of Directors. This section does not deal with the power of the Board of Directors to revoke the appointment of Managing Director. The Board of Directors in the meeting of the Board appoint a Managing Director. When the authority given to the Managing Director is sought to be revoked by the Directors the provisions of Sec. 284 would not come into play.

Education: In *D. Jayabalan v. The Registrar, Madurai Kamaraj University, Madurai*, (1992) 1 M.L.J. 7, the court has held that since the order refusing permission to the petitioner, a practising lawyer to register for Ph.D. Degree is very cryptic and no reason is given in that order it has got to be set aside as it is well settled now that an order passed administratively also should contain reasons.

Evidence Act: In *N. Sabapathy and others v. Pattammal and others*, (1992) 1 M.L.J. 187, the court

has held that under Sec. 108 of the Indian Evidence Act a person who has not been heard of for seven years is presumed to be dead. The presumption is raised as to the fact of death at the expiry of seven years, but not to the date of death at any particular point of time during those seven years. The onus of proof of death at any particular point of time within the period of seven years lies on the party who claims a right to the establishment of which that fact is essential. In *Raju Naicker v. Ananthakrishnan Naicker and others*, (1992) 1 M.L.J. 163, it is held that mere attestation of a document will not create an estoppel and it should be proved that the contents of the document were known to the attestor and that other circumstances were known to him and yet he did not protest against the recitals. In *Dehuxe Roadlines represented by its Partner Kushalchand B. Shah v. P.K. Palani Chetty*, (1992) 2 M.L.J. 481, it is held that it is well settled proposition of law that mere production of accounts will not be sufficient to charge any person with any liability. The requirements of Sec. 34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. In *Terminated Full Time Temporary L.I.C. Employees' Welfare Association v. Senior Divisional Manager, Life Insurance Corporation of India Ltd., Thanjavur Division, Thanjavur*, (1992) 2 M.L.J. 574, the court has held that it is too well settled that there can be no estoppel against a statute. The fact that the LIC did not object to the dispute being decided by the national tribunals on the earlier occasions would not prevent them from raising a contention that the applicability of the Industrial Disputes Act is excluded from the field occupied by Sec. 48(2C) of the Life Insurance Corporation Act.

Hindu Marriage Act: In *Sumitra Bai v. V.G. Shyamsundar Sah*, (1992) 1 M.L.J. 595, it has held that the legislature has not contemplated the case of an *ex parte* decree as in the present appeal. No provision has been made for restoring the appeal which has been dismissed for default in the Hindu Marriage Act. In the absence of any provision under Sec. 28 of the Hindu Marriage Act. Sec. 21 of the Hindu Marriage Act alone has to be followed wherein the procedure contemplated under the C.P.C., has to be taken as guidance for disposing of an appeal. Even Sec. 21 of the Hindu Marriage Act does not prohibit the provisions of C.P.C.,

to be followed while disposing of an appeal. What Sec.21 of the Hindu Marriage Act says is subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf all proceedings under this Act shall be regulated as far as may be by the Code of Civil Procedure, 1908. There is no prohibition for invoking the provisions of the C.P.C., while disposing of an appeal especially when there is no specific provisions in the Hindu Marriage Act for setting aside the *ex parte* decree or order. In such contingency the provisions of the C.P.C., alone has to be followed as per Sec.21 of the Hindu Marriage Act. The application has been filed by the wife under O.41, Rule 19, C.P.C., for setting the lower appellate court and this application is maintainable. In *R.Anita Marginic v. R.Annadurai*, (1992)2 M.L.J. 11, it has held that, when the factum of marriage is disputed evidence regarding performance of marriage according to Hindu rites must be brought on record to show that there had been a valid marriage. The registration is not the sole proof of marriage in order to become a valid marriage.

Hindu Minority and Guardianship Act: While considering the provisions of the Hindu Minority and Guardianship Act the Bench has held in *Nallathambi Koundar v. Gopala Krishna Koundar and others*, (1992)1 M.L.J. 259, the alienations are by the father of the plaintiff as guardian of the plaintiff and so Sec.8(2) and (3) of the Hindu Minority and Guardianship Act, 1956, was attracted. Sec.8(2) says that a natural guardian shall not without the previous permission of the court alienate the property of the minor. Sec.8(3) says that any disposal of any immovable property by the natural guardian in contravention of Sec.8(2) is voidable at the instance of the minor. In the present case, admittedly the previous permission from the court has contemplated under Sec.8(2) has not been obtained. So the plaintiff can avoid the transaction. In this context the trial court has erred in stating that in order to succeed, the plaintiff has to prove that the transaction is tainted with immoral or illegal purposes or that it must be shown that there is no family necessity. The mere fact that the plaintiff has filed the suit shows that he wants to avoid the alienation. He could avoid the alienation in this regard by any act or conduct on his part showing his intention to avoid them. In

Dhanasekaran v. Manoranjithammal and others, (1992)2 M.L.J. 116, the Bench has held that in Sec.12 of the Hindu Minority and Guardianship Act, 1956, adult member would include both male and female. The management spoken to in Sec.12 need not necessarily be management as kartha but would include even the management otherwise. Sec.12 of the Hindu Minority and Guardianship Act statutorily recognises the principles which was laid down consistently by several High Courts that under the Guardians and Wards Act, 1890, no guardian can be appointed of minor's undivided interest in the joint family properties where the property is under the management of an adult. Yet, it has been held even under the Guardians and Wards Act a guardian can be appointed in cases where the minor is the sole surviving co-parceners. Therefore, the case of the interest of the sole surviving co-parcener in the joint family property is treated as if it were a separate property. Therefore, Sec.8 of the Hindu Minority and Guardianship Act would also cover the case of such an interest. In view of what is stated in Sec.8 there is an implied exclusion of minor's interest in the joint family property from it. In other words, the very content of Sec.8 suggest, though not expressly that the said section does not operate in the case of minor's undivided interest in the joint family property. But while reading Sec.11 the court does not get the impression that it cannot operate with reference to minor's interest in the joint family property. Further, Sec.6 mentions who are all natural guardians for the minor's property other than his interest in the joint family. While so when the succeeding Sec.8 deals with powers of a natural guardian, it is but natural to imply when there is nothing to indicate contra in that section that the said powers are that of a natural guardian of minor's property other than his interest in the joint family property. So Sec.11 will apply to all properties of a minor including the minor's interest in the joint family property.

Mohammedan Law - Wakf: In dealing with *N.R.Abdul Azeez and others v. E.Sundaresa Chettiar and another*, (1992)1 M.L.J. 535, the court has held that it is a fundamental principle of the Mohammedan Law of Wakf that when a mosque is built and consecrated by public worship it ceases to be the property of the builder and vests in God. A mosque once so consecrated cannot in any case
[to be continued]

revert to the founder and every Mohammedan has the legal right to enter it and perform devotions according to his own tenets so long as the form of worship is in accordance with the recognised rules of Mohammedan ecclesiastical law. A mosque from its very nature is indicated for worship and is open to all Muslims local and others. Once the mosque was constructed it stood dedicated to God and the owner is divested of his right title and interest in the property. The very concept of a private mosque is unknown to Muslim Law. Once the founder dedicates a particular property for the purpose of a public mosque no Muslim can be denied the right to offer prayer therein on the ground that the mere fact that in the village plan a mosque is shown to have existed in the year 1938 this disputed piece of land has become a wakf by user although there is no evidence of an express dedication and any attempt on the part of the respondents to prevent the appellants from coming over to the property and saying their prayers cannot be permitted.

Industrial Disputes Act: In Rajendran v. The Presiding Officer, Principal Labour Court, Madras and another, (1992)1 M.L.J. 551, the court has held that under Sec.2(s) of the Industrial Disputes Act, 1947, the petitioner is a workman because the said provision includes an apprentice also as a workman. Assuming for a minute that the petitioner is entitled to get any of the benefit under the provisions of the Industrial Disputes Act he has not worked for the required number of days which is prescribed in any other sections of the Act. (sic.) The petitioner is not entitled to the benefits enshrined under Sec.25-F of the Industrial Disputes Act, since he has worked less than a year. Even if a workman who is retrenched under Sec.25-F of the Industrial Disputes Act to get the benefits he ought to have worked for a period of not less than a year. In Ashok Leyland Ltd., Ennore, Madras v. The Presiding Officer, II Additional Labour Court, Madras and others, (1992)1 M.L.J. 263, the court has held that the nature and scope of the proceeding under Sec.33-C(2) of the Industrial Disputes Act, 1947, have been many times looked into and settled by the highest court in the land and the first rule is that such proceeding is generally in the nature of an execution proceeding. The said proceeding cannot take in any investigation as to the right of the claimant to relief and the

corresponding liability of the opponent including the question as to whether the opponent is liable or not an adjudication upon the same. However, such proceeding where the right has been already founded can take in an investigation as to the extent of the opponent's liability if any. For the purpose of making the requisite computation under Sec.33-C(2) of Act, 1947, it may be open to the Labour Court to interpret the award of the settlement on which the right of the workman rests. This is on the principle that it is permissible for the Executing Court to interpret the decree for purpose of execution. But, this principle cannot be availed of to enlarge the right or to bring in a new right, especially when there is a dispute over the same. Here the controversy does not centre round a bare interpretation of the settlement. Larger questions are involved. One is as to the application of the amended provisions of the Act to the situation spoken to in the settlement. The other is with regard to the question as to whether the disbursement under the settlement already done could be reopened and the difference claimed. These questions in our view only parkatē the character of an industrial dispute and cannot be made to stand only at the level of a bare interpretation of the settlement; and they fall outside the purview of a proceeding under Sec.33-C(2) of the Act, 1947. In *Veeramani v. The Management of Tamil Nadu Electricity Board and another, (1992)2 M.L.J. 58*, the court has held that the normal rule is that award of full back wages must follow when the relief of reinstatement given and if there is going to be a departure from the normal rule compelling circumstances necessitating such departure must be established by the employer. In *E.I.D. Parry (India) Ltd. and another v. The Presiding Officer, Industrial Tribunal, Madras and another, (1992)2 M.L.J. 382*, the court has held that it is well established principle to interpret the provisions of a statute as harmoniously as possible so that there is no conflict of the provisions and likewise that no provision is rendered otiose. It is also well established under Sec.10(1) of the Act is purely an administrative function while referring to a dispute under Sec.10(4) of the Act the Legislature has conferred on the Government a power to issue an order under Sec.10-B of the Act by Tamil Nadu Act 36 of 1982. The insertion of Sec.10-B of the Act has not taken away the power of the tribunal under Sec.10(4) of the Act to pass an interim

order. The power under Sec.10-B is given to the Government to give an interim relief to the workers including the payment of money by employer. Sub-secs.(2) and (3) of Sec.10-B stated that such an order shall cease to operate on the expiry of a period of six months from the date of the order or on the date of the award of the Labour Court or the tribunal as the case may be whichever is earlier and that the money which has been paid can be adjusted. So, if the Government while referring the dispute has passed an order under Sec.10-B of the Act giving an interim relief to the workmen then the power under Sub-sec.(4) of Sec.10 cannot be exercised by the tribunal. For instance, when the adjudication is pending before the tribunal no interim relief can be tasked for, if an order has already been passed under Sec.10-B of the Act granting some interim relief to the workmen under Sec.10-B of the Act. At the same time if no interim relief has been given while making a reference, the sole authority to decide the dispute and as a matter incidental thereto the tribunal has got the power before whom the proceeding is pending. So, the power of the Government to pass an order under Sec.10-B of the Act has to be exercised immediately after a reference made it cannot be contended that the tribunal has lost its power to grant an interim relief. Apart from that quasi judicial power under Sec.10(4) of the Act cannot be taken away by conferring an administrative power on the Government by amendment. It is also settled law that the repeal by implication is not favourable and such interpretation is not to be adopted unless it is inevitable. The presumption is always against the principle of repeal. Any reasonable construction which offers an escape from implied repeal must be considered in consonance with the true intention of the legislature. So, two provisions can co-exist side by side even though one may to some extent overlap the other.

In *The Management of Tamil Nadu Mercantile Bank Ltd., represented by its Chairman, Tuticorin v. T.Venkatesan*, (1992)2 M.L.J. 435, the court has held that the law that prevailed before the advent of the Industrial Disputes Act did not recognise any right in an employee to question an order of the employer falling strictly within the terms of the contract on the ground that it was a *mala fide* act of victimisation. It is only under the provisions of the Act such right is created by the legislature enabling the workers to challenge orders of

transfer made by the management. Before the Industrial Disputes Act was passed there was no fetter on the powers of the employer to transfer an employee when the terms of contract of employment expressly provided therefor. In fact contracts of service were governed by the provisions of the Contract Act and the Specific Relief Act. It is too well-settled that a contract of personal service cannot ordinarily be specifically enforced and there were only three well recognised exceptions to the rule; viz., (i) Where a public servant is sought to be removed from service in contravention of the provisions of Art.311 of the Constitution of India, (ii) where a worker is sought to be reinstated on being dismissed under the industrial law, and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute. The respondent having initiated proceedings under the Act is not entitled to maintain the suit in the civil court even if his case is governed by principle No.2 formulated by the Supreme Court.

Land Acquisition Act: The Full Bench has held in *Seethalakshmi Ammal v. The State of Tamil Nadu*, (1992)1 M.L.J. 606, that the concept of person aggrieved is not in any way different from a person interested. There can be variety of interest, and different persons may have different interest. It is also possible that a person surrendered some interests but fought for other interests, such as the owner found no tenable objection to the acquisition but questioned the adequacy of the compensation. The *locus standi* to question the acquisition will not be available to him. He can, however, question the quantum of compensation. Similarly a purchaser of a piece of land under acquisition who came in the picture only after the stage of objection under Sec.5-A but before the dispute of compensation was decided may enter into the proceeding and question the compensation amount but may not demand inquiry under Sec.5-A of the Act. If he purchased after the notice under Sec.9 he cannot be heard to say that he was entitled to a notice. A purchaser may have a right to raise objections to the award and or even acquisition such as the objection that the proceeding elapsed because the award was not made within the stipulated period and like but not the objections which the owner availed or had opportunity to avail under Sec.5-A of the Act. If his purchase is after the award, but before possession is taken by the

Collector, he may not be heard to question the acquisition because his vendor never questioned the acquisition. These however will depend upon facts as well as law attracted to the fact situation of each case. Thus it will be a misconception to say that a purchaser shall have no *locus standi*.

But it will be equally misconceived if it is said that the purchaser shall have *locus standi* in all circumstances. In *C.Narayanasami Nadar v. The Government of Tamil Nadu*, (1992)1 M.L.J. 308, the Bench has held that the specification of the provisions of Sec.17(1) and (4) of the act in the notification under Sec.4(1) enables the respondents to exercise the power available under the aforesaid subsections and it has necessarily to be exercised in the instant case. The provision of Sec.17(4) relates to the dispensation of the enquiry under Sec.5-A of the Act. In the instant case, it is only after the publication of the notification under Sec.4(1) of the Act and after issuance of notices as contemplated, the Government have to exercise the power available under Sec.17(1) of the Act. In *A.Vembuli Naicker v. State of Tamil Nadu*, (1992)1 M.L.J. 26, the Bench has held that the rule 1 of the Rules clearly prescribed that the notice should be published at convenient places the said locality and copies thereof should be fixed up in the offices of the Collector, the Tahsildar and in the nearest Police Station. It is obligatory on the part of the respondents not only to see that the notice is published in the convenient places in the said locality but also to see that copies thereof are affixed in the offices of the Collector, the Tahsildar and in the nearest police station. Notification is not suffice but notice should be published at convenient place in the locality and copies thereof should be fixed up in the offices of the Collector, the Tahsildar and in the nearest police station and that is mandatory and failure to do so vitiates the acquisition proceedings. It is clear that the procedure prescribed under Rule 1 of its rules framed under Sec.55 of the Act for giving public notice of the 4(1) notification is mandatory and failure to follow the procedure will vitiate the entire proceedings. In the instant case, except the averments that public notice of the substance of the notification under Sec.4(1) of the Act publication was given in the locality by beat of tom-tom under rules on 1.10.1985 there is nothing on record to show that the respondent has allowed the

prescribed procedure for giving public notice of the substance of the Notification in the locality viz., publication of the notice at convenient places in the said locality and affixing copies thereof in the offices of the Collector the Tahsildar and in the nearest police station. Having regard to the aforesaid peculiar circumstances of the case the impugned proceedings are liable to be quashed. The Full Bench has held in *M.D.Govindarajan v. State of Tamil Nadu represented by its Commissioner*, (1992)1 M.L.J. 470, that under the first proviso to Sec.11(1) no award shall be made under Sub-sec.(1) of Sec.11 without the previous approval of the appropriate Government may authorise in this behalf. Under the second proviso it shall be competent for the appropriate Government to direct that the Collector may make such award without such approval in such class of cases as the appropriate Government may specify. In the present case the appropriate Government is the State Government. One of the objects and reasons for introduction of the amendments appears to be that pendency of acquisition proceedings for long periods often causing hardship to the affected parties and rendering unrealistic the scale of compensation offered to them, should be avoided and as a measure for fresh assessment, the Collector is required before making the award to obtain the previous approval of the appropriate Government or any officer of that Government authorised in this behalf. The court does not think that the obtaining of the previous approval can be skipped over and as per the express language of the first proviso introduced, a breach of the requirement of obtaining previous approval will vitiate the passing of the award. By the infirmities suffered in the passing of the award in the proceedings under the Act prosecuted against the petitioners and taking note of which infirmities the awards will have to be struck down the proceedings under the Act could not be prosecuted at all against the petitioners on the basis of the notification under Sec.4(1) and the consequent declaration under Sec.6 of the Act so as to pass any fresh awards, because the amendments to Sec.6 of the introduction of Sec.11-A into the Act by Act 68 of 1984 will come into play. In *The Special Tahsildar (L.A.) Marudhanadhi Reservoir Scheme, Dindigul, Madurai District v. R.Sundarsekar*, (1992)1 M.L.J. 378, the Court has held that when the lands to be acquired under the Land Acquisition Act are

yielding income the proper method in ascertaining the market value of those lands would be by income capitalisation method according to Chapter 15 of the Act. In *C.Narayanasami Nadar v. The Government of Tamil Nadu*, (1992)1 M.L.J. 307, the court has held that when the real urgency exists it is not for the court to investigate whether the materials on which the Government came to the conclusion for invocation of the urgency process while acquiring the land are sufficient. The court cannot go into the question of adequacy of material or evidence for the purpose of invocation of urgency. If the court is satisfied with reference to the existence of urgency it is sufficient. The court cannot investigate whether the materials available on record for the purpose of invocation of urgency clause are sufficient or not. In *N.Subramaniam v. State of Tamil Nadu*, (1992)2 M.L.J. 239, the Bench has held that a reading of Secs.39 and 65(2) of the Tamil Nadu Town and Country Planning Act, 35 of 1972 and Secs.3(aa) and 6 of the Land Acquisition Act clearly shows that the acquisition in this case is for local authority, even though Chapter IV of the Town and Country Planning Act, 1971, is invoked for requiring the lands for the purpose of constructing a bus stand. But the declaration made under Sec.6 of the Land Acquisition Act clearly shows that the entire compensation of the acquisitions is paid out of the public revenue. As rightly pointed out by the learned counsel for the writ petitioners on this ground alone, the declaration made under Sec.6 of the Land Acquisition Act is bad in law. The Full Bench has held in *A.Jothi v. The State of Tamil Nadu*, (1992)2 M.L.J. 525, that it is well settled that the decision of the Government is final and what all the authority who holds the enquiry under Sec.5-A of the Act is to do is to send a report to the Government and the report is not binding on the Government and the Government can differ from that. So the finality of the proceedings is reached only at the stage of the declaration under Sec.6 of the Act when the Government decides to proceed with the acquisition. As such there is no substance in the contention that justice because the enquiry officer overruled the objections and but the report to the Government, the Government has not applied its mind. The declaration under Sec.6 of the Act itself will show that the Government has come to the conclusion to acquire the land. It is well settled that in a petition praying for the issue of a writ of

certiorari if no counter affidavit is filed then records can be produced to prove that there is compliance of Rules. In *The Government of Tamil Nadu represented by its Secretary Adi Dravidar and Tribal Welfare Department, Fort St. George, Madras-9 v. S.Jayaraman*, (1992)2 M.L.J. 294, the court has held that a plain reading of the words namely the last of the dates of such publication and of the giving of such public notice being hereinafter referred to as the date of publication of the notification introduced in Sec.4(1) by Central Act 68 of the 1984 will only mean that the date on which public notice of the substance of the notification is given at convenient places in the locality is to be taken as the date of publication of the Notification in Sec.4(1) of the Act for the purpose of computing the period of one year contemplated under clause (ii) of proviso to Subsec.(1) of Sec.6 of the Act. It is obvious on a plain reading of the said Amendment that for the purpose of finding out the last of the dates the publication and giving of public notice are made inseparable in the Amendment and therefore that date on which public notice of the substance of the 4(1) notification was given at the convenient places in the locality cannot be ignored for the purpose of finding out the last of the dates. There must be continuity of action in the publication of the Sec.4(1) notification in the Official Gazette and in the newspapers and also in giving public notice of the substance of the Sec.4(1) notification at convenient places in the locality and if there is any long delay and or break in the continuity in any individual case, it is open to the court to quash the acquisition proceedings. Unless there are convincing reasons such as these granted by courts or competent Authorities or otherwise, the delay between the publication of the 4(1) notification in the Official Gazette and the public notice of the substance at convenient places of the locality should not exceed two months. If it exceeds two months it is liable to be questioned.

Limitation Act: In *O.N.A.Nagamani Chettiar (died) v. Shanmugham Finance Company by its Proprietor K.P.S.Shanmugam*, (1992)1 M.L.J. 603, the court has held that the written statement filed in the suit itself cannot be called in aid for the purpose of Sec.19 of the Limitation Act. In *Commissioner, H.R. & C.E., Madras v. P.V.Subramania Ayyar, (since deceased)*, (1992)1 M.L.J. 1, it has held that

Sec.60 of the Limitation Act applies only where possession is also transferred to the alienee and in the present case, and as such in the document does not purport to make any transfer of the suit land. Art.60 does not apply and the suit is not barred by limitation. The Court has held in *Ramachandran v. Valliammal*, (1992)1 M.L.J. 188, that when there is no pleading before court the court ought not to have allowed any evidence to be let in by the parties. It is well settled that no amount of evidence without a plea can be looked into by the court. It is well settled that a party who is in possession of the best evidence and a party who is the best person to give evidence on certain matter should enter the witness box and place the facts before the court and in the event of his failure to do so the court is bound to draw an adverse inference against him. In *M/s. The Kotsan Engineering Corporation Partnership Firm represented by its partner, Sri.Ch.Sambasiva Rao v. The General Manager, Southern Railway, Madras-600 003*, (1992)1 M.L.J. 267, it has held that all that Art.137 lays down is that Limitation Act shall apply to the proceedings before the Arbitration and it has nothing to do with the application for appointment of an arbitrator. There is no provision in the Arbitration Act which lays down within which time an application for arbitration should be made. The application for arbitration in my view can only be made when the dispute arises between the parties to the agreement. Art.137 which is a residuary Article will apply to a petition under Sec.20 of the Act and hence the period will be three years from the time the right to apply accrues and the time begins to run from the period when the right to apply accrues. In this case the right to apply accrues to the plaintiff after his demand to refer the dispute to Arbitration. The court has held in *Vasuki Ammal v. R.Joseph*, (1992)2 M.L.J. 363, that there is not much difference between the two articles. Under Art.7 the period of limitation starts running from the date when the wages accrue due. Under Art.55 compensation for breach of contract, the period of limitation starts running from the date of the breach of contract. It has been held that in matters of employment, the employee cannot file a suit unless and until the order of dismissal is set aside by a competent authority. Otherwise any suit will be dismissed *in limine* on the ground that his service had been terminated and therefore the

question of payment of salary would not arise. In *Muniammal v. Venkitammal*, (1992)2 M.L.J. 425, the court has held that Art.58 falls in para III of the schedule to the limitation act. This part deals with suits relating to declaration. Part V deals with suits relating to immovable property. Art.65 thereof reads that for possession of immovable property or any interest therein based on title, the period of limitation is twelve years. The instant suit based upon Ex.A-1 is undoubtedly a suit for interest based on title in immovable property. The period of limitation in such a situation will be 12 years and not three years.

Law Relating to Motor Vehicles Act: In New India Assurance Co. Ltd. v. D.Kamalam, (1992)1 M.L.J. 41, the court has held that Sec.110-C(2A) is in the nature of a power exercisable by the Tribunal in the course of any enquiry in a proceeding before it. The requirements to be fulfilled before the Tribunal can permit the insurer to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made are these: (1) the tribunal should be satisfied that there is collusion between the claimants and the person against whom the claim is made, or (2) the person against whom the claim is made has failed to contest the claim, (3) the tribunal should record reasons in writing for directing that the insurer should be made a party to the proceeding, and (4) on such impleading, the insurer shall have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. In this case there was no plea of collusion between the claimants and the owner of the car put forward by the appellant. The only other circumstance is that the owner of the car though initially had filed a counter had subsequently remained *ex parte*. By the filing of a counter the owner of the car had contested the proceedings whatever be the nature of the contest. This cannot therefore be regarded as a case of a failure on the part of the owner of the car to contest the claim. It is true that the owner of the car which was involved in the accident had subsequently remained *ex parte*. The circumstances that the owner of the car remained *ex parte* in the proceedings before the Tribunal does not in the view of the court either by itself or even necessarily lead to the sole inference that there had been a failure to contest the claim on his part. By mere

non-appearance on a particular date on which the case is posted a party may be set *ex parte* but that by itself would not lead to the conclusion that there was a wilful default in appearance with a view to allow the claimants to succeed in the claim petition. The power of the tribunal under Sec.110-C(2A) of the Act can be properly exercised in cases where the insurance company has not already been impleaded as a party to the proceedings but an attempt is made collusively by the claimants and the owner of the vehicle to secure an award fastening liability on the insurance company without even so much as being heard. If the insurance company is already a party to the claim petition then its defences would be restricted to the grounds specified in Sec.96(2) of the Act. If, however, the insurance company for some reasons is not yet made a party to the claim petition but yet there is an attempt by the claimants and the owner of a vehicle to mulct the insurance company with payment of compensation collusively then the insurance company which may be made liable to pay compensation as a result of the collusion between the claimant and the owner of the vehicle is enabled to be impleaded as a party to the claim petition and on being so impleaded the insurance company has the right to contest the claim as grounds available even to the owner of the vehicle apart from the defences statutorily made available under Sec.96(2) of the Act. The use of the words that the insurer shall be impleaded as a party to the proceeding contemplates cases where in the course of an enquiry the tribunal realises that as a result of collusion between the claimants and the owner of the vehicle liability for payment of compensation is sought to be fastened on the case the tribunal is enabled to exercise its power under Sec.110-C(2A) of the Act to implead the insurer as a party to the proceedings for reasons to be recorded in writing and the right of defence available to the insurer so impleaded would in vehicle against whom the claim has been made. The court is therefore of the view that the powers conferred under Sec.110-C(2A) of the Act on the tribunal is in the nature of a special power exercisable on the fulfilment of the conditions enumerated therein and not in a case like this where there was no whisper of any collusion between the claimants and the owner of the car or that there was a failure on the part of the person against whom the claim has been made to contest it. The Court has held in *Mariyayee alias*

Rajalakshmi Ammal v. M. Basheer, (1992) 2 M.L.J. 144, that the liability of the insurance company is purely contractual and necessarily therefore, that would depend upon the terms and conditions incorporated in the policy as well as the availability of one or more of the defences permitted to be raised by the insurance company under the provisions of the Act and on a consideration of the Tamil Nadu Motor Vehicle Rules framed under the Act. While under Sec.3(1) of the Act a person can derive a motor vehicle only if he holds an effective driving licence authorising him to drive the vehicle by Rule 39 of the Rules, that had not been made applicable to a learner. A combined reading of Sec.3(1) and (2) of the Act and Rule 39 of the Rules thus clearly establish that an effective driving licence contemplated under Sec.3(1) of the Act and a learner's licence as provided under rule 39 of the Rules are not the same. Indeed Rule 39 of the Rules creates a separate class of licence known as learner's licences distinct from the licences contemplated by Sec.3(1) of the Act. Under Sec.96(2)(b) of the Act it is open to the insurer who is made a party to a claim proceeding, to defend such an action on receipt of notice on the ground that there has been a breach of a specified condition of the policy being one of the conditions enumerated thereunder. Sec.96(2)(b)(ii) of the Act states that if there is a breach of a condition excluding driving by a named person or persons then it would be open to the insurer to defend the claim for compensation on that ground. In this case the condition in the policy excludes driving by holders of learner's licence. The provision under Sec.96(2)(b)(ii) of the Act excluding driving by a named person or persons cannot be construed only as referring to individuals A, B or C but would also be applicable to a class of persons named learners. In other words, the provision under Sec.96(2)(b)(ii) of the Act could be read as excluding driving by persons all of whom would be under one name learners. The word named cannot be literally interpreted to refer to the name of a particular person but as comprehending specified person or persons cited as instance. So construed even though the driver of the vehicle involved in the accident in this case held only a learner's licence on the date of the accident such licence had been excluded from the purview of the liability under the policy and that exclusion has been incorporated in the policy as a condition that driving by holders of a learner's

licence cannot be regarded as either holding a valid driving licence or as having held a permanent driving licence. In *New India Assurance Co. Tuticorin v. Meenal*, (1992)2 M.L.J. 389, the court has held that it is elementary that for maintaining any action for compensation the wrong or tort committed by the owner of the vehicle must be specifically pleaded. But the claim petition does not show any wrong on the part of the owner of the car. There is absolutely no allegation in the claim petition that the owner of the vehicle has committed any tort. Not only there is no plea that the owner committed any wrong there is also no plea to that effect. Further there is also no plea that there was any master servant relationship between the owner of the car and the said driver. In such a case no vicarious liability also will arise or can be foisted on the owner. It is also well settled law that when the owner insured is not liable the insurer cannot be held liable. Taking all these into account the present claim by the claimants is absolutely misconceived and they cannot claim any compensation from the owner of the vehicle and consequently they cannot have any claim against the insurance company also. In *M/s. Venkataswami Motor Service, Coimbatore v. C.K. Chinnaswamy*, (1992)2 M.L.J. 463, the court has held that to establish that a certain person was a passenger it should be seen how he acted and how those responsible to carry him as a passenger behaved. It is not in doubt and it cannot be doubted that a person becomes a passenger by contract express or implied. The expression passenger ultimately refers to one who travels either in a bus and one who travels and nothing else. When the relationship of a carrier and a passenger begins with reference to the vehicle concerned must be found varying from fact to fact and case to case. A person rushing to a vehicle and attempting to board when in fact it had started moving the Court found not to be a passenger. One who had alighted from the vehicle is also not a passenger. But a passenger alighting from a vehicle may still be a passenger until he had reasonable opportunity to reach a place of safety meaning thereby that he was away from the vehicle. While there can be no hesitation in holding that insurance of a motor vehicle against third party risks is a sort of indemnity to the insured it cannot be visualised that in the garb of enjoying such indemnity a negligent carrier can escape the liability for damages. How can he be allowed to say:

look here my vehicle is insured. Therefore, I can throw out a passenger and then say that since he was found on the street he was not a passenger. It is one thing to say as to what defence is available to the insurer and quite another as to whether any person including the owner of the vehicle can saddle the insurer with something beyond its liability. The statute had fixed a limit. The insurer is obliged to act as provided thereunder. If something more than the law is said and done the insurer can always say that anything beyond the law shall not bind it. Here is a case in which the tribunal has recognised the statutory limitation and fixed the liability of the insurer strictly in accordance with law. The owner of the vehicle had appeared and suggested that it is not his but that of the insurer's liability because the victim was a third party and not a passenger. How then the insurer cannot say that the victim was not a third party and that he was a passenger. In such cases, the argument that the insurer can raise no defence other than the defence made available to it under Sec.96(2) of the 1939 Act cannot be accepted. Unlike Sec.95(2) of the 1939 Act wherein there is mention of a limit as to insurer's liability for each individual passenger etc., there is no provision in the 1988 Act imposing any such limitation. It however must be borne in mind that Sub-sec.(2) of Sec.147 of the new Act is controlled by Sub-sec.(1) thereof. It will be thus for the insured to see that there is a policy insuring against the death of or bodily injury to any passenger of a public service vehicle or against any liability which may be incurred in other cases. A public service vehicle cannot be confused with any State owned operation. It has a definite connotation under the Act and that can be gathered from the definition. Sec.2(35) has defined public service vehicle to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and included a maxi cab, motor cab contract carriage and stage carriage. In view of the above it is not possible to find any change introduced by the new law that would destroy what actually accrued as a right to the claimants and or the insurer or in the same view to find any such right accruing to the owner of the vehicle which can enter into a claim arising under 1939 Act. The mention in Sub-sec.(4) of Sec.217 of Sec.6 of the General Clauses Act, 1897 shall automatically make such claims subject to the principles that are

generally recognised under the said provision.

Tenancy Laws - Houses and Rent: In *Rajagopal Vandaiyar and Sons v. D. Joseph Nadar (died)*, (1992)1 M.L.J. 287, the court has held that the inclusion of hut in the definition and other indication in Sub-clauses (a) and (b) of Sec.2(2) of the Act point to the fact that the word 'building' is used to denote a structure of the nature of a house intended for human habitation or for using it for non-residential purpose such as carrying on business. Hence if the definition of the building is taken along with the purpose of the Act it includes not only a building, but even a part of it. A building consists of not only the superstructure but also the site on which the superstructure stands. In *Badrudin Mohamedally v. T. & B. Dehganwala Estate by its Co-owner Tayebally Mohamedally*, (1992)1 M.L.J. 428, it has held that Sec.2(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act defines a building as any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes. In the case of co-owners none of them is entitled to claim that a particular portion of the property belongs to him as a co-owners. Every co-owner is entitled to every inch of the property so long as there is no division of the property among the co-owners. Therefore any lease by some co-owners in favour of one of them or another co-owner will not be a separate letting. What is let out is only an undivided share in the property. So long as there is no separate letting of a portion of the buildings or building itself, it will not fall within Sec.2(2) of the Act. Sec.2(6) of the Act gives an inclusive definition for the term 'landlord'. It reads that landlord includes the person who is receiving or is entitled to receive the rent of a building. Similarly Sec.2(8) of the Act defines a 'tenant' as any person by whom or on whose account rent is payable for a building. If the amount payable under the arrangement between the parties is not 'rent' in the real sense and it is only a compensation payable by the petitioner it will not bring the parties within the definition in Sec.2(6) and Sec.2(8) of the Act. The term 'rent' has not been defined in the Act. The real nature of the transaction and the legal relationship of the parties cannot be decided by the nomenclature used by the parties. It has to be decided on the basis of the substantial terms of the agreement between the parties. The court has held in *Natesan Pillai v.*

Sethumani Ammal, (1992)1 M.L.J. 8, that as per Sec.10(1) of the Tamil Nadu Buildings (Lease and Rent Control) Act a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of that Section or Secs.14 to 16. Therefore, it is imperative that the plaintiff has to initiate proceedings for eviction against the defendant in a rent control proceeding. To this Sec.10(1) an exception is provided under the Second proviso according to which where the tenant denies the title of the landlord or claims right by permanent tenancy the controller shall decide whether the denial of title is *bona fide* and if he records a finding to that effect the landlord shall be entitled to sue for eviction in the Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said section notwithstanding that the court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded. In *K.N. Ramakrishnan and Brothers v. Thammaraj*, (1992)1 M.L.J. 31, it is held that on a plain reading of Sec.10(2)(i) of the Act it is clear that the arrears of rent contemplated by Sec.10(2)(i) is arrears of rent due by the tenant in respect of the building. The provision does not say or require that the arrears of rent should be due to a particular landlord. The requirement is that the tenant should not have paid or tendered any rent due by him in respect of the building. Therefore, in the opinion of the court the petitioner who is a purchaser of the demised premises from the original landlady and who had cleared the arrears of rent payable by the respondents (tenants) to the original landlady is entitled to file the application for eviction of the respondents under Sec.10(2)(i) of the Act on the ground of arrears of rent due and payable to the previous landlord. The court has held in *SP.S.S. Medical Hall a partnership business represented by one of its partners SP.S.S. Shanmugam Chettiar v. S. Ibrahim & Co., a regd. partnership represented by one of its partners S.I. Mustafa Kamal*, (1992)1 M.L.J. 472, that no doubt it is not for the tenant to suggest as to which of the portion would be suited for the business of the landlord. But the point in order under the given circumstances whether the requirement of the landlord of the petition premises under Sec.19(3)(a)(iii) of the Act is *bona fide* when the other portions in the same premises are available for the landlord's godown purposes. A close scrutiny of the facts

arising in this case would go to show, that the requirements of the landlord of the petition premises under Sec.10(3)(a)(iii) of the Act appears to be not genuine. Even if the possession of the petition premises is not given that would not cause great hardship to the landlord. Therefore even looking at this angle also the request of the landlord is not *bona fide*. The point is whether carrying on business in a particular commodity and storing the same commodity in a godown are two different kinds of business, as contended by the learned counsel for the landlord. This contention cannot be accepted because storing the commodities in a godown and selling the same in the business premises of its own are different components of the same business and they are not two different kinds of business. Even assuming that the landlord is using the rented its own for different purpose viz., for selling the goods on this basis also eviction of the petition premises cannot be asked for under Sec.10(3)(a)(iii) of the Act. Since eviction on this basis is not envisaged under the abovesaid provision of the Act. According to the fact arising in the present case the landlord is not carrying on two different business in two different commodities as in the present case. In *Partners of Satyanarayana & Co. v. The Official Assignee, High Court, Madras*, (1992)2 M.L.J. 634, the court has held that a statutory tenancy under the Tamil Nadu Buildings (Lease and Rent Control) Act is not property within the meaning of Sec.17 of the Presidency Towns Insolvency Act so as to vest in the Official Assignee. There is no scope for bringing in the Official Assignee within the ambit of the definition of a tenant. Therefore, the Official Assignee on whom the properties of the insolvents would vest under Sec.17 of the Presidency Towns Insolvency Act cannot become a tenant as defined in Sec.2(8) of the Tamil Nadu Act 18 of 1960 as amended. The insolvents right of occupation is only statutory under the provisions of Rent Control Act and is not property which can vest in the Official Assignee. The court has held in *M.Nemichand Jain v. P.Ethirajan*, (1922)2 M.L.J. 422, that Sec.2(2) of the Act defines a building as any building let or to be let separately for residential or non-residential purposes and includes the garden grounds etc., In this case, the building that was let out was only the shop which was occupied by the petitioner herein and another teashop in the front portion of No.62, Kandappa Chetty Street.

The rear portion was always in the occupation of the landlord for the purpose of his residence. Hence there is a severance and carving out of the portion let out from the entire building. The portion let out has been used for his residential purpose. Even after he vacated it, it was not let out and it was kept vacant and therefore it continued to be a residential building. Hence, it cannot be treated as part of the building let out to the tenant within the meaning of Sec.10(3)(c) of the Act. Under Sec.10(3)(a)(iii) of the Act a landlord may subject to the provisions of clause (d) apply to the controller for an order directing the tenant to put him in possession of the building in case it is a non-residential building if the landlord or any member of his family is not occupying for purpose of a business which he or any member of his family is carrying a non-residential building in the city town or village concerned which is his own. The language is quite clear and it cannot be said that the landlord is occupying a non-residential building of his own for the purpose of his son's business. The question of *bona fide* has to be considered only on the basis of all the circumstances available in the case. It is not possible to contend that the court should advert to one of such circumstances only and decide the question of *bona fide*. In *M/s Wren Bennett & Co. India Ltd. v. Dr.C.P.Gupta*, (1992)2 M.L.J. 410, it has held that the maintainability of the petition for fixation of rent is a plea that will have to be taken by the respondent at the earliest stage to the R.C.O.P. itself and when such a plea has not been taken in the counter filed in the R.C.O.P. itself, it will not be open to the respondent to raise the plea either in the appeal filed before the appellate authority or in revision before the High Court. The definition of landlord given under Sec.2(6) of the Act is an inclusive definition. The inclusive definition in Sec.2(6) of the Act adds to the normal concept of landlord certain other categories of persons such as the person who is receiving or entitled to receive the rent of a building whether on his own account or on behalf of another or on behalf of himself and others as an agent etc. A person who is actually receiving or who is entitled to receive the rent of a building will be a landlord within the meaning of Sec.2(6) of the Act and such a person can maintain a petition for fixation of fair rent against the tenant. In the present case, the petition for fixation of fair rent is not filed in the firm name but in

the name of the individual partners. The firm is merely a compendious name for partners who constituted it and when the firm purchased the petition-mentioned property, the purchase is really by the partners and after the purchase of the petition-mentioned property the partners become the landlords within the meaning of Sec.2(6) of the Act as they are entitled to receive the rent for the petition-mentioned property as an agent of the firm from the tenant. It is needless to point out that every partner of a firm is an agent of the firm and as an agent of the firm the partners are entitled to receive the rent for the petition-mentioned property from the tenant. In these circumstances in view of the inclusive definition of landlord contained in Sec.2(6) of the Act and inasmuch as the petitioner as partners of the unregistered firm are entitled to receive the rent due for the petition-mentioned property and actually received the same, there is no difficulty in holding that the petitioners are landlords within the meaning of Sec.2(6) and the petition for fixation of fair rent filed by them is maintainable. A careful reading of Sec.4 of the Act shows that the fair rent is fixed for the building and it is payable by the tenant for the building occupied by him. In other words, what is fixed under Sec.4 of the Act is the fair rent for the building let out by a landlord to a tenant. The court has held in *Deluxe Road Lines represented by its partner Kushalchand B. Shah v. P.K. Palani Chetty*, (1992)2 M.L.J. 481, that an unexplained default is undoubtedly wilful. A reading of the main section and proviso makes it clear that it is for the tenant to prove that his default is not wilful. It is only the tenant who knows the relevant facts and he should plead the same and prove them before the Controller in order to satisfy the controller that the default was not wilful. If the tenant is not able to satisfy the controller that there were circumstances which prevented him from carrying out his contractual or statutory obligation of having paid the rent then the necessary consequential inference is that the default is wilful. No doubt the explanation introduced by the Amending Act of 1973 is to the effect that a default should be construed as wilful if the tenant fails to pay even after issue of two months notice by the landlord claiming the rent. But it is not necessary in every case that a notice should have been issued by the landlord to the tenant in order to hold that the default is wilful. Even in cases where there was no

notice calling upon the tenant to pay the rent the default could still be held to be wilful. The court has held in *K.A. Vadivelu v. R. Govindarajulu*, (1992)2 M.L.J. 341, that *bona fides* is a question of fact. What will be sufficient evidence will vary from case to case and the court will have to carefully scrutinise such materials before accepting or rejecting the *bona fide* of the landlord or the landlady as the case may be. It is a matter of common knowledge that rent control proceedings do take some years before a final decision is arrived at or rendered by the court at the top in the vertical order. A sanctioned plan obtained necessarily has to be renewed or reobtained depending on the nature of pendency of the Rent Control proceedings. It cannot always be insisted that without a sanctioned plan the landlord cannot claim *bona fides*. It is in this context if one refers to Sec.14(2)(b) of the Act the requirement is clear that the demolition in material part must be commenced within one month and completed within three months. The second does not speak of commencement of new construction within that period. In *K.A. Syed Ali v. Saradambal*, (1992)2 M.L.J. 111, the court has held that if the Rent Controller had come to certain conclusions on the questions of *res judicata* and jurisdiction then it might have given to an appeal. The Rent Controller said that the question raised by the petitioner could not be gone into as a preliminary issue and it could be decided in the proceedings only after trial and the recording of evidence is closed. The order not having decided any rights of the parties was not appealable.

City Tenants: In *Pandian Automobiles Private Ltd. v. Tirunelveli Sivakasi Hindu Nadar Pothu Abhiviruthi Sangam*, (1992)2 M.L.J. 185, the court has held that once the tenant suffers forfeiture he loses the character of tenant and consequently the rights of protection afforded under the Act will cease to have any application and therefore there is no need to provide a separate section under the Act to enable the landlord to evict the tenant on the basis of denial of title. Sec.2 of the City Tenants Protection Act while giving definitions to certain words appearing in the statute, expressly states that the definition as given in Sec.2 will apply unless there is anything repugnant in the subject or context. Therefore, if the context requires to read the word tenant in a different manner there is

nothing wrong in doing so. It cannot be disputed that if in the context it will be repugnant to hold that a particular person is a tenant as defined in Sec.2(4)(ii)(a) of the Act then the section must be construed in a manner which will be in harmony with the settled principles of law and enquiry. Sec.2(4)(ii)(a) states that a tenant is said to include a person who continues in possession of the land after the determination of the tenancy agreement. Obviously it can apply only to cases of determination of the tenant agreement otherwise than by forfeiture. Under Sec.111(g) of the Transfer of Property Act the tenancy is forfeited. Sec.111 of the Transfer of Property Act deals with various modes of determination of lease. So far as the Transfer of Property Act is concerned it makes no difference whether a lease is determined under one sub-clause or other. But for purposes of the City Tenants Protection Act which is a special statute intended to confer benefits on tenants who are continuing in possession in the hope of being able to do so till they pay a fair rent to the landlord a case of forfeiture of tenancy will be on entirely a different plane. It will be absurd to contemplate that a man who is deprived of his tenancy by reason of forfeiture because of his denial of title will be entitled to claim that he is retaining the character of a tenant for the purpose of the said Act. Basically such an interpretation will be against all notions of justice and equity. The act never intended to confer benefits on such person who having entered a land under a tenancy choose to deny the same or set up independent title. Therefore it is clear that when the section uses the expression a person is liable to pay rent in respect of such land under a tenancy agreement express or implied including one who continues in possession of the land after the determination of the tenancy, he is not entitled to any right unless there is a holding over under Sec.116 of the Act. In order that Sec.116 applies the lessor should accept the rent or otherwise assent to the lessee continuing in possession. There may be several cases in which the lessor may not be willing to accept rent or assent to the lessee's continuing in possession though the lessee may be willing to pay the rent and will be anxious to continue as a tenant and be in possession. It is only to benefit of such persons who are desirous of continuing the relationship of landlord and tenant the section includes the persons who continue in possession after

determination of the tenancy agreement in the definition of tenant. If a person claims that he has got an agreement for sale in his favour and his possession is under the agreement and he is not liable to pay rent as a tenant he cannot claim that he is a tenant under Sec.2(4) of the City Tenants' Protection Act.

Cultivating Tenants: In Lakshmikanthan v. Thiruvengadam, (1992)1 M.L.J. 297, the court has held that no party can dispossess the other party during the pendency of the suit and claim an advantage on the date of filing of the suit and prayed for injunction for protecting their lawful possession and interim injunction has been granted. It is not open the other side to forcibly enter into the possession of the suit property and then when the plaintiffs come forward with the alternative prayer for recovery of possession resist it stating that the petitioners are not cultivating tenants of the property. It is proved by unassailable evidence that plaintiffs were in possession under a lease. It does not make any difference whether they were contractual lessees or cultivating tenants. Once they are proved to be lessees having been in possession of the land under a contractual lease or as cultivating tenants their possession was forcibly removed, even without an amended prayer for recovery of possession by virtue of the inherent powers of the court the court is competent and the court is obliged to put back the parties in their original possession by restoring possession to the plaintiffs and court should not allow anybody to take the law in his own hands and dispossess the plaintiff when the court is seized of the matter. Only when the primary relief sought for is one of declaration of status of their party as a cultivating tenant the civil court may not have jurisdiction to decide the controversy. The provisions of Sec.6 of the Tamil Nadu Cultivating Tenants' Protection Act are not attracted when the party already in possession is dispossessed when the court is seized of the matter. The rent court does not have jurisdiction to try the matter in dispute in this case. The court has held in *Chenniammal v. Diamond Jubilee Governing Council represented by its Secretary, (1992)1 M.L.J. 186*, that under Sec.4 of the Tamil Nadu Cultivating Tenants Protection Act (38 of 1990) any cultivating tenant who is in arrears of rent payable to the landlord for the fasli year ending with the 30 days of June 1989 and for any

previous fasli year and outstanding on the date of the publication of the Act shall within two months exercise his option in writing to pay the current rent and the one fourth or one third of the arrears of rent for availing relief under the Act from payment of the said arrears of rent. It was contended that Sec.6 of the Act providing for the stay of suit was an independent provision and would not depend on the exercise of the option under Sec.4. The language of Sec.4 of the Act is very clear. Unless the option is exercised under that section no person can claim the benefit of the Act. In *M.Palanichamy v. Muthiah Pillai*, (1992)2 M.L.J. 523, the court has held that in Sec.4 of the Act the significant expression is arrears of rent payable to the landlord for the fasli year ending with 30th day of June, 1989 and for any previous fasli year and outstanding on the date of the publication of this Act. That expression itself shows that the section refers only to the amount due to the landlord on the date of the publication of the act after giving credit to the amounts already paid to him. Further, clause (2), Sub-sec.(1) expressly refers to the said amount as said arrears of rent. Hence, the section contemplates only the amount due and payable on the date of publication of the Act. Sec.5 of the Act no doubt uses the expression total amount of arrears of rent. That expression itself shows that it refers to the amount remaining due after giving credit to the payments already made. The contention that the expression total amount of arrears of rent would mean total amount of rent fixed between the parties cannot be accepted. When the section uses the term arrears it would automatically mean that the amount payable is only rent due after taking into account the amounts already paid. The word arrears is defined in the *Concise Oxford Dictionary* as outstanding debts: what remains not done. Hence, there is no difficulty in holding that under Sec.5 of the Act the tenant is bound to pay the current rent plus 1/4th of the amount due and payable on the date of the publication of the Act with regard to the rent payable for fasli year ending with 30th June, 1989 and previous fasli years. It can never mean that the tenant is bound to pay 1/4th of the total amount of rent fixed between the parties inclusive of amount already paid. If the contention of the learned counsel for the petitioner is accepted it would tantamount to refixing the rent at one fourth of the agreed rent in all cases when the tenant is in

arrears. There is no warrant for such a construction. If the legislature intended to wipe out all arrears in cases where the tenants had paid earlier one fourth of the total rent or more, it would have said so expressly. Such provisions are found in some of the Debt Relief Acts. No such provision is found in the Act. The legislature has intended to give only a concession and reduce the burden of arrears as on the date of the said Act. Learned counsel submits that the Preamble of the Act indicates that the tenant should not be made to pay again if he had already paid some amount towards the rent due. The Legislature has made it clear that the relief that is granted in the Act is only with reference to the arrears of rent. The name of the Act itself shows that it pertains to arrears of rent due on the date of the Act. The Preamble also refers only to arrears of rent. Hence, the Act does not refer to the amounts already paid. The Act is concerned only with the arrears of rent due as on the date of publication of the Act. In *Subbu Reddiar v. The District Revenue Officer, Trichy*, (1992)2 M.L.J. 64, the court has held that it could be seen from the provisions of Sec.2(aa) of the Act that even a heir of a deceased tenant could claim benefits only if the heir contributed his own physical labour or that of any member of his family in cultivation of suit lands and consequently it has to be established by anyone claiming benefits of the Act that he is an heir and that he contributed his own physical labour or that of any member of the family in the cultivation of such lands. The mere fact that a person who cannot otherwise be classified as an heir was assisting the erstwhile tenant cannot confer him with any tenancy rights in his own right or as a successor in interest of the erstwhile tenant.

Transfer of Property Act: In *K.Mohanakrishnan v. Seetha Natarajan*, (1992)1 M.L.J. 240, the court has held that a rule which has received universal recognition and needs no reiteration, however, seems to have been overstretched by the mortgagee in the sense that a mortgagee with a power of sale is not a trustee of the power of sale; it is a power given to him for his own benefit to enable him better to realise his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser the court will not interfere even though the sale be very disadvantageous unless indeed the price is so

low as to itself be evidence of fraud. In *S.Sarojini (died) v. The Nungambakkam Saswatha Dhanarakshaka Nidhi Ltd.*, (1992)1 M.L.J. 627, the court has held that A puisne mortgagee is entitled to purchase the property in the auction brought under Sec.69 of the transfer of Property Act by the first mortgagee. Nothing in law prevented the puisne mortgagee from making a purchase. In *The Tamil Nadu Handloom Weavers Co-operative Society Ltd., represented by its Chief Marketing Officer, Madras v. M/s.Glamour Saree Museum represented by its partner, No.843, Anna Road, Madras-2*, (1992)1 M.L.J. 555, the court has held that if Sec.106 of the Transfer of Property Act is declared unconstitutional, the very requirement of notice to terminate the tenancy will cease to exist in the statute. The defendant cannot argue that if its lease was not for agricultural or manufacturing purposes, in its case also six months notice should be the law. For that a legislation will be needed. The court cannot usurp the functions of the Legislature except in cases where for making a provision, workable, legislative words hold that since the rule of six months notices applies to agricultural and manufacturing leases, the same would be applied to all other kinds of leases. Courts ordinarily do not go into the motive behind the legislation. It is a matter exclusively for the legislatures to decide whether for reasons they have in their mind a particular class of people should be subjected to a particular law or not. Such classification may be based on the difference in the nature of the persons trade, calling or occupation. There may be some degree of hostility on account of the peculiar nature of the trade or calling or the transactions that are subjected to a classification. Indeed, every classification shall have some degree of hostility or bias for or against a certain section of the society. It is the overall effect of the law that will determine whether certain classification is unreasonable and hit by Art.14 of the Constitution. In order to find out whether there has been any inequality so as to strike off a certain piece of legislation the test to be applied is not the degree of inequality but the reality of it. Thus the presumption is always in favour of the constitutionality of an enactment since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people. It will be for those who challenge to rebut the presumption. They can do so undoubtedly by reference to the

contents of the law itself and also by intrinsic evidence. The legislative intent in providing for longer period of notice in the case of agricultural lease as well as manufacturing lease is not beyond comprehension. Manufacturing which essentially is trading, is a kind of operation which cannot be easily shifted from one place to another and evidently a longer duration will be necessary for the manufacturer to find out another suitable accommodation. Agricultural operations are generally seasonal; durations of which vary depending upon the type of crop grown in the land. For the obvious geographical and historical reasons, agricultural tenancies are protected by different tenancy laws and regulations of the States. The two purposes specifically chosen for a longer period of notice thus constitute a reasonable basis of classification and a special legislation for such purposes only leaving other purposes as a separate class. The purposes for which manufacturing lease and agricultural lease have been treated as a separate clause are based on firm foundation of the nature of the activities historically recognised as activities of distinct significance for people involved in them as well as for the people at large. There can be no equation available in the duration or the time as such to find any aggravation or enhancement of the degree of hostility if at all any such hostility existed in the classification of the two types of leases, namely agricultural and manufacturing for a longer period of notice. The Court has held in *Marappa Gounder v. Chennimalai Gounder*, (1992)2 M.L.J. 140, that the object of Sec.52 of the Transfer of Property Act is to afford protection of law in respect of a property which is the subject matter of litigation being alienated to the prejudice of the decree which may ultimately result in the pending suit. The law does not allow litigant parties but also on those who derive title under them by alienations *pendente lite*. In *Pandian Automobiles Private Ltd. v. Tirunelveli, Sivakasi Hindu Nadar Pothu Abhiviruthu Sangam*, (1992)2 M.L.J. 185, the court has held that a notice under Sec.111(g) of the Transfer of Property Act is required only when the tenancy is subsisting. This is because it cannot be disputed that a tenancy can be determined by issuing a notice in accordance with Sec.106 read with Sec.111(g) of the Transfer of Property Act. A careful reading of Sec.111(g) would suggest that a separate notice under that section is necessary only if the lease had not been

otherwise terminated.

Law Relating to Arbitration: In *M/s. The Kotson Engineering Corporation, Partnership Firm represented by its Partner Sri Ch. Sambasiva Rao v. The General Manager, Southern Railway, Madras-3*, (1992)1 M.L.J. 267, the court has held that in order to attract the provision of Sec.20 of the Act the following conditions must be satisfied: (a) The parties must have a valid and subsisting arbitration agreement between them; (b) The agreement was executed before the institution of a suit relating to the subject matter of the agreement; (c) Existence of a difference to which the agreement applies; (d) the application is made to a court having jurisdiction in the matter to which the agreement relates. Under Sec.20 of the Act the court has to ensure about the existence of an arbitration agreement between parties and the covering of the dispute by the agreement. The existence of a dispute is absolutely essential for a reference under Sec.20. The court has held in *M/s. Muthuswamy v. Chief Engineer Construction Works Branch, Southern Railway, Madras*, (1992)1 M.L.J. 121, that in order to attract the provisions of Sec.20 of the Arbitration Act the following conditions must be fulfilled, (a) The parties must have a valid and subsisting arbitration agreement between them, (b) the agreement was executed before the institution of a suit relating to the subject matter of the agreement, (c) the existence of a difference to which the agreement applies, (d) the application is made to a court having jurisdiction in matter to which the agreement relates. Under Sec.20 the court has to ensure about the existence of an arbitration agreement between parties and the covering of the dispute by that agreement. The existence of a dispute is absolutely essential for a reference under Sec.20. In *The Tamil Nadu Cements Corporation Ltd. v. M/s. Sathiapal and Company*, (1992)2 M.L.J. 303, the court has held that the only inhibition which courts have recognised upon the jurisdiction of the arbitrator to award interest is that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest and that it must be assumed that the arbitrator will have the same power to award interest as the court. The

instant case is not one in which without reference to the contents of the contract and various terms and conditions therein, it will be possible to say that award of interest has been illegal and thus the arbitrator misconducted himself in making such an award.

Specific Relief Act: In *M. Elumalai v. Devi alias Perundevi*, (1992)1 M.L.J. 113, the court has held that under the Specific Relief Act the plaintiff must prove before the court that he is always ready and willing to perform his part of the contract and it is only to show that he has performed his part of the contract the deposit of the balance of sale consideration. It is not open to the plaintiff decree holder to contend that the judgment-debtor could not withdraw the same. The entitlement to enforce specific performance depend upon the deposit made by the decree-holder. Unless the decree-holder makes the deposit he would not be entitled to enforce the decree against the defendant. Once the money is deposited as per the provisions of the Specific Relief Act or the decree it is earmarked for payment to the judgment-debtor. The court holds the money for the benefit of the defendant. If it earns interest on account of deposit in a Bank such interest should go to the decree holder. It is contended that in one sense the respondents are decree holders and that petitioner is a judgment-debtor to that extent. Even so the petitioner being bound by law to make the deposit in order to get a decree for specific performance he could not be entitled to claim interest on the amount. On the other hand the petitioner may be entitled to claim possession of the property as a consequence of execution of sale deed in his favour. Hence the petitioner cannot claim interest which had accrued on the amount deposited. In *S. Raju Pillai v. Paramasivam*, (1992)1 M.L.J. 467, the court has held that no doubt the burden was on the plaintiff to prove the execution of the document. But the question of burden loses its importance after both the parties have chosen to adduce evidence before the court and the court was certainly entitled to come to a conclusion on facts after considering the entire evidence. The lower appellate court had done only the same. It is well settled that in a contract relating to immovable property time is not the essence of the contract.

Hindu Religious and Charitable Endowments Act: In *The Deputy Commissioner, H.R. & C.E. Department, Tiruchy v. S.Rama Iyengar*, (1992)1 M.L.J. 48, the Court has held that any property which was set apart under Sec.63(f) for the purposes of religious trust cannot thereafter be said to be a private property or a private secular trust property. In *A.Shanmugha Mudaliar v. P.V.Rajagopal (died)*, (1992)2 M.L.J. 416, the court has held that the proviso relates only to Sec.64(5)(a) and not to Sec.64(5)(b). Only underneath Sec.64(5)(a) the proviso is found in the enactment and thereafter only come Sec.64(5)(b). No doubt both Secs.64(5)(a) and 64(5)(b) deal with modification of any pre-existing scheme by the Deputy Commissioner. But Sec.64(5)(b) deals with modification by the Deputy Commissioner where he is satisfied that there is the abovesaid inconsistency. On the other hand Sec.64(5)(a) deals with modification of any scheme. There may be even any other factual necessities for modifications would come under Sec.64(5)(a). But though Sec.64(5)(a) is worded generally in view of Sec.64(5)(b) providing for a particular situation as stated above Sec.64(5)(a) should be held to be providing for a modification other than the modification contemplated under Sec.64(5)(b). So in that sense Sec.64(5)(a) and Sec.64(5)(b) are mutually exclusive. Only in the case of Sec.64(5)(a), the proviso therein will apply that is in certain cases of court Schemes modification could be done by the Deputy Commissioner subject to such conditions and restriction as may be prescribed. But that qualification to the power given to the Deputy Commissioner is not there in the case of his power to modify under Sec.64(5)(b). If really he is satisfied that there is the abovesaid inconsistency he is free to modify the original scheme and the Legislature has not thought it fit to fetter the said power with any restrictions or conditions as contemplated in the case of modification under Sec.64(5)(a) of the Act. In *Seeni Thevar v. M.S.Velayutha Raja*, (1992)2 M.L.J. 530, the Court has held that the question whether a temple is public one (coming under the Act) or a private one (not coming under the Act) can be decided only by the Deputy Commissioner H.R. & C.E. Department under Sec.63(a) of the Act and not by the Civil Court.

Miscellaneous: Appellate Side Rules of Madras High Court: The Full Bench has held in *Terminated Full*

Time L.I.C. Employees Welfare Association v. Senior Divisional Manager, L.I.C. of India Ltd., Thanjavur Division, Thanjavur, (1992)2 M.L.J. 573, that it is not necessary for the purpose of reference to a Full Bench that a question of law should arise. Under Rule 6, O.1 of the Appellate Side Rules of the High Court the Chief Justice may direct that any application, petition, suit appeal or reference shall be heard by a Full Bench notwithstanding anything in the earlier rules. Once the reference is made by the Chief Justice the competence of the Full Bench to hear the matter cannot be challenged on the ground that such a question of law does not arise.

Approbate and Repröbate: The Bench has held in *Samsuddin Rowther v. Avvammal*, (1992)2 M.L.J. 252, that when both the appeals were pending in this Court and the parties agreed that the question of title could be decided in this second appeal and independent of the same, the S.T.A. could be disposed of it is no longer open to the plaintiffs to turn round and contend that this Court has no jurisdiction to decide the question of title.

Benami Transactions Act: In *Greaves Cotton and Company Madras v. J.Jamal Mohammed Abdulla*, (1992)2 M.L.J. 236, the Bench stated that the pronouncement of the Supreme Court in *Mithilesh Kumari v. Prem Behari Khare*, (1989)2 S.C.C. 95, has exhaustively assessed the scope, purport and intendment of the Act and in spite of that this court will not be in order to construe the set of expressions on behalf of a person claiming to be the real owner of such a property occurring in Sec.4 as excluding from its ambit and purview a decree holder who has no other case except to say that the properties though not standing in the name of the judgment-debtors are only his so as to be available for being proceeded against in execution. The decree holder puts forth a case that the judgment-debtor is the real owner of the properties. That is the basis for proceeding in execution against the properties. The court can only view that as a case on behalf of and projecting a claim of a person namely the judgment-debtor as the real owner of the properties. The decree holder indirectly confers the benefit of ownership on the judgment-debtor and wants to proceed against the properties in discharge of decree debts of the judgment-debtor so as to exonerate him

therefrom. It is significant to note here that the judgment-debtor was not made a party to the proceedings and was never called upon to make his say on the question. It is only the voice of the decree holder the appellant herein which spoke and that voice was only to say that the real owner is the judgment-debtor and not the respondent herein in whose name the properties stood. The present case will certainly come within the mischief of Sec.4. On facts the court is not prepared to accept the construction put forth by the learned counsel for the appellant on the provisions of Sec.4.

Carriers Act: The Court has held in *The Manager Doars Transport (P) Ltd. v. The Canara Bank represented by its Branch Manager, Chennimalai Erode Taluk*, (1992)1 M.L.J. 454, that as per Sec.8 of the Carriers Act any carrier shall be liable for loss or damage where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants or where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. The second defendant cannot be made liable by virtue of Sec.8 of the Carriers Act in view of the positive finding of the lower appellate court that there was no negligence or misconduct on the part of the servants of the second defendant. Sec.9 provides that the plaintiff need not prove that such loss or damage or non-delivery was owing to the negligence or criminal act of the carrier his servants, as agents. The duty is not cast upon the plaintiff to prove these factors, but the common carrier can prove that non-delivery was not due to its negligence or criminal act of his servants. The finding of the lower appellate court is there was no such negligence or misconduct while so neither under Sec.9 the second defendant can be made liable. Looking the case from any angle the finding of the lower appellate court that as an insurer, the second defendant is liable though there was no negligence or misconduct on the part of the servants of the second defendant cannot be sustained. So the second defendant is also not liable for the suit claim.

Divorce Act: It has held in *R.Anitha Marginic v. R.Annadurai*, (1992)2 M.L.J. 11, that if either of the parties is a christian, it would be sufficient to invoke the jurisdiction of the court under the

provisions of Divorce Act. The High Court alone is empowered to entertain an application for nullity of the marriage on the grounds stated in Sec.19 of the Divorce Act. In *Winfred Dhanraj Samuel v. Betsy Ramakumari*, (1992)2 M.L.J. 106, the bench has stated that the condition precedent to satisfy the requirements of Sec.37 of the Divorce Act are two-fold: (1) there must be a decree absolute declaring the marriage to be dissolved, and (ii) a decree of judicial separation obtained by the wife. In that event court can grant permanent alimony. In the instant case, the suit filed by the husband has been dismissed and hence the grant of maintenance ordered is irregular. Sec.36 of the Indian Divorce Act provides that the wife may present a petition for alimony pending the suit. The court on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just. Sec.15 of the Indian Divorce Act also provides that in any suit instituted for dissolution of marriage, if the respondent opposed the relief sought on the ground in case of such suit instituted by husband of the adultery, and cruelty the court may in such suit give to the respondent or his or her application the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief and the respondent shall be competent to give evidence of or relating to such cruelty or desertion. Thus it is seen that the court has a power to grant maintenance pending suit under Sec.36 of the Indian Divorce Act and had power to order maintenance under Sec.37 of the Indian Divorce Act only when a decree is made absolute declaring the marriage to be dissolved or on any decree of judicial separation obtained by the wife. Permanent alimony and maintenance can only be granted in case divorce is granted and if the marriage between the parties subsists. If the petition by the husband as in the instant case fails then no decree is passed. The decree is denied to the husband. Alimony cannot therefore be granted in a case where decree for divorce is refused. Ultimately alimony on a permanent basis maintenance given to an ex-spouse and if a petition fails then the marriage still subsists unaltered by the intervention of any decree and the normal rights of the parties to be found in the legal system under which they are married has to prevail. There is no

question of granting alimony in such cases, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so then the other partner can seek maintenance by recourse to the civil or criminal court. There is no question of granting alimony in such cases. The word decree is used in matrimonial cases in a special sense different from that in which it is sued in C.P.C.

Letters Patent: The Bench has held in *K. Murugesan v. Seethalakshmi*, (1992)1 M.L.J. 396, that it shall always be in relation to the subject matter of the dispute that the Court will decide whether to nonsuit the plaintiff for the reason that one or some of the defendants are residing and carrying on business within the jurisdiction of the court but some are not and if cause of action is found common to all of them by dint of residence of one or some of the defendants or otherwise it would be enough to hold that since cause of action is not wholly but in part has arisen within the jurisdiction of the court the suit is maintainable. In *Tuticorin Alkali Chemicals and Fertilizers Ltd. v. M/s. Cochin Silicate & Glass Industries a partnership firm represented by its Managing Partner, Mr. A.J. Shelat*, the Bench has held that the words determine suits of every description if the cause of action shall have arisen or in case the leave of the court shall have been first obtained in part within the local limits of the ordinary original jurisdiction in clause 12 of the Letters Patent clearly establish the right of litigant to institute a suit on the original side of this court if the cause of action would have arisen wholly within the local limits of the Ordinary Original Jurisdiction of the court. The leave of the court is required only in a case in which the cause of action would have arisen in part within the local limits of the Ordinary Original Jurisdiction. It is thus not possible to ignore the case of a litigant who decided to file the suit on the Original Side of the court on the plea that most part of the cause of action had arisen within the City of Madras, only on the ground that the defendant had pleaded otherwise and alleged that no part of the cause of action had arisen in Madras, but had arisen at Cochin.

Pleading, Practice, Procedure and Precedent: In *O.N.A. Nagamani Chettiar (died) v. Shanmugam Finance*

Company by its Proprietor, K.P. Shanmugam, (1992)1 M.L.J. 603, the court has held that the written statement filed in the suit itself cannot be called in aid for the purpose of Sec.19 of the Limitation Act. The court has held in *Ramachandran v. Valliammal*, (1992)1 M.L.J. 188, that when there is no pleading before court the Court ought not to have allowed any evidence to be let in by the parties. It is well settled that no amount of evidence without a plea can be looked into by the court. It is well settled that a party who is in possession of the best evidence and a party who is the best person to give evidence on certain matter should enter the witness box and place the facts before the Court and in the event of his failure to do so, the court is bound to draw an adverse inference against him. In *State Bank's Staff Union (Madras Circle) v. State Bank of India*, (1992)1 M.L.J. 133, the Bench has held that in a case where there are two pronouncements of the highest court in the land suggesting or indicating contrary views the rule of guidance for the High Court is to adopt the ruling of the decision rendered by a larger Bench. In *Vijayalakshmi v. Vasantha*, (1992)2 M.L.J. 152, the court has held that it is the duty of the court to give effect to the inference to be drawn from the evidence on record even if the finding is not consistent with the pleadings of either party. The Full Bench has held in *Philip Jeyasingh v. The Joint Registrar of Co-operative Societies, Chidambaram Region, Tuticorin*, (1992)2 M.L.J. 309, that it is common knowledge that Full Benches are constituted specially for deciding specific questions referred to them. The judgment of the Full Bench is binding precedent as it expresses that collective opinion of the court as such. It is binding on a single judge as well as a Division Bench until it is reversed by a higher court. Mere expression of dissatisfaction by their Lordships of the Privy Council about the principles decided by a Full Bench of a High Court was not sufficient to take away their authority until the Privy Council expressed a definite disagreement with them. A Full Bench is a final court of appeal in an Indian High Court unless the case is referred to a Full Bench and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law and if the later Bench does not accept as correct the decision of the earlier Bench the only right and proper course to adopt is to refer the matter to a Full Bench. The following principles can be culled out from the

myriad case laws. (a) A single Judge is bound by the decision of a Division Bench and if he does not agree with it he shall refer it to a larger Bench, (b) a *fortiori* he is bound by the judgment of a Full Bench and if he does not agree with its ratio, he shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for considering the question, (c) A Division Bench is bound by the decision of another Division Bench and if it wants to differ it shall refer the matter to the Full Bench, (d) a *fortiori*, a Division Bench is bound by the decision of a Full Bench and if it wants to differ it shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for reconsidering the question, (e) the decision of a Full Bench is binding on the court including a subsequent Full Bench until it is overruled by a larger Bench specially constituted by the Chief Justice for deciding the question, (f) Even the obiter dicta of a Full Bench is entitled to great weight, (g) the binding effect of a prior decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided, (h) the decision of the Supreme Court is binding on the High Court and the latter cannot ignore it on the ground that some relevant provisions of law were not brought to the notice of the Supreme Court or some aspects of the matter in question were not considered by the Supreme Court.

Insolvency: In *S.P. Govindaraj v. A Palaniappan*, (1992)1 M.L.J. 486, the court has held that in clauses (ii) and (iii) of Sec.6(d) three situations are contemplated. One, the debtor departs from his dwelling house or usual place of business. Two, the debtor absents himself otherwise from his dwelling house or usual place of business. Three, he secludes himself so as to deprive his creditors of the means of communicating with him. In the first of the contingencies, the act of insolvency is complete as soon as the debtor departs from his dwelling house or usual place of business with intent to defeat or delay his creditors. The second contingency arises when the debtor absents himself from his dwelling house or his usual place of business without actual physical absence. In a case where the debtor takes an assumed name so as to conceal himself and be out of reach of his creditors it will

be an absence otherwise than by departure. Even if the debtor conceals himself in a room of the house or place of business on a false pretext that will also fall within the second part of clause (ii). But in the case of absenting himself it is a continuing act of insolvency so long as he is absent. The act is not completed on the first day on which he absents himself but it continues until he presents himself. It is a continuing act of insolvency giving rise to a cause of action for filing a petition for adjudication every day and every moment till the absence comes to an end. Similarly in the third contingency also there is no necessity for the debtor to leave his dwelling house or usual place of business. Even without doing so he could seclude himself in such a way as to deprive his creditors of the means of communication with him. In that case also it is a continuing act of insolvency so long as he continues to seclude himself. Thus the cause of action is a continuing cause of action and it arises every day for the purpose of Sec.9(1)(c) of the Act. The expression used in Sec.9(1)(c) of the Act is has occurred. In the case of a debtor remaining out of the territories absenting himself otherwise than by departure and secluding himself the act of insolvency is occurring every moment of his remaining outside the territory remaining absent and secluding himself. Sec.9(1)(c) of the Act does not use the expression has first occurred. Hence the intention of the legislature is very clear that the period of three months mentioned in Sec.9(1)(c) of the Act will have to be calculated from the date on which the act of insolvency it occurs on every day until the act of insolvency continues to exist. In *A.G. Krishnamoorthy v. V. Kannammal*, (1992)2 M.L.J. 343, the Bench has held that there can be no dispute that in case of a benami transaction the most important issue is as to who paid the consideration money purchase money if at all there was such consideration involved. It is indeed a mistake to imagine a dispute raised by a third party as the title in some one other than the person in whose name the property stands. Sec.59 of the Evidence Act provides that the contents of documents cannot be proved by oral evidence. Sec.91 of the Evidence Act says that when the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of

the terms of such contract grant or other disposition of property or of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible subject to the exceptions that are enumerated within Sec.92 excludes evidence as to oral agreement which will have the effect of contradicting, varying or adding to or subtracting from the terms of the document reduced to writing. Benami is a concept derived from the use and practice in India of any immovable property by the real owner keeping himself in hiding and projecting ostensibly someone else as the owner. The ostensible owner thus has all the rights and privileges of the owner of a property except against the real owner who enjoyed the privilege of asserting his title against ostensible owner. If anyone could assert any right or interest in the property that stood in the name of K in the title deed that was the real owner viz., the husband if at all K was only ostensibly the owner and the property in fact had been purchased by V. The court cannot see any possibility of a creditors who may have a claim against the debtor say that his debtor is the real owner of the property although the property stood in the name of another person. The most vital of the questions that was required to be answered is the source from which the purchase money came and then only the nature of possession of the property after the purchase and the other issues as aforementioned have to be examined. As observed by the Supreme Court in *Gapadibai v. State of M.P.*, A.I.R. 1980 S.C. 1040, the title deeds are solemn documents. It cannot easily be ignored and no inference drawn against its contents unless as again observed by the Supreme Court the person asserting the transaction to be benami is able to show that the ownership although ostensibly show in the name of a certain person was in reality with another

Sale of Goods: In *The Food Corporation of India represented by its Zonal Manager, Madras v. The Bengal Trading company represented by its partner, Madras-1*, (1992)1 M.L.J. 225, the bench has held that Sec.42 of the Sale of Goods Act provides a legal fiction of deeming acceptance of the goods by the buyer under certain circumstances enumerated therein. They are: (1) when he intimates to the seller that he accepted the goods, or (2) when the goods have been delivered to him and he does

any act in relation to them which is inconsistent with the ownership of the seller, or (3) when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. The instant case squarely falls under the category of circumstances enumerated in (2) and (3) as above. In *Tirumala Tirupathi Devasthanam represented by its Marketing Officer V.Venkataramana Reddy, Tirupathi v. Madras Port Trust represented by the Traffic Managers*, (1992)2 M.L.J. 159, the court has held that it is true that under Sec.43 of the Sale of Goods Act, the buyer is not bound to return rejected goods but it is sufficient to intimate the seller that he refused to accept the same. But in view of the provisions of Sale of Goods Act with regard to the sale of goods on sample with regard to the position of law laid down by this Court with regard to C.I.F.

Succession Act: The Bench has held in *G.Vaidehi v. Govindarajan*, (1992)2 M.L.J. 393, that it cannot be contended by any stretch of imagination that in case where attesting witnesses were dead, a will could not be proved otherwise. The method in such a situation will be one as envisaged under Sec.69 of the Evidence Act. All that is required is to prove the attestation by bringing on record the evidence of a witness that the attestation was in the handwriting of that person who was described as the attesting witness and that he had put his signature.

Wills: In *Palaniammal v. Chinnammal*, (1992)1 M.L.J. 460, the Bench has held that the principles governing proof of wills as recognised by judicial precedents run as follows: (i) The *onus probandi* lies in every case on the propounder of the testament so that he is bound to satisfy the conscience of the court that the instrument is the last Will of a free and capable testator, (ii) If the propounder takes an active part in the preparation of the Will under which he takes a benefit that is a circumstance which would excite the suspicion of the court and justify the vigilance and jealous scrutiny before accepting the Will and the same principle will stand extended to what may be termed suspicious circumstances or factors in general of course, attendant upon the execution of the Will or in some clear manner related to that issue, (iii) it is for the propounder to satisfy the conscience of the court by dispelling those suspicions in the light of

the evidence and its probabilities and if he fails to do so and the conscience of the court is not satisfied the court will decline to accept the Will. The suspicious circumstance may be as to the genuineness of the signature of the testator the condition of the testator's mind, the dispositions made in the Will being unnatural improbable or unfair in the light of the relevant circumstances, if there might be other indications in the Will to show that the testator's mind was not free.

Words and Phrases: In *Dravidar Kazhakam represented by the General Secretary, K. Veeramani v. The Chairman, United India Insurance Company Ltd.*, (1992)1 M.L.J. 530, the court has held that the Gayathrimantra is said to be shabda Brahman and is said to appear in the Rig Veda, as the tenth mantra in the sixth sutra of the third mandala. It is considered to be all pervasive synonymous with divinity and valued as a universal prayer which does not ask for any mercy or pardon but seeks for a clear intellect so that truth may be reflected therein without distortion. It, therefore, is supposed to purify rescue or protect the chanter who contemplates the glory of light that illuminates the three worlds or the religious experience as they are called with a prayer for final liberation through the awakening of the innate intelligence that pervades the Universe as light. As one having its origin in Vedas and Vedic times, it will be anachronistic for any one to contend that it signifies or relates to any particular religion. Gayatri-mantra is the key to Vedic wisdom. The Vedas have been in existence long before any of the present day organised religions nor are concerned with propagating religion.

Supreme Court Rulings: While considering the scope and applicability of Sec.100, C.P.C. In *Ramaswamy Kalingarayar v. Mathayan Padayachi*, (1992)1 M.L.J. 19 (S.C.), the Supreme Court has held that suggested shortcomings in the findings of fact recorded by the lower courts would not alter the situation that those were findings of facts, unquestionable under the provisions of Sec.100, C.P.C., which defines the contours of the power of the High Court in second appeal. Sufficiency of proof can be no ground for the High Court to interfere in a finding of fact. In *Mohammad Mahibulla v. Seth Chamanlal (dead) by L.Rs.*, (1992)1 M.L.J. 12, the Supreme Court has held that

reading the provisions of Secs.107(2) and 149 of the C.P.C. together and keeping fairness of procedure in view it must be held that when the lower appellate court came to hold that the memorandum of appeal had not been sufficiently stamped an opportunity should have been given by the Court to the appellant to make good the balance court fee within a time to be indicated and if there was failure to comply with the direction of the Court the memorandum of appeal could have been dismissed. This opportunity having not been given the dismissal of the appeal was not appropriate. In *Byram Pestonji Gariwala v. Union Bank of India*, (1992)2 M.L.J. 1, the Supreme Court has held that there is no reason to assume that the Legislature intended to curtail the implied authority of counsel engaged in the thick of proceedings in court to compromise or agree on matters relating to the parties even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognised agent and his principal is a matter of contract and with the freedom of contract generally the legislature does not interfere except when warranted by public policy and the legislative intent is expressly made manifest. So long as the system of judicial administration in India continues unaltered and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has though not expressly; but impliedly reduced counsel role or capacity to represent his client as effectively as in the past. On a matter of such vital importance, it is most unlikely that parliament would have resorted to implied legislative alteration of counsel capacity or status or effectiveness. The court may however hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession. Considering the

traditionally recognised role of counsel in the common law system and the evil sought to be remedied by Parliament by the C.P.C. Amendment Act, 1976, namely attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties the legislature cannot in the absence of express words to such effect be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay loss and inconvenience especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal so can counsel possessed of the requisite authorisation by vakalathnama act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change even the risk of delay inconvenience and needless expenditure, it would have expressly so stated. Accordingly it must be held that the word in writing and signed by the parties inserted by the C.P.C. (Amendment) Act 1976 must necessarily mean to borrow the language of O.3, Rule 1, C.P.C. any appearance, application or act in or to any court required or authorised by law to be made or done by a party in such court may except where otherwise expressly provided by any law for the time being in force be made or done by the party person or by his recognised agent or by a pleader appearing or acting as the case may be on his behalf. Provided that any such appearance shall if the court so directs, be made by the party in person. A judgment by consent is intended to stop litigation between the parties just as much has a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an

estoppel by judgment. The Supreme Court has held in *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay*, (1992)2 M.L.J. 55, that it cannot be said that the main object of the Rule 10(2) of O.1, C.P.C. is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the question involved that would only make him a necessary witness; It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled therefore, must be question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is therefore necessary that the person must be directly or legally interested in the action in the answer i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. In *Dalpat Kumar v. Prahlad Singh*, (1992)2 M.L.J. 49, the Supreme Court has held that O.39, Rule 1 is primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent possible future injury. In other words the court on exercise of the power of granting ad interim injunction is to preserve the subject matter of the suit in the *status quo* for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that, (1) there is a serious disputed question to be tried in the suit and that on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant, (2) the court's interference is necessary to protect the party from the species of injury.

In other words, irreparable injury or damage would ensure before the legal right would be established at trial, and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is a *prima facie* case in his favour which needs adjudication at the trial. The existence of the *prima facie* right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. *Prima facie* case is not to be confused with *prima facie* title which has to be established on evidence at the trial. Only *prima facie* case is a substantial question raised, *bona fide* which needs investigation and a decision on merits. Satisfaction that there is a *prima facie* case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in irreparable injury to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury as dispossession. Irreparable injury however, does not mean that there must be no physical possibility of repairing the injury but means of only that the injury must be a material one namely one that cannot be adequately compensated by way of damages. The third condition also is that the balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit the subject matter should be maintained in *status quo* an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit. Undoubtedly in a suit seeking to set aside the decree the subject matter in the earlier suit though became final the court would in an appropriate case grant ad interim injunction when the party seeks to set aside the decree on the ground of fraud

pleaded in the suit or for want of jurisdiction in the court which passed the decree. But the court would be circumspect before granting the injunction and look to the conduct of the party the probable injuries to either party and whether the plaintiff could be adequately compensated if injunction is refused.

Benami Transactions: The Supreme Court has held in *Om Prakash v. Jai Prakash*, (1992)2 M.L.J. 38, that this Court in *Mithilesh Kumari v. Prem Behari Khare*, (1989)2 S.C.C. 95, has already held that the expressions shall lie in Sec.4(1) and shall allow in Sec.4(2) of the Benami Act are prospective and shall apply to present future stages and future suit claims or actions only. The expression any property held benami is not limited to any particular time, date or duration. In a suit for recovery of benami property if any appeal is pending on the date of coming into force of Sec.4, the appellate court can take into account the subsequent legislative changes. In that case, this Court considered the 130th report of the Law Commission submitted to the Government on August 4, 1988. Benami Transaction (Prohibition) Bill, 1988 was drafted after getting the report and the Bill was introduced in the Rajya Sabha on August 1, 1988 and then the Bill was passed. The Law Commission's view was that the legislation replacing the Ordinance should be retrospective in operation and that no *locus penitentie* need be given to persons who had entered in the benami transaction in the past. The court is not convinced to take a different view from that already taken by this Court in *Mithilesh Kumari v. Prem Behari Khare*, (1989)2 S.C.C. 95.

Constitution of India: In *Special Tahsildar Land Acquisition Visakhapatnam v. A. Mangala Gowri*, (1992)1 M.L.J. 6, the Court has held that it is settled law that the High Court and the reference court when made wrong application of a principle on important points affecting valuation has been overlooked or is applied this Court would under Art.136 correct the same. The Supreme Court has held in *Workmen represented by Secretary v. Rep-takos Brett and Co. Ltd.*, (1992)2 M.L.J. 16, that the tribunal and the High Court in this case has acted in total oblivion of the legal position as propounded by the Supreme Court in various judgments. Manifest injustice has been caused to the

workmen by the award under appeal. The court sees no force in the contention that so long as there is some basis some material to validate the award the jurisdiction under Art.136 stands repelled.

Hindu Law: In *B.T.Govindappa v. B.Narasimhaiah*, (1992)1 M.L.J. 3, the Supreme Court has held that there can be no manner of doubt that a Hindu woman is the full owner and entitled to deal with her Stridhana property as shebaities. She can also put any restriction or constituent of her rights by her own consent and free will in her stridhana property.

Land Acquisition: In *Nutakki Sesharatanam v. Sub-Collector, Land Acquisition, Vijayawada*, (1992)1 M.L.J. 26, the court has held that the acquisition of the land is bad in law because the substance of the notification under Sec.4(1) of the said Act was not published in the locality within forty days of the publication of the notification in the Government Gazette. The time limit of forty days for such publication in the locality has been made mandatory by Sec.4(1) of the said Act by Andhra Pradesh (Amendment) Act. It is well settled that such non-compliance renders acquisition bad in law. The Supreme Court has held in *State of Tamil Nadu v. A.Mohammed Yousf*, (1992)1 M.L.J. 14, that Chapter VII of the Madras State Housing Board Act containing Secs.35 to 69 deals with the framing of the scheme. The Act has laid down separate procedures for the different types of schemes. The different types of schemes according to necessity and suitability. Some of the schemes do not require acquisition of land which is however essential for constructing residential buildings under the house scheme. Sec.39 of the Act therefore, while enumerating the matters to be included in the scheme specification mentions acquisition of land in clause (a). If the acquisition is contemplated as a subject matter of the scheme itself it follows that it must await the preparation of the scheme where it will be included. The Act requires the proposed scheme to be published permitting objections to be made and if they are found to be valid under Sec.53 the scheme to be modified or abandoned. Sub-sec.(1) of Sec.49 directs the notice of the draft housing scheme to include and specify the following information as contained in clause (b) for the purpose of the publication and information to the general

public the place or places at which particulars of the scheme a map of the area and details of the land which it is proposed to acquire and of the land in regard to which it is proposed to recover a betterment fee may be seen at reasonable hours. The words of the land which it is proposed to acquire reaffirm the position that the acquisition of the land has to be a part of the scheme which can be executed only after its publication. Apart from the provisions of Sec.53, Sec.56 further clothes the Board with the power to alter or cancel the scheme even after it is finally sanctioned. The language of clause (b) of the proviso to the section once more leads to the same conclusion that acquisition of land has to await the framing of the scheme. In *A.Viswanatha Pillai v. Special Tahsildar for Land Acquisition No.IV*, (1992)1 M.L.J. 1, the Bench has held that a co-owner is as much an owner of the entire property as to a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds. Therefore, a co-owner of the property is an owner of the property acquired, but entitled to receive compensation pro rata. The State would plead no waiver nor omission of other co-owners to seek reference nor disentitle than to award to the extent of their legal entitlement when in law they are entitled to since the acquired property being the ancestral co-parcenary and continued to be kept in co-owners among the brothers and the income derived therefrom was being shared in properties their shares by all brothers it remained a joint family property. When one of the co-owners a coparceners made reference in his application that himself and his brothers are dissatisfied with the award made by the Collector and that they are entitled to higher compensation it would be clear that he was making a request though not expressly stated so but by necessary implication that he was acting on behalf of other co-owners or co-parceners and was seeking a reference on behalf of other co-parceners as well. What was acquired was their totality of right title and interest in the acquired property and when the reference was made in respect thereof under Sec.18, they are equally entitled to receive compensation

as per their share. The Bench has held in *Bhagwathula Samanna v. Special Tahsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam*, (1992)1 M.L.J. 9, that in awarding compensation in acquisition proceedings the court has necessarily to determine the market value of the land as on the date of the relevant notification. It is useful to consider the value paid for similar land at the material time under genuine transactions. The market value envisages the price which a willing purchaser may pay under *bonafide* transfer to a willing seller. The land value can differ depending upon the extent and nature of the land sold. A fully developed small plot in an important locality may fetch a higher value than a larger area in an undeveloped condition as situated in a remote locality. By comparing the price shown in the transactions all variables have to be taken into consideration. The transaction in regard to smaller property cannot therefore be taken as a real basis for fixing the compensation for larger tracts of property. In fixing the market value of a large property generally a deduction is given taking into consideration the expenses required for development of the larger tract to make smaller plots within that area in order to compare with the small plots dealt with under the sale transaction. The principle of deduction in the land value covered by the comparable sale is adopted in order to arrive at the market value of the acquired land. In applying the principle it is necessary to consider all relevant facts. It is not the extent of the area covered under the acquisition which is the only relevant factor. Even in the vast area there may be land which is fully developed having all amenities and situated in an advantageous position. If a smaller area within the large tract is already developed and suitable for building purposes and have in its vicinity roads, drainage, electricity, communications, etc. then the principle of deduction simply for the reason that it is part of the large tract acquired may not be justified. The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and in given circumstances, it would be permissible to take into account the price fetched by the small plots of land. If the larger tract of land because of advantageous position is capable of being used for the purpose for which the smaller plots are used and is also

situated in a developed area with little or no requirement of further development the principle of deduction of the value for the purpose of comparison is not warranted. In *Mir Fazeelath Hussain v. Special Deputy Collector, Land Acquisition, Hyderabad*, (1992)2 M.L.J. 59, the Supreme Court has held that there is a slight distinction in the case of award of solatium and the award of interest on the amount of compensation. The solatium is given on account of compulsory acquisition while the interest is awarded to compensate the delayed payment of the amount of compensation to which the claimant becomes entitled as soon as possession is taken from him till the payment is made in the court. Thus, so far as the grant of solatium for compulsory nature of the acquisition is concerned it comes into operation on the date when the award is given by the Collector or the court and the rate of solatium would be governed according to the rate prevailing on the date of award made by the Collector or the court. But, so far as the payment of compensation is concerned the grievance continues till the entire amount is paid to the claimant.

Landlord and Tenant: The Bench has held in *D.C. Oswal v. V.K. Subbiah*, (1992)2 M.L.J. 23, that in the several statutes operating in the different States regulating the law relating to landlord and tenant wilful default is not. A situation where the landlord has consented to collect rent for two to three years at a time non-payment of rent for three months at the time of filing of the case the court is prepared on the basis of the evidence on record that it was not a case of wilful default.

Pratap Singh, J.

**Kovilpatti Sri Dhanadayuthapani Trust,
through its Hugdar A.Seethalakshmi v.
Tilakaraj.**

17th February, 1993.

C.R.P.No.3431 of 1992.

Registration Act (XVI of 1908), Secs.17 and 49 - Lease for rent of Rs.700 per month - Unregistered document showing that lease was extinguished and also showing that possession of premises was handed over to the lessor - If can be admitted in evidence.

Held:- The prohibition against admissibility enacted by Sec.49 of the Registration Act is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in clauses (a) and (c) and leaves it available to be used in evidence for other purposes. The last sentence of the document sought to be filed would amount to extinguishment of the lease. As such this is a document compulsorily registrable under Sec.17 of the Registration Act inasmuch as monthly rent was Rs.700. So to evidence extinguishment of the lease, this document cannot be received as evidence. But the penultimate sentence would indicate that possession was handed over by 'T' to 'S'. For the purpose of showing that possession was handed over, this document can be received in evidence since it is for a collateral purpose. If we apply the proposition of law which the court has deduced above, this document is made available to be used in evidence for the other purpose viz., with regard to handing over possession.

K.Alagiriswamy, Senior Counsel, for T.Ravikumar, P.T.S.Narendravasan and T.Muruganandan, for Petitioner.

P.P.Peppin Fernando, for Respondent.

B.S.

Petition allowed.

*V.Ratnam, Acting Chief Justice
and Somasundaram, J.*

**Managing Director, Repatriate Co-operative
Finance and Development Bank Ltd. v.
Deputy Commissioner of Labour-II, Madras-6.**

2nd February, 1993.

W.A.No.1008 of 1989.

(A) Appeal - Act conferring right of appeal - Repealed - Repealing enactment providing a new forum - Effect of.

The right of appeal is a substantive right and gets vested in a litigant no sooner the lis is commenced in a suit in a Court of first instance and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right. Unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. However, the forum where such an appeal can be lodged is a procedural matter and therefore if the repealing Act provides a new forum where the remedy by way of appeal or legal proceedings in respect of such vested right can be perused after the repeal, the forum must be as provided in the repealing Act.

(B) Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Secs.6 and 41 - Tamil Nadu Co-operative Societies Act (LIII of 1961), Sec.11 - Appeal by the dismissed employee before Deputy Commissioner of Labour - Jurisdiction of the Deputy Commissioner.

When the special by-laws were registered before the Registrar under Sec.11 of the 1961 Act on 12.4.1978, by virtue of G.O.Ms.No.5780, the appellant bank is exempted from the provisions of Sec.41 of the Act and only the new forum provided under the special by-laws namely the Central Registrar can hear and dispose of the appeal filed by the second respondent against the order of the appellant bank dismissing him from service. The second respondent was dismissed from service on 21.7.1975 and on that date, the second respondent had the right of appeal under Sec.41 of the Act and, as a matter of fact, the second respondent had

filed on appeal before the first respondent on 25.8.1975 and the appeal was pending before the first respondent when the special by-laws were registered under Sec.11 of the 1961 Act on 12.4.1978. Therefore, from 12.4.1978, the appellant bank gets an exemption from the provisions of Sec.41 of the Act and thereafter, only the provisions of the special by-laws dealing with the dispensing with the services of the employees of the appellant bank, the right of appeal available to such employees whose services has been dispensed with and the forum of appeal will apply in the place of Sec.41 of the Act. Again clause 6(d) of the special by-laws provides the forum before which an appeal can be filed against the order of the appellant bank dispensing with the services of any employee of the bank. The vested right of appeal available to the employees of the appellant bank to prefer appeals against the orders of the appellant Bank dispensing with their services is not taken away by the incorporation of the model by-laws in the registered by-laws of the appellant Bank and by the registration of such by-laws under Sec.11 of the 1961 Act, but such right of appeal is preserved and kept in tact under Clause (d) of the special by laws. On 12.4.1978 when the special by-laws were registered, they have repealed Sec.41 of the Act and the clause 6(d) of the Special by-laws provides a new forum of appeal before which an appeal can be filed against the order dispensing with the services of the employee of the appellant bank. The appeal filed by the second respondent and which was pending before the first respondent could be pursued after the registration of the special by-laws only before the new forum viz., the Central Registrar. After the registration of the Special by-laws under Sec.11 of the 1961 Act on 12.4.1978, the second respondent ought to have asked for the transfer of the appeal to the new forum provided under Clause 6(d) of the special by-laws or the first respondent himself should have transferred the appeal in the Central Registrar. In these circumstances, it has to be held that after 12.4.1978, the first respondent had no jurisdiction to hear and dispose of the appeal filed by the second respondent under Sec.41 of the Act and which was pending on that day.

B.S. ----- *Appeal allowed.*

Janarthanam, J.

**Sri Mahalingawami Devasthanam,
Thiruvudaimurthur v.
State of Tamil Nadu.**

3rd February, 1993.

W.P.No.6918 of 1984.

Tamil Nadu Levy of Ryotwari Assessment on Freehold Lands Act (XXXI of 1973) - Object of - Determination of issuance of rough patta to occupiers of lands - Permissibility.

Held:- It is clear that the object of the Act is only to provide for the levy of ryotwari assessment as free-hold land in the State of Tamil Nadu. It does not purport to affect or alter in any manner other rights in the free-hold land. Ryotwari settlement of free-hold land can be effected in accordance with the settlement notification framed and published by the Government for the purpose. The object of various notices now under challenge is not only to bring the lands in question on par with similarly situate ryotwari lands for the purpose of assessment but also for the purpose of deciding the question as to the entitlement of rough patta of these lands by the occupiers.

B.Kumar, for Petitioner.

V.Raghupathy, Government Pleader, for Respondents.

B.S. ----- *Petition allowed in part.*

Bellie, J.

**Steel Authority of India Ltd. Madras-6 v.
The Union of India, owning South Eastern
Railway, Calcutta.**

8th February, 1993.

A.S.No.328 of 1982.

(A) Torts - Damages for short delivery of goods - Railway receipt showing 51.660 M.T., was consigned - 48.300, M.T. alone delivered - Endorsement of consignee that contents received intact fully - It will absolve Railways from liability.

As per Ex.B-1 railway receipt, the weight of the consignment was 51.660 M.T., This being the case, the Railways are bound by that weight and it is not open to them to contend that the medicals consigned were not of that weight. It has to be held that while loading, the consignment was of the weight of 51.660 M.T. That being the case, if, on arrival at the destination any storage is found, only the defendants are responsible for that shortage. Ex.B-3 endorsement 'Received (8) intact fully' for whatever reason it was made by the plaintiff, will not absolve the defendants from their liability.

(B) Torts - Damages for short delivery of goods - Consignment partly carried by Railways and partly by Railways belonging to the Madras Port Trust - Liability for shortage.

It is not the case of defendants 1 and 2 that the shortage has occurred while the consignment was in transit in the Railways of the third defendant Port Trust or it was in their (Port Trust's) Custody and it is not the case of the third defendant that the storage occurred when the consignment was to transit in the first and second defendant's railway. In this position, it would be quite reasonable and lawful to hold that both the defendants 1 and 2 as well as the third defendant are jointly and severally liable to make good the shortage.

B.Rajagopalan, for Appellant.
R.G.Rajan, and *P.S.Srisailam*, for Respondent.

B.S. ----- *Appeal allowed.*

Abdul Hadi, J.

**K.R.Murugesan v.
The Chairman Ex-Servicemen Welfare,
represented by the Collector, Vellore.**

18th January, 1993.

C.R.P.No.47 of 1993.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(2)(ii)(b) - Building

leased for cycle shop business - Business not abandoned - substantial quantity of liquor found stored in building - Building if can be said to be used for a purpose other than that for which it was leased.

From the fact that a very substantial quantity liquor bottles had been stored in the demised building, it is not difficult to infer that at least a substantial part of the building was used by the petitioner for the liquor trade. Therefore, every assuming that the original cycle business was not altogether abandoned, the relevant clause in Sec.10 would be satisfied.

K.R.Ramabhadran, for Petitioner.

B.S. ----- *Petition dismissed.*

Thangamani, J.

**S.Kuppurathinam v.
A.R.Munirathinam**

22nd January, 1993.

A.A.O.No.852 of 1985.

(A) Civil Procedure Code (V of 1908), O.41, Rule 27 and O.13, Rule 2 - Documents available in court - Omitted to be marked due to inadvertence - Party, if can be allowed to mark them by appellate court.

It is true that the provisions of O.41, Rule 27, C.P.C. should be strictly complied with by the lower appellate Court. However, it cannot be gainsaid that only by inadvertence, the documents available in Court were omitted to be marked during trial by the present respondent. At the most, it can reflect only on the carelessness of the counsel concerned in conducting the case. It is unfortunate that even in the lower appellate court, the advocate appearing for the present respondent had not cared to file an application seeking permission to put in additional evidence. However, the party need not be penalised for the mistake of the counsel. Under O.13, Rule 2, C.P.C. additional evidence could be received at any subsequent stage of the proceedings if good cause is shown to the satisfaction of the court for the

non-production thereof. While, so interests of justice as contemplated under O.41, Rule 23 requires that the respondent herein is given an opportunity to mark the documents already available in Court as additional evidence and have a decision on consideration of the entire materials on record in respect of his liability to render accounts in case he has functioned as an agent under the present appellants.

(B) Civil Procedure Code (V of 1908), O.41, Rule 23 - Suit whether can be remanded by appellate court merely to give opportunity to a party to let in additional evidence.

There cannot be any remand merely for the purpose of affording an opportunity to a party to let in additional evidence. The expression 'interest of justice' occurring in O.41, Rule 23 does not wider the powers of the appellate court to remand a suit in the sense that irrespective of the fact whether it comes to the conclusion that the judgment and decree of the trial court are liable to be reversed or set aside or not, if the appellate court is of the opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. There is no principle or authority to support such a contention. It is clear from the scheme of the rules that generally speaking, only where it is not possible to apply O.41, Rules 24 to 27, C.P.C., a remand should be resorted to under O.41, Rule 23, C.P.C.

*P.Veeraraghavan, for Appellants.
C.Jaganathan, for Respondent.*

B.S. ----- Appeal allowed.

Mishra, J.

**Jayarama Naidu v.
The State of Tamil Nadu.**

9th November, 1992.

W.P.No.4067 of 1984.

(A) Land Acquisition Act (I of 1894), Secs.4(1) and Rule 3 under Sec.5-A - Publication of primary notification under Sec.4(1) and publication of substance

of such notification at convenient places in the locality - If mandatory - Notice in Form I in Rule 3 under Sec.5-A containing substance of notification whether would satisfy the requirement of publication of substance of notification.

It has been settled by now that there is no ambiguity of any kind in the principle that publication of primary Notification under Sec.4(1) of the Land Acquisition Act is mandatory and not only the publication in the official gazette but publication of the substance of such notification at convenient places in the locality is also mandatory.

(B) Land Acquisition Act (I of 1894), Secs.4(1) - Notification under - Publication of - Some defect in notice - Court thinking that mandatory requirement of publication of substance of notification has not been complied with - Effect - If automatically nullifies acquisition proceedings.

In case where there is some defect in the notice of a sort that a Court may think that the mandatory requirement of the publication of the substance of the notification under Sec.4(1) has not been complied with, the Court shall not for the reason of non-compliance of this requirement alone nullify any acquisition proceedings unless it is shown that the petitioners have suffered for want of notice in the sense that they lost the opportunity to participate in the enquiry under Sec.5(1) of the Act for the reason of want of notice or could not make any representation in the case of urgency acquisition to the proper authorities to show that it was not a case for the acquisition of their lands. No remedy is extended unless it is required to redress an injury. Unless such injury is sustained, no remedy is required. The court may not, for the reason of a mere non-compliance with the requirement of a mandatory provision like to interfere with a concluded proceeding unless the petitioners without such interference have suffered any legal injury.

V.Raghavachari, for Petitioner.

B.S. ----- Petition dismissed.

K.S.Bakthavatsalam, J.

**S.Mohan v.
The Government of Tamil Nadu.**

26th November, 1992.

W.P.No.2527 of 1990.

Civil Services - Disciplinary enquiry - Punishing authority differing from enquiring authority - Reasons for taking different decision to be given - Order passed without application of mind, cannot be sustained - High Court whether can go into the question of quantum of punishment.

On a perusal of the materials placed before the court, it has to be held that the impugned order shows the non-application of mind. The impugned order proceeds on the footing as if 'demand' and 'acceptance' are proved by the enquiry authority. A reading of the enquiry report does not show that the enquiry authority has held that only the demand portion alone is proved. But the punishing authority has come to the conclusion that it has been clearly proved, on the report of the enquiry officer, the charge stands with regard to 'demand' and 'acceptance' of the bribe. No reasons are stated in the impugned order as to how such a conclusion has been arrived at when the punishing authority normally, differs from the enquiry report, the least what could be expected is that reasons should be stated therein as to why a different decision has been taken. A reading of the impugned order shows that no reasons are stated therein for differing from the report of the enquiry officer. In such a circumstances, the impugned order has got to be set aside.

*S.Sundar for Aiyar and Dolia, for Petitioner.
P.Balasubramaniam, Additional Government
Pleader, for Respondent No.1.
S.Doraisamy, for Respondent No.2.*

B.S. ----- Petition allowed.

A.R.Lakshmanan, J.

**M/s.Rolab Polymers (P) Ltd. v.
M/s.Subhadra Enterprises.**

9th February, 1993.

C.A.No.1168 of 1992 in
C.P.No.112 of 1991.

Arbitration Act (X of 1940), Sec.34 - Expression - 'Any matter agreed to be referred' - Meaning of - Company admitting its liability for a particular amount - Not making payment - Petitioner filing winding up of the company - Matter whether can be said to have been agreed to be referred to proceedings - Whether can be stayed.

Held: It would be seen from Sec.34 of the Arbitration Act, that the legal proceeding which can be stayed should be a proceeding in respect of any matter agreed to be referred. The expression "any matter agreed to be referred" makes it clear that, unless the matter has been agreed to be referred, the proceeding cannot be stayed even though it may incidentally have a bearing upon the contract providing for arbitration. In the instant case, it cannot, by any stretch of reason, be said that the parties contemplated that any reference to arbitration for winding up the applicant-company was possible or could be done by an arbitrator. In that view, the company petition is not liable to be stayed.

*Hajee P.K.Jamal Mohammed, for Applicant.
A.Chandramouleeswaran, for Respondent.*

B.S. ----- Petition dismissed.

A.R.Lakshmanan, J.

**Manoj Kumar Sonthalia v.
Nariman Point Building Services and
Trading (P) Ltd., Bombay.**

24th February, 1993.

Appln. No.5130 of 1992 in
C.S.Nos.1246 and 1247 of 1992.

Specific Relief Act (XLVII of 1963), Sec.41 - Injunction - Grant of - Right of Plaintiff infringed - Injunction, if can be granted.

The jurisdiction to grant a perpetual injunction is discretionary. In deciding whether an injunction should be granted, the Court has to consider (a) whether the right of the plaintiff has been infringed and (b) whether under all the circumstances of the case, an injunction ought to be granted as the proper and appropriate remedy for such infringement. In this case, the right of the

plaintiff has not been infringed at all and the plaintiff only speaks for 'K' and against the appointment of 'P.C.' and makes allegations against 'P.C.' in his absence. Under the circumstances, the Court is of the view that an injunction as prayed for cannot be granted since granting of injunction is not the proper and appropriate remedy in the instant case.

Arvind P. Datar, for Plaintiff.

P. Chidambaram, Senior Counsel, *G.E. Vahan Vati*, Senior Counsel, *Arun Jaithey*, Senior Counsel, *Darius Khambatta* Senior Counsel and *Nowroz Seervai*, Senior Counsel, for Defendant.

B.S. ---- *Application dismissed.*

K.S. Bakthavatsalam and
D. Raju, JJ.

**S. Senthil Kumar, represented by
father and Natural Guardian N. Subbarayan v.
The Government of Tamil Nadu, rep. by
its Secretary, Health Department,
Madras-600 009.**

13th October, 1992.

W.P. Nos. 10337, 10453, 10482,
10483 etc. of 1992.

(A) Constitution of India (1950), Art. 226 - Admission to professional colleges for academic year 1992-93 - Division Bench of Madras High Court directing admission on the basis of results of the entrance examination - In appeals state accepting suggestion of Supreme Court for an increase of number of seats limited to 10% of the total seat - Supreme Court remitting matter to High Court - Held, order has to be read as giving direction to decide the modality of admission and not to increase the number of seats beyond 10% of seats.

If the order of the Supreme Court is read as a whole (it has to be done normally), certainly the State Government has accepted the suggestion of the Supreme Court for an increase of number of seats but limited to 10% of the seats in all professional course for the academic year 1992-93. So, in the opinion of the court, it is not possible to accept the contentions raised by the learned counsel who

have appeared for the various petitioners that it is possible for this court to read something into the order of the Supreme Court and increase the number of seats. It is clear from the order of the Supreme Court that this Court has to give opportunity to all the petitioners of being heard and then decide on the way the seats have to be filled by whether by taking the entrance marks into consideration or the usual method of taking into consideration the marks in the qualifying examination and the marks in the entrance examination. So, a reading of the order of the Supreme Court shows a limited direction is given to this Court to decide about the modality of admission.

(B) Constitution of India (1950), Art. 226 - Writ of mandamus - If lies against provisions of a statute. It is well-settled that no mandamus can lie against the provisions of a statute.

(C) Constitution of India (1950), Art. 226 - Jurisdiction under - Court, if can create additional seats in Medical Colleges.

Unless the State Government and the Indian Medical Council consent for creation of additional seats, a counter sitting under Art. 226 of the Constitution cannot increase the number of seats, or in other words, create additional seats.

(D) Constitution of India (1950), Art. 226 - Admission to professional courses for academic year 1992-93. Petitioners aggrieved by order of Government moving Court - Court issuing directions to provide seats for them - Students or candidates not actually before court, if can be considered.

While the court has decided to issue suitable directions to provide seats for all those who are before this Court and when are found eligible and satisfying the required and respective out off marks in terms of the criteria stipulated in the prospectus, the court cannot take into consideration the students or candidates who are not actually before court by invoking the jurisdiction of the Court under Art. 226 of the Constitution of India.

R. Gandhi, Senior Counsel, for *K. Ravichandra Babu*, *T.S. Sivagnanam*, *R.G. Narendran*, *N. Paul Vasanthakumar*, *L. Chandrakumar* and *N. Kandaswamy*, for Petitioners.

K. Subramanian Advocate-General Assisted by *A.S. Venkatachalamoorthy*, Special Government Pleader, for State.

S. Subbiah, for *M/s. Row and Reddy* and *Vellaichamy*, for Respondent.

B.S. ---- *Directions issued*

A.R.Lakshmanan, J.

**Gannon Dunkerley and Company (Madras)
Ltd. (In liquidation) rep. by the Official
Liquidator, High Court, Madras v.
The Government of Tamil Nadu.**

18th February, 1993.

Com.Appln.No.596 of 1992
in C.P.No.83 of 1968.

(A) *Companies Act (I of 1956), Secs.446, 456 and 457 - Company in liquidation - Assets of - Disposal of - Court alone empowered to give directions for.*

(B) *Tamil Nadu Urban Land Ceiling and Regulation Act (XXIV of 1978), Sec.21 - Object of Act (XXIV of 1978), Sec.21 - Object of Act - Company in liquidation - Disposal of excess vacant urban land - Exemption from provisions of Act - Government, if can refuse.*

The Official Liquidator of the High Court was appointed as Official Liquidator of the Gannon Dunkerley and Company. He filed C.A.No.692 of 1982 for quashing the order of the Government in respect of a delectation made for the company's and as surplus and applied for exemption from the provisions of the Tamil Nadu Urban Land (Ceiling and Regulations) Act. During the hearing, the Advocate General represented that the State Government had issued an order under which companies in liquidation would be given exemption in relation to land held by them. The Court directed the Official Liquidator to apply for the exemption. But his application was rejected by the Government. A fresh application was made but it was also rejected on the ground that the lands had already vested in the Government. The Official Liquidator filed an application to direct the Government to quash the orders.

Held:- It is to be seen that the land and other assets of the company in liquidation are vested in the Court and no action can be taken by any statutory authority without the leave of the Court under Sec.446 of the Companies Act and in respect of the properties which vest in Court by virtue of Sec.456 of the Companies Act, 1956, only the Court is empowered to give direction Under Sec.457 of the

Companies Act and the Court may exercise the power under the said section by quashing the impugned order dated 21.2.1992 and permit the Official Liquidator to sell the land.

The object of the Act is to impose a ceiling on vacant land and to regulate the construction of building thereon with a view to prevent the concentration of urban land in a few hands and to prevent speculation and profiteering in such lands apart from the object of achieving equitable distribution of land to subserve common good. Sec.21 of the Act empowers the Government to exempt any vacant land in public interest and also in cases where such exemption is considered necessary to avoid undue hardship to any person. It is to be noticed that the power to exempt under Sec.21 of the Act is a power coupled with a duty and when the facts so warrant or exist, the discretion must be used and the authority cannot refused to exercise the power of discretion. It is now well-settled that the words which are permissive in character will become obligatory where the thing to be done is for public benefit or in advancement of public justice. By giving the exemption sought for from holding the excess vacant land and for sale of the same, the dominant purpose of the legislature is not at all defeated. Unless a fair value at current market price is realised for the vacant lands of the company, it would become impossible to pay those creditors even a fraction of the amount due which will cause them considerable hardship. The large body of creditors comprising of workmen, employees, traders and persons who had advanced loans belonging to different walks of life are eagerly looking forward to receive at least a portion of the debt due to them and granting exemption for direct sale of the vacant land would only meet the ends of equity and social justice.

Vedantham Srinivasan, for Applicant.
R.Swaminathan, Additional Government Pleader,
T.R.Mani, Senior Counsel and *A.S.Kailasam*, for Respondents.

B.S.

Direction given.

Bellie, J.

Mishra and
S.M.Ali Mohamed, JJ.

**M/s.A.B.T.Parcel Service by Proprietors
Annamalais Bus Transport (P) Ltd., Pollachi v.
City Palayakat Company its Managing Partner
M.Subbaraya Mudaliar.**

**M.James v
S.Issac Banerjee.**

2nd February, 1993.

25th January, 1993.

A.S.No.783 of 1982.

O.S.A.No.198 of 1986.

Carriers Act (III of 1865), Secs.8 and 9 - Carrier's liability - Genuine way bill sent by consignors to consignee presented to carrier for delivery of goods - No specific instruction to carrier regarding persons who would bring waybills for taking delivery of goods - Staff members of carrier dealing with several customers - Carrier, if liable for negligence when goods are delivered to the person presenting genuine way-bill.

Civil Procedure Code (V of 1908), Sec.92 (as amended by (CIV of 1976) - Applicability - Grant of leave - Conditions for - Averment in the plaint - That church is a religious trust - That the affairs have not been administered according to provisions stipulated' - Praying for a scheme - Requirements of section whether satisfied.

When the genuine waybill sent by the consignors to the consignee is presented to the defendant for delivery of goods, the defendant has to deliver the goods. In this case, there is no special instruction by the plaintiff regarding the persons who would bring the waybills for taking delivery of the goods or regarding the staff members who only would make the authorisation. It is the further case of the defendant that their staff members are transferred from one branch to another. Therefore, they cannot be expected to be familiar with the staff members of the customers. Further, the staff members of the defendant have to deal with several customers who present several waybills and therefore when genuine waybills are presented, normally they are expected to deliver the goods unless there is anything glaring which should arouse their suspicion. For these reasons, it cannot be said that the defendants were negligent in delivering the goods.

After amendment of Sec.92, C.P.C. under Act CIV of 1976, leave of the Court has to be obtained instead of written consent of Advocate General. The discretion of the court to grant leave or not to grant leave under Sec.92, C.P.C. has to be exercised according to known principles of law. It is clear that there are sufficient averments in the plaint to the effect that the church is a religious trust and the affairs of the religious trust have not been administered in accordance with the provisions stipulated and there is also a prayer for framing a scheme. The averments made in the plaint *prima facie* satisfied the requirement of the suit filed under Sec.92, C.P.C. The merits of the issue will not arise at the stage of granting leave or refusal to grant leave under Sec.92, C.P.C.

S.Dhamakhan, for Appellant.

B.S. ---- Appeal allowed.

N.C.Rangarajan, for Appellant.
C.N.Sivakumar, for Respondent.

Bellie, J.

B.S. ---- Appeal allowed.

**The Commissioner, H.R. & C.E., Madras v.
V.P.S.Nammalwar.**

12th February, 1993.

A.S.No.749 of 1982.

(A) *Madras Hindu Religious and Charitable Endowments Act (II of 1927), Sec.9(7) - Earlier decision of the High Court - Holding an institution a 'math' - Later decision (stating) that the institution was only a samadhi (as a passing comment) - Earlier decision, held will prevail.*

(B) *Madras Hindu Religious and Charitable Endowments Act (II of 1927) - Tamil Nadu Religious and Charitable Endowments Act (XXII of 1959) - Definition of 'math' under both Acts same with only difference that math should have properties under later Act - Decision of High Court holding that institution was 'math' under old Act - Can be followed even after passing of the later Act.*

The respondent filed a suit under Sec.70 of the Hindu Religious and Charitable Endowments Act, 1959 for setting aside the orders passed by the Deputy Commissioner and the Commissioner holding that the Dhakshinamoorthy Math was a math. The trial court relied on a decision of the High Court in A.S.No.2 of 1963 holding that it was only a samadhi in preference to an earlier Division Bench in A.A.O.No.472 of 1951.

Held: In A.S.No.2 of 1963, it was not a point for decision whether the Dhakshinamoorthy math was a math or samadhi. No such issue had been framed. It was only while giving a decision whether the first defendant therein was ineligible to be the trustee of the math, the High Court has made the statement that the math was only a samadhi. It is only a passing comment made by the High Court and it is not a finding. In the earlier Division Bench judgment of the High Court in A.No.472 of 1957, the direct question was whether 'Dhakshinamoorthy math' was a math or not and it was decided that it was a math. Therefore, on the question as issue, this earlier judgment of the High Court would prevail.

If the definition of 'math' in the earlier Act is substantially the same as the definition in the later para and there is no significant change, then it would be quite justified to follow the decision of the High Court rendered under the earlier Act. A close scrutiny of the definitions of 'math' in the two Acts would show that the only difference in that while as per the later definition properties shall be attached to the institution in question, in

the earlier definition there is no such thing. In all other respects, the definitions are similar. Hence, if there are properties attached to 'Dhakshinamoorthy math', then there is no difficulty in relying on the finding given in the earlier judgment of the High Court to hold that the institution is a math or not. In the plaint itself it is mentioned that 'Dhakshinamoorthy math' has its own properties.

P.M.Bhaskaran, Assistant Government Pleader, for Appellant.

B.Kumar, for Respondent.

B.S. ----- *Appeal allowed.*

*Srinivasan and
Thangamani, JJ.*

**Nanjammal (died) v.
Palaniammal.**

2nd March, 1993.

A.S.No.205 of 1987.

(A) *Specific Relief Act (XLVII of 1963) - Suit for specific performance of agreement - Agreement made out to be true - Court, if bound to enforce agreement.*

The normal rule is that once the truth of the agreement is made out, the Court shall enforce it unless there are circumstances which would prove that equity suffer by enforcing the agreement for sale.

(B) *Specific Relief Act (XLVII of 1963), Sec.10 - Clause in agreement - Breach on part of defendant - He shall pay twice the amount advanced to plaintiff - Remedy of plaintiff - Whether claim only amount - Plaintiff, if can ask for specific performance of the contract.*

The court is unable to accept the contention of the defendant that the plaintiff is not entitled to specific performance of contract in view of the provision for payment of damages in the event of breach by the defendant. There is no question of any

option having been given by the agreement to the plaintiff to make an election. Hence, it is only a normal term of the contract fixing the liquidated sum of damaged. That does not prevent the plaintiff from enforcing the contract.

B.S. ---- Appeal dismissed.

Pratap Singh, J.

**Abdul Salam v.
T.R. Vinod Kumar.**

19th February, 1993.

C.R.P.No.2389 of 1992.

(A) Civil Procedure Code (V of 1908), Sec.24 and O.39, Rule 1 - Interim injunction obtained by one party - Other party insisting that application may be heard - Court insisting on hearing the application - Transfer of case from that Court on that ground - If can be made.

When a party had obtained an order of interim injunction and the other party insisted that the application may be heard, the Court should generally insist that application would be heard. A party in whose favour there is an injunction should be ready to argue the case particularly when the other side has already filed counter and was ready. It is seen from the petition that counter was filed on 24.4.1992 and the Sub Judge, had adjourned it to 28th, 1992 for arguments, though initially the learned Judge insisted the counsel for the petitioner to argue the matter. Simply because the Judge was anxious to dispose of the matter quickly, nothing can be imparted against him. On that score, a transfer cannot be made.

(B) Civil Procedure Code (V of 1908), Sec.24 - Transfer petition - Remarks called for - Court stating that it had no objection for the transfer - Case, if can be transferred on that ground.

The learned District Judge, has referred to the remarks submitted by the Sub Judge, in which he

has referred the allegation that he made observation as alleged by the petitioner before him and has finally stated that he has no objection in transferring the case and taking that factor into account had transferred the case. Neither that can be a premises for transfer of a case from one court to another court.

*T.R.Rajagoplan, for Petitioner.
S.V.Sudheer, for Respondent.*

B.S. ---- Petition allowed.

*Mishra and
S.M.Ali Mohamed, JJ.*

**The Superintending Engineer, Fishing
Harbour Projects Circle, Nagercoil v.
M/s.Andhra Civil Construction
Company, Madras.**

17th February, 1993.

O.S.A.No.205 of 1992.

Arbitration Act (X of 1940) - Arbitration proceedings - Payment of excise duty under the Central Excises and Salt Act - Statutory liability of - If can be adjudicated in arbitration proceedings - Contracting parties if can confer jurisdiction in such proceedings by agreement - Condition in contract making it obligatory on either party to pay taxes etc. - If can be subject of arbitration.

It is only the authorities specified under the Central Excises and Salt Act, who have the jurisdiction to decide whether excise duty is attracted for casting of delouses and whether the same is manufacturing process. As per the Central Excises and Salt Act, excise duty is levied on manufacture of excisable goods, the person who is liable to pay is the manufactures viz. the persons who manufacture excisable goods. It is not open to contracting parties to oust the jurisdiction of authorities specified under the Act and confer jurisdiction to decide the matter in arbitration proceedings before the arbitrator the court is not unaware that

parties themselves can create a contract and make obligatory on either of them payment of taxes, etc., and such a condition in the contract can be a subject of arbitration, if it is so provided in the contract. The Court, however, has not been persuaded to accept the extreme contention that a contract of this kind shall also mean a determination of the obligation of either party which would ultimately bind a statutory authority. The jurisdiction in this behalf created under a statutory authority shall remain unaffected and the authority concerned shall always proceed against the party obliged under the law concerned to pay the taxes.

R.Swaminathan, Additional Government Pleader, for Appellant.
T.Raghavan, for Respondent.

B.S. ----- *Appeal allowed in part.*

Janarthanam, J.

**Rajambal Ammal v.
The Deputy Commissioner, H.R. & C.E.,
Coimbatore.**

24th February, 1993.

W.P.No.8127 of 1984.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.53(4) - Two persons declared hereditary trustees of a temple - One of them placed under suspension pending enquiry into charges - Fit person, if could be appointed to perform the functions of the disabled trustee.

In the case on hand, it is not as if 'K' who had been placed under ad interim suspension on account of certain grave charges of acting against the interests of the temple pending enquiry is the lone and sole hereditary trustee. But the petitioner herein, namely, 'R' was also declared as a hereditary trustee alongwith 'K'. When such a hereditary trustee is available in flesh and blood who could very well

be in effective charge of the administration of the temple in discharging the duties as well as performing the functions of the disabled 'K' there could have been no need for the appointment of respondent 2 as a fit person.

K.Jayaraman for *Subramanya Rao* and *Ram Mohan*, for Petitioner.

P.M.Bhaskaran, Additional Government Pleader, for Respondent.

B.S. ----- *Petition allowed.*

Mishra and
S.M.Ali Mohamed, JJ.

**The State of Tamil Nadu represented by the
Collector of Madras (Accommodation Wing),
Madras v.
M.Kazim Khaleeli.**

21st January, 1993.

O.S.A.Nos.175 and 176 of 1986.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.3(5), proviso - Fair rent fixed for building taken over by Government - When becomes effective.*

The fair rent fixed for the building taken over by the Government operates retrospectively from the date of tenancy subject to the law of limitation.

(B) *Limitation Act (XXXVI of 1963), Art.52 - Suit for enhanced rent - Limitation for - Starting point.*

The right to sue for enhanced rent accrues when the enhanced rent is ascertained.

B.S. ----- *Appeal dismissed.*

*Srinivasan and
Thangamani, JJ.*

Abdul Hadi, J.

**C.S.Sastri (died) v.
The Collector of Chengalpattu
District at Kancheepuram.**

**Kamakshi v.
Minor Ramalingam alias Munusami.**

12th January, 1993.

23rd February, 1993.

S.A.No.920 of 1982.

A.S.No.747 of 1982.

Requisitioning and Acquisition of Immovable Property Act (XXX of 1952), Sec.8(3) - Acquisition of property under compensation payable - Fixation of Principles for.

Under Sec.8(3) of Central Act XXX of 1952 compensation payable for the acquisition of any property shall be the price which the requisitioned property would have fetched in the open market if it had remained in the same condition as it was at the time of requisitioning and been sold on the date of acquisition. And there is no dispute that the lands under acquisition are dry cultivable lands. The market value envisages the price which a willing purchaser may pay under *bonafide* transfer to a willing seller. The land value can differ depending upon the extent and nature of the land sold. The principle of deduction in the land value covered by the comparable sale is thus adopted in order to arrive at the market value of the acquired land. In applying the principles, it is necessary to consider all relevant facts. The Supreme Court has pointed out in *Chimanlal v. Special Land Acquisition Officer, Poona, A.I.R. 1988 S.C. 1652*, the factors that have to be borne in mind. The evaluation of those factors, of course, depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide.

B.S. ----- *Appeal dismissed.*

(A) *Civil Procedure Code (V of 1908), Sec.103 - Lower appellate court not giving into a question of factum of marriage - But gave a finding - High Court, if can go into the question in second appeal.*

The lower appellate court has not specifically gone into the question of factum of marriage though it held that the marriage was void in view of the subsistence of the 1st defendant's earlier marriage. In the above context, in view of Sec.103, C.P.C., the court itself could go into the question of factum of marriage.

(B) *Evidence Act (I of 1872), Sec.35 - Birth extract - Whether can be relied on to prove marriage between the parents.*

The birth extract of the plaintiff cannot be relied on to prove the parentage of the plaintiff or, in other words, to prove the factum of marriage between the 1st defendant and 'S'.

(C) *Hindu Marriage Act (XXV of 1955), Sec.16 - Applicability - Factum of marriage not proved - Section if applicable.*

If the factum of marriage has not been proved, there is no scope for the application of Sec.16 of the Hindu Marriage Act.

(D) *Hindu Marriage Act (XXV of 1955), Sec.11 - Marriage between two persons not proved - Parties to marriage if under obligation to seek declaration of nullity of marriage.*

In Mulla's Hindu Law, Sixteenth Edition at page 648, it has been observed by way of commentary to Sec.11 of the Hindu Marriage Act that neither party is under any obligation to seek a declaration of nullity under Sec.11, though, of course, such a declaration may be asked for the purpose of precaution or record. The language used in Sec.11

also makes the said position clear.

19th February, 1993.

R.Subramaniam, for Appellant.
S.Swaminathan, for Respondent.

C.R.P.No.250 of 1993.

B.S. ---- Appeal allowed.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.7(2) - Tenant making an advance of Rs.3,000 to landlord - Excess amount not refunded by landlord - Tenant not asking landlord to adjust that amount towards arrears of rent - Tenant, if can be said to have committed wilful default in payment of rent.

Pratap Singh, J.

**Kalianna Kounder v.
Marappa Kounder.**

22nd February, 1993.

C.R.P.No.1638 of 1992 and
A.A.O.No.509 of 1992.

Civil Procedure Code (V of 1908), O.38, Rule 6, Appendix F, Form No.6 - Security - Defendant, if can furnish third party security, personal or property.

It is evident that O.38, Rule 6, C.P.C., merely refers to the security. It does not refer to the nature of security. It does not indicate that it is not open to the defendant to furnish the third party security, personal or property. A reading of Form No.6 in Appendix F of C.P.C., would show that if the personal security of third party is not contemplated under O.38, Rule 5, C.P.C., the said form could not have been prescribed. The security referred to in O.38, Rule 6 is the security as contemplated under O.38, Rule 5, C.P.C.

R.Sekar, for Petitioner.
V.K.Muthusami, for Respondent.

B.S. ---- Petition and appeal allowed.

Sec.7(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 makes it very clear that any amount paid by the tenant in excess of the agreed rent and one month advance if stipulated by the landlord shall be refunded by the landlord to the tenant. Thus, there is mandate of law to the landlord to refund that amount even though the tenant has not asked for that. But an option is given to the tenant to tell the landlord to adjust that amount towards rent and that the landlord shall do. The question is when the landlord has not refunded the said excess amount as enjoined on him by law even though the tenant has not asked him to adjust that amount towards the arrears of rent, can it be said that the tenant has committed wilful default in payment of rent. Obviously not, when the tenant's amount is with the landlord which the landlord ought to have refunded and he failed to do so, and the amount is more than the alleged arrears of rent, it does not lie in the mouth of the landlord to say that the tenant committed default much less wilful default in payment of rent because rent amount payable by the tenant and even more is already with the landlord.

T.P.Sankaran for Mrs.C.R.Rukmani, for Petitioner.
T.V.Ramanujam, for Respondent.

B.S. ---- Petition allowed.

Bellie, J.

**Nazimuddhin Ahmed represented by his
wife and P.A.A.Nameeza Ahmed v.
K.Narasimha Rao.**

Janarthanam, J.

**K.M.Duraiswami v.
The Special Officer, The Coimbatore
Divisional Rural Co-operative Housing
Society Limited.**

10th March, 1993.

W.P.No.8357 of 1984.

Constitution of India (1950), Art.226 - Natural justice - Petitioner appointed irregularly in breach of rules - Services terminated without giving opportunity to show cause - Termination order, if can be sustained.

There is no pale of controversy that before even the petitioner was terminated from service, he was not given any notice to show cause why his services should not be terminated on the ground of his appointment having been irregular. Such a non-giving of an opportunity is definitely bad in law. The order of termination passed, as such, suffers from the vice of non-observation of the principles of natural justice and, therefore, such an order cannot at all be sustained and is accordingly quashed.

C.Xavier for P.Sharmugham, D.Balasundaram and K.Suguna, for Petitioner.
A.Ramanathan, for Respondent No.1.

B.S. ---- Petition allowed.

Srinivasan and
Thangamani, JJ.

**Nallya Gounder v.
P.Ramaswami Gounder (died)**

25th Feburary, 1993.

A.S.No.817 of 1982.

Specific Relief Act (XLVII of 1963), Secs.9 and 10 - Person asking for specific performance - Not coming forward with clean hands - Relief refused.

In the present action, the court has no hesitation in negating specific performance for the reason that the plaintiffs have not come forward with clean hands in asking for the equitable relief.

G.Subramaniam, Senior Counsel, for K.Govindarajan, for Appellants.
K.Doraiswami, Senior Counsel, for Mrs.Muthumani Doraiswami, for Respondents.

B.S. ---- Appeal allowed.

Srinivasan, J.

**M/s.Ekambaranathan Chettiar Firm
represented by its Partner E.Kanagasabapathy v.
The Commercial Tax Officer, Tuticorin.**

12th March, 1993.

W.P.Nos.5715 to 5718 of 1987.

Central Sales Tax Act (LXXIV of 1956), Sec.10-A and C Form - Goods purchased with a view to resell - Put to use before resale - No loss of revenue to State alleged - No contravention of conditions of C Form - Penalty, held, cannot be levied.

It is clearly pronounced by this Court in T.C.Nos.564 and 565 of 1975 (Revision Nos.129 and 130 of 1975), that the law does not prevent the goods from being used before resale. The only condition is that the goods covered had been purchased with a view to re-sell. When that condition is satisfied, then there is no question of loss of revenue and the department cannot be aggrieved by the same.

K.Srinivasan, for Petitioner.
D.Francis Ashok, Government - Advocate, for Respondent.

B.S. ---- Petitions dismissed.

THE MADRAS LAW JOURNAL

I]

NOTES OF RECENT CASES

[1993

*Ratnam and
Somaśundaram, JJ.*

**Sri-la-Sri Sivasubramanyananda Swami v.
Sri-la-Sri Arunachalasamy, Chidambaram.**

14th October, 1992.

C.M.P.No.14049 of 1990 in
App.No.730 of 1987.

*Civil Procedure Code (V of 1908), Sec.151 and
O.39, Rule 2-A - Exercise of inherent powers under
Sec.151 - Scope - Civil courts if can issue directions
to police to extend their aid in the execution of
decrees and orders or to implement orders of injunc-
tion passed by civil courts.*

Sec.151 of the Civil Procedure Code confers power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. Every court is constituted for the purpose of doing justice according to law and must be deemed to possess as a necessary corollary and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo the wrong in the course of the administration of justice.

There is no provision in the Code providing for the implementation of the order of temporary injunction or decree for perpetual injunction granted by the courts. Therefore, when a party has obtained an order of temporary injunction from a court under O.39, Rule 1 of the Code and the other party against whom the order of injunction is passed disobeys the same, the aggrieved party can certainly approach the court invoking the power of the Court under Sec.151 and pray for police aid for the enforcement of the order of temporary injunction.

In view of the above position of law it has to be held that in appropriate cases, directions under Sec.151 of the Civil Procedure Code can be issued

by the civil courts to the police authorities to extend their aid and assistance in the execution of decrees and orders or to render aid to aggrieved parties for the due and proper implementation of injunction orders granted by civil courts.

(1991)1 L.W. 513, overruled.

View of Shanmukham, J. in C.M.P.No.352 of 1986 in A.S.No.297 of 1980, *approved*.

G.Subramaniam for *B.Kumar*, for Appellant.
Ilango, for Respondent.

V.K. --- Petition allowed.

Lakshmanan, J.

**P.R.Chockalingam v.
The Director of Tourism, Government of
Tamil Nadu.**

21st September, 1992.

W.P.No.3173 of 1990

*Constitution of India (1950), Art.16(4) - Reserva-
tions to public appointments - Only one post to be
filled up - If rule of reservation can be applied.*

In the selection to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and counter service, the fourth respondent was selected in preference to the petitioner though the latter was placed in the waiting list No.1 on the sole ground that the Executive Committee had decided to fill up the vacancy from backward classes. The petitioner challenged the selection.

Held: The decisions reported in *A.I.R. 1988 S.C. 959* and *A.I.R. 1990 Kant. 320*, are very clear that

when there is only one post, the same has to be filled up without applying the rule of reservation. Admittedly, the Executive Committee after interview had decided to fill up the post from Backward Community candidate. This is not at all permissible in law. The competent authority has decided to fill up the post only from open competition. On the sole ground, the impugned order is liable to be set aside.

R.Krishnamurthi, Senior Counsel for *M.S.Kandasami*, *K.Sukumar* and *Ravichandrababu*, for Petitioner.

P.Shanmugham, Additional Government Pleader, for Respondent Nos.1 and 2.

K.Sridhar, for Respondent No.3.

R.Ganesan, for Respondent No.4.

B.S. ---- *Petition allowed.*

Venkataswami, J.

**J.Ramamurthy v.
M/s.Endas by Partner Moorjimal.**

21st September, 1992.

C.R.P.No.3376 of 1989.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Secs.14(1)(b) and 19 - Civil Procedure Code (V of 1908), Sec.11 - Petition filed under Sec.14(1)(b) dismissed as not maintainable - Findings given on merits also - Finding if operates as res judicata or as bar under under Sec.19.

The landlord's earlier petition for eviction under Sec.14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act was dismissed on the ground that he was only a life estate holder and that his claim was not *bona fide*. After the decision of the Supreme Court in *A.I.R. 1975 S.C. 1750*, holding that a life estate holder could also file an eviction petition, the petitioner filed another petition for eviction under Sec.14(1)(b) of the Act. It was allowed by the Rent Controller but that order was set aside by the appellate authority on the ground

that the petition was barred under Sec.19 of the Act. In revision,

Held: A perusal of the judgments in *A.I.R. 1950 P.C. 80*, (1976)1 *M.L.J.* 406 and (1983)2 *M.L.J.* 583 will clearly support the contention that when the dismissal of the earlier petition under Sec.14(1)(b) of the Act was mainly on the ground that it was not maintainable any findings given on merits in that case will not operate as *res judicata* or as a bar under Sec.19 of the Act.

K.Sarvabhauman, Senior Counsel for *M.S.Krishnan* and *S.Parthasarathi*, for Petitioner.

S.V.Jayaraman, for *S.K.Narayanan*, for Respondents.

B.S. ---- *Petition allowed.*

Srinivasan, J.

**Ibrahim Ismail v.
The Superintendent of Customs,
Air Customs Pool, Madras Air Port.**

14th September, 1992.

W.P.No.13125 of 1992.

Customs Act (LII of 1962), Sec.124, proviso - Proviso enabling authority to dispense with the issue of a written notice and making of written representation at the request of the person concerned - Object of - Provision, if constitutional violating Arts.14, 21 and 300-A of the Constitution of India - (Constitution of India (1950), Arts.14, 21 and 300-A.)

The purpose of the proviso is quite obvious. In several cases, the person concerned may be in a hurry to have the adjudication process completed within a short time so that he would know where exactly he stands. It depends on various circumstances including the immediate necessity for the release of the goods to the person affected. Quite often, it may depend on the nature of the goods too. In order to enable the persons affected to get the adjudication completed. Orally the

Parliament has thought fit to introduce the proviso. It is only for the benefit of the persons affected and it does not in any way confer any right on the authorities to dispense with the procedure prescribed under Clauses (a) and (b) of the section at their sweet will and pleasure. The language of the proviso is very clear and there is no ambiguity whatever. The proviso can be invoked only when a request is made by the person concerned and not otherwise. There is no substance in the argument that the proviso is vague or arbitrary and that it does not provide for any guidelines for the invocation thereof. In view of the unambiguous terminology of the proviso, there is no necessity for any further guidelines or explanations. There is no merit in the contention that different officials may be handling different situations, some of them may be junior officials who may not know all the provisions of the Act, Rules and Notifications. No such presumptions can be made with reference to statutory authorities and as that ground, no provision of the statute can be invalidated. The contention that the cases to which the proviso is applicable are not specified and, therefore, the proviso is vague is also not acceptable. The proviso will apply to all cases in which order of confiscation of any goods or imposition of penalty is proposed to be made irrespective of the value of the goods. If the oral notice is in a language which can be understood by the person concerned and if the said notice satisfies the requirements of the law in that it informs the person concerned of all the grounds for the proposed order. It is sufficient compliance with the law and it gives a reasonable and fair opportunity to the person concerned. It cannot be said in such cases that he is deprived of an opportunity to know the grounds put against him. Incidentally, learned counsel contends that the proviso does not prescribe the language in which the oral notice should be given. Advisedly, the Parliament has not mentioned it as it is implied that the oral notice should be in such a language which can be understood by the person concerned. There is a reasonable classification in the section. The main section provides for a procedure to be adopted by the authorities in all cases generally. The proviso is an exception which can be invoked in cases where a specific request is made by the persons concerned. The persons who have made such a request to form a separate class different from others. The object of the section is

in no way defeated by the notice and the representation being oral. They can be as effective as a written notice and a written representation. Thus, the proviso is not in any way unconnected with the object of the section. The contention that if a person makes a request for issue of oral notice, he will be waiving his fundamental right and that is opposed to law is unsustainable. There is no fundamental right to any particular procedure. The fundamental right is to have a fair and reasonable opportunity to make a representation and thereafter have a fair hearing. In other words, the right is to have a fair enquiry which is in accordance with the principles of natural justice. When a person prefers to have an oral notice under the proviso, he is not giving up his right to have a notice. He has not waived any right by that. He is only choosing the mode of such notice. The principle that a fundamental right cannot be waived by a person has no applicability to cases falling under the proviso. There is no must in the contention that Art.21 of the Constitution of India is violated by the proviso. Similarly, the contention that Art.300-A of the Constitution is violated has no basis whatsoever.

P.R.Krishnan, Senior Counsel for *R.Thyagarajan* and *K.Geetha*, for Petitioner.

C.A.Sundaram, Additional Central Government Standing Counsel, for Respondent.

B.S. ----- *Petition dismissed.*

Ratnam, J.

M/s.Hindustan Petroleum Corporation Limited

v.

M/s.Karthikeyan Agencies represented by its Partners.

21st August, 1992.

C.R.P.No.1411 of 1992.

Civil Procedure Code (V of 1908), O.8, Rules 10, 6, 9, 9(2) - Civil Rules of Practice, Rule 32 - Suit

instituted against four persons initially - Petitioner added as fifth defendant - Not filing any written statement in spite of grant of time - Set ex parte - Suit dismissed for default against all the defendants - Plaintiff filing application for restoration of suit - Petitioner not made party - Suit restored - Ex parte decree passed against the defendants 1 to 4 and also the petitioner - Sustainability.

The respondent instituted a suit O.S.No.143 of 1977 for declaration and for permanent injunction. Defendants 1 to 4 were originally the defendants. On 16.6.1978, it was brought to the notice of the court that the first defendant stood amalgamated with Hindustan Petroleum Corporation Limited the petitioner herein. The petitioner was impleaded as the fifth defendant. The petitioner did not file any written statement and he was set *ex parte*. The court did not pronounce judgment against the petitioner. The respondent filed an application to restore the suit. The petitioner was not made a party to it. The suit was restored. After several adjournments, on 16.11.1989, an *ex parte* decree was passed against the petitioner as well as the other defendants. The petitioner prayed that the *ex parte* decree passed against it on 16.11.1989, be set aside. It was dismissed and an appeal against that order was also dismissed. The correctness of the order was questioned in revision.

Held, apart from Rule 32 of the Civil Rules of Practice even under O.9, Rule 9(2), Code of Civil Procedure, notice of the application should be served on the opposite party. However, what had happened in this case is that one of the opposite parties, viz. the petitioner herein was not made a party at all, with the result that there was no restoration. Whatever of the suit dismissed for default against the petitioner and the subsequent proceedings taken on the footing that the suit against the petitioner had also been restored and that the petitioner had remained *ex parte* which justified the passing of an *ex parte* decree against the petitioner, are not in order. In other words, it would follow that having regard to the dismissal of the suit against the petitioner on the earlier occasion and the failure on the part of the respondent to have it restored against the petitioner also, the trial court was in error in proceeding to deal with the suit as if the suit had been restored against the petitioner also and that for the absence of the

petitioner on 16.11.1989, there was justification for the passing of an *ex parte* decree against the petitioner. Inasmuch as the view above taken, there was no restoration of the suit dismissed for default against the petitioner there was no question thereafter of the passing of an *ex parte* decree against the petitioner on 16.11.1989 as if the suit against the petitioner was pending on that date. Under those circumstances, the courts below fell into an error in dismissing the application filed by the petitioner for setting aside the *ex parte* decree.

R.Krishnamurthy, for *K.Kumar*, for Petitioner.
S.Parthasarathy, for Respondent.

B.S. ---- *Petition allowed.*

Thanikkachalam, J.

**R.Krishnaswamy v.
N.Arumugam.**

18th August, 1992.

C.R.P.No.3237 of 1988.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(c) - Petition for eviction under, by landlord for additional accommodation - No averment as to relative hardship as contemplated by proviso to section - Maintainability.

In a petition for eviction filed under Sec.10(3)(c) of the Act, the landlord should clearly state that he required the petition premises by way of additional accommodation. But according to the proviso, the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. In order to decide this question of hardship, there must be proper pleadings in the petition. If the hardship is not pleaded in the petition, that is fatal to the petition.

In the present case, the petition filed under Sec.10(3)(c) of the Act contains no averment with regard to the hardship as contemplated under the

proviso to Sec.10(3)(c) of the Act and hence the petition is not maintainable. Therefore, it is liable to be dismissed.

T.R.Rajagopalan, for Petitioner.

T.R.Mani, Senior Counsel, for *J.M.Hariharan*, for Respondent.

V.K. ---- *Petition allowed.*

*Mishra and
Janarthanam, JJ.*

**M.Shakur Chathik (Minor) represented
by
his father and natural guardian A. Mohammed
Abdul Habeeb v.
Association of Private Schools
affiliated to the Central Board of
Secondary Education represented by
its President, V.Venkatachalam.**

14th August, 1992.

W.M.P.No.17001 of 1992 in
W.P.No.7656 of 1992.

Constitution of India (1950), Art.226 - Writ proceedings under order of court is collateral review of - Competency - Powers of Judge sitting in a collateral proceeding.

A judgment of the Court is final subject to appeal and if there is any mistake or error therein is found, it is corrected by the appellate court or by way of review in accordance with the procedure prescribed therefor and constructively recognised by the Courts in India and accordingly applied to the writ proceedings. The decision of the Court in the case of 1991 *Writ L.R. 519*, completely rules out any collateral review and interference thus in the orders or directions issued by a Bench of the Court. The collateral proceedings, unless are in the nature of review petitions are incompetent and no court can make any order of any kind in such proceedings whether a single Judge or a larger Bench. A Judge sitting in a collateral

proceeding can go into the question of any *obiter dicta* or the judgment being *per incuriam* only for the purpose whether he would be bound by one or the other judgment as the rule of *obiter dicta* and *per incuriam* are the rules attached to the *ratio decidendi* of the judgment and thus for deciding whether one or the other judgment is a binding precedent and not for the purpose of review of any of the two judgments on the plea that one is wrong and the other is right.

K.Chandru, for Petitioner.

B.S. ---- *Petition ordered.*

*Ratnam and
Somasundaram, JJ.*

**The Assistant Collector of Central
Excise, Coimbatore v.
M/s.Elgi Equipments Ltd., India.**

6th August, 1992.

W.A.No.187 of 1991.

Central Excise and Salt Act (I of 1944), Sec.11-B (as amended by Central Excise Amendment Act (XL of 1991) - Refund of excise duty - High Court directing Excise Authorities to refund excise duty on 8.1.1991 - Writ appeal filed and pending - Amended Act coming into force on 20.9.1991 - Act if will apply barring the Court to direct refund.

The respondent is a manufacturer of Service Station Equipments. The first appellant demanded a sum of Rs.1,15,502.57 towards the differential duty for the period from 10.1.1979 to 31.3.1980. This order was set aside by the Collector of Central Excise (Appeals), Madras. The first appellant was directed to approve the price list based on the sales value at the factory gate. The first appellant, basing on the above order approved the price list. The respondent filed an application for refund of Rs.19,83,225.64 before the first appellant. This was rejected. An appeal against that order was allowed with a direction to the first appellant to

decide the refund claim, if admissible otherwise. Pursuant to this order, the respondent submitted an application for refund. It was dismissed and an appeal against that order was also dismissed. He filed a writ petition. A learned single Judge allowed the writ petition and directed the appellants to refund Rs.16,59,721.30 to the respondent with interest at 12% per annum from 23.6.1987 within four weeks from 8.1.1991. In appeal, it was contended that by reason of Sec.3 of the Central Excise (Amendment) Act, 1991, no refund can be made to the respondent except as provided in Sub-sec.(2) of Sec.11-B of the Act of 1940.

Held: Admittedly, during the pendency of the present writ appeal, Sec.11-B of the Act was amended by the Central Excise (Amendment) Act, 1991, with effect from 20.9.1991. The Central Excise (Amendment) Act, 1991 will apply to the facts of the present case because the order of the learned single Judge passed in W.P.No.6260 of 1987 has not become final on the date when the Amendment Act, 1991 came into force. The order in W.P.No.6260 of 1987 is challenged by the appellants by filing the present writ appeal and when the Central Excise (Amendment) Act XL of 1991 came into force, the whole matter was pending in the present writ appeal. As per the amended Sec.11-B, all pending claims for refund on or from 20.9.1991, that is, the date on which the Amendment Act came into force will have to be dealt with and disposed of only in accordance with the Amended provision of law. By reason of the amended Sec.11-B(3), notwithstanding the direction given by the learned single Judge by the order made in W.P.No.6260 of 1987 to refund a sum of Rs.16,59,721.30 to the respondent, no refund can be made to the respondent except as provided in Sub-sec.(2) of Act XL of 1991. As rightly contended by the learned counsel for the appellant, the order of the learned single Judge under appeal is subject to Sec.11-B of the Act as amended by Act XL of 1991. Therefore, it is for the respondent to seek refund of the concerned amount from the Assistant Collector as provided in Sub-sec.11-B(1)(2) of the Act as amended by the Amendment Act XL of 1991 and in compliance of the Rules and Regulations framed thereunder.

K.Jayachandran, Additional Central Government Standing Counsel, for Appellant.

V.Santhanam, for Respondent.

B.S. ---- *Appeal allowed.*

K.S.Bakthavatsalam, J.

**P.Devendran v.
The State of Tamil Nadu.**

17th July, 1992.

W.P.No.2173 of 1991.

Land Designation Act (I of 1894), Secs.4(1), 6 and Proviso as inserted by Land Acquisition (Amendment) Act (LXVIII of 1984), Sec.4(1) - Notification published on 9.8.1978 - Declaration under Sec.6 published on 8.8.1981 - Declaration challenged in writ petition - Stay of declaration not obtained - Writ petition allowed and appeal against dismissed on 1.3.1990 - Fresh declaration published afterwards - Legality - Limitation prescribed by the Proviso to Sec.6 if applies - Decision in (1990)1 M.L.J. 219, held would apply and not that in (1980)2 M.L.J. 269.

The Government sought to acquire certain lands including the petitioner's lands by a notification under Sec.4(1) of the Act which was published in the Gazette on 9.8.1978. The declaration under Sec.6 of the Act was published in the Gazette on 8.8.1981. The petitioner challenged the declaration under Sec.6 by way of a writ petition. It was allowed and on appeal against the order was dismissed on 1.3.1990. Thereafter, the petitioner received a notice on 28.1.1991 calling on him to appear and submit his objections to the notification under Sec.4(1) dated 9.8.1978. He filed a petition challenging the proceedings contending that a declaration cannot be made after three years after the publication of the notification under Sec.4(1). He relied on the proviso to Sec.6 inserted by Central Act LXVIII of 1984. He further contended that the ratio in (1990)1 M.L.J. 219, would apply to the facts of this case. Relying on the Full Bench decision in (1980)2 M.L.J. 269, it was contended by the respondent that it was

enough if the first declaration was made within three years from the date of notification under Sec.4(1) of the Act.

Held: The Court of the view that the facts of the case which are placed before it, in all force are one and the same to the case decided in (1990)1 M.L.J. 219. The reliance of the decision of a Full Bench of this Court in (1980)2 M.L.J. 269, is wholly unsustainable. That was a case which arose before the Central Act LXVIII of 1984 came into force. After coming into force of Act LXVIII of 1984, the principle laid down by the Full Bench of this Court in the above mentioned case will not hold good. The Full Bench of this Court in the decision cited supra, applied the *maxim actus curiae neminem gravabit* and took note of the fact that there was no stay in that case in favour of the petitioner. After the passing of the Central Act LXVIII of 1984, an express provision has been made regarding the period of limitation when a stay order of the court is in operation. So, the decision in (1980)2 M.L.J. 269, will not apply to the facts of this case.

M.Raghavan, Senior Counsel for *M.Subramanian*, for Petitioner.

Kalaiselvi, Government Advocate (Housing), on behalf of Respondents.

B.S. ---- *Petition allowed.*

Thanikkachalam, J.

**Pachaiyappan and others v.
Sri Kamatchi Amman Koil Devasthanam.**

15th July, 1992.

S.A.No.521 of 1982.

French Civil Code, Art. 745 - 'Descendant' - Meaning of - If includes wife.

According to the definition of the term 'descendant' as contained in Art.745 of the French Civil Code a wife cannot claim herself as the descendant of her deceased husband. Further, this Court while

considering the meaning of the word 'santhathi' in (1984)1 M.L.J. 255, took a similar view. In view of the abovesaid decision and on the plain reading of Art.745 of the French Civil Code it remains to be seen that the plaintiff in the present suit cannot claim herself as the descendant of her husband. If that is so, she would not have any right under the Will dated 1.1.1913 either to collect the rental income from the suit property or to perform the Thai Poosam festival as claimed by her.

R.Gopalakrishnan, for Appellant
K.S.Ahmed, for Respondent.

B.S. ---- *Appeal dismissed.*

Bakthavatsalam, J.

**V.Sudhakaran v.
The Corporation of Madras.**

10th July, 1992.

W.P.No.298 of 1991.

Constitution of India (1950), Arts.226, 14 and 16 - Writ - If can be issued for violation of any non-statutory direction.

It is well-settled that any violation of any non-statutory direction cannot be made a cause of action to approach the High Court under Art.226 of the Constitution unless the provisions of the Constitution are violated especially Arts.14 and 16 of the Constitution.

Miss.R.Vaigai, for Petitioner.
R.Swaminathan, Standing Counsel for Respondent.

B.S. ---- *Petition dismissed.*

Srinivasan, J.

able - (Civil Procedure Code (V of 1908), Sec.10).

**Meenakshi Apartments, Unit of
MIG. Flats, Madurai-20 v.
The Tamil Nadu Housing Board, Madras-35.**

24th August, 1992.

W.P.Nos.7061 to 7064 of 1986.

Tamil Nadu Housing Boards Act (XVII of 1961) and Rules made thereunder - Contract between Housing Board and allottee of flat providing for recovery of difference of cost within a stipulated period - Housing Board, if entitled to fix final cost beyond that period.

This Court held in S.A.83 of 1982 by judgment dated 20.8.1982 that the clause fixing a period for determination of the final cost is a clause of limitation. The respondents (Tamil Nadu Housing Board and the Executive Engineer and Administrative Officer, Madurai Housing Unit) are not entitled to make any demand over and above the cost already fixed in the contract as the respondents are not entitled to fix the final cost beyond the period of limitation prescribed in the contract.

E.Padmanabhan, for Petitioner.
S.Doraisami, for Respondents.

B.S. ---- *Petitions allowed.*

*Mishra and
Mrs.Padmini Jesudurai, JJ.*

**Radhika Konel Parekh v.
Konel Parekh.**

12th August, 1992.

O.S.A.Nos.93 and 94 of 1992.

(A) Letters Patent (Madras), Clause 15 - Order passed on application for stay of proceedings - If 'judgment' - Appeal from such order, if maintain-

(B) Hindu Marriage Act (XXV of 1955), Secs.13(1-A) and 26 - Suit for divorce and for declaration that she is entitled to the custody of her minor child filed by wife in Family Court, Bombay - Husband filing petition in Madras High Court seeking him appointment as guardian of the minor son and for grant of interim custody - Questions involved in both proceedings if same - Judgment of one Court delivered earlier, if would operate as res judicata in the other.

(C) Civil Procedure Code (V of 1908), Sec.10 - 'Matter directly and substantially in issue in former and subsequent suits' - Whether should be the same in all respects.

Respondent Konel Parekh and the appellant Radhika were married in accordance with Hindu rites on 1st April, 1990 and a male child was born to them on 30th March, 1991. On 16.12.1991 the respondent filed O.P.No.694 of 1991 in the Madras High Court seeking his appointment as the guardian of the son and also for other reliefs. He applied for a direction that he be given interim custody of the minor son in an application in that petition. The appellant stated in reply that she had moved the Family Court at Bombay seeking reliefs *inter alia* of divorce and the interim custody of the minor and restraint orders and that the Bombay Family Court had restrained appellant from removing the minor from her custody. She filed an application for stay of the proceedings in this Court. A learned single Judge was of the view that the question involved in the O.P.No.694 of 1991 and the proceedings in the Family Court at Bombay could not be the same and that therefore there could be no stay of proceedings. He rejected the request of the respondent for the interim custody of the minor, but permitted him to visit the child as frequently as he felt so with liberty to take the child for outings also. The appellant filed two appeals. The respondent contended that as an order passed as an application for stay of the proceedings under Sec.10, Civil Procedure Code was not a judgment, no appeal could be maintained against that order.

Held: Since the Supreme Court has already declared the law in *A.I.R. 1981 S.C. 1786*, and the Court is obliged to follow it, it has to be held

notwithstanding the judgment of the Full Bench of this Court in *A.I.R. 1954 Mad. 1057 (F.B.)*, that the appeal is maintainable. *Srinivasan, J.*

A mere glance at this provisions shows that in a suit seeking divorce, the Court can make provisions in the decree itself with respect to the custody of the child and may after the decree upon application by petition filed for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree. Thus, the prayer in the Family Court suit at Bombay for a decree cannot be equated with the decree for interim custody in the sense of an order *pendante lite*. In most of the cases custody orders have to be made for limited purpose. No minor can be ordered to be always in custody of another, the limit being the statutory age of majority. Once however, the question of custody of a minor child is an issue on fact and law in the proceeding before the Family Court, if the same issue is brought between the same parties in another court, the judgment of one delivered earlier has to operate as *res judicata* in the other. It is not in dispute that the child is below five years. Ordinarily thus the custody has to be with the mother. The mother has accordingly prayed for a decree for such a custody in the Family Court at Bombay. The father, who is the respondent can have every say and thus can say to the Court that the child's custody with the mother may not be in the interest of child. The court is constrained to observe that the suit has been filed in this Court by the respondent has brought in substantially the same questions of fact with respect to the custody of the child which have to be decided by the Family Court.

It is not necessary, as has been held by different High Courts and about there is a consensus of judicial opinion, that the matter directly and substantially in issue in former as well as subsequent suits, should be the same in all respects.

C.A.Sundaram, for Appellant.
R.Krishnaswami, for Respondent.

B.S. ---- *Appeals allowed.*

**L.Subbien v.
The Deputy Commissioner of
Labour, Coimbatore.**

7th August, 1992.

W.P.No.10018 of 1992.

Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Secs.4(1)(a), 5 and 41(2) - Act, if applicable to person employed in a position of management?

The petitioner who was employed as a supervisor for more than 35 years in the second respondent-company drawing a salary of Rs.2,075 per mensem was discharged from service by oral order on 1.11.1988. In spite of his demand for restoration of services, the second respondent was not inclined to do so. The petitioner filed an appeal under Sec.41(2) of the Tamil Nadu Shops and Establishments Act to the first respondent. Holding that the Act did not apply to a person employed in a position of management, the first respondent dismissed the appeal. He filed a petition for the issue of a writ of *certiorari* filed *mandamus* to quash the orders of termination.

Sec.4(1)(a) of the Tamil Nadu Shops and Establishments Act provides that nothing contained the Act shall apply only to the persons employed in any establishment in a position of management. But Sec.5 thereof empowers the Government to issue a notification applying all or any of the provisions of the Act to any class of persons or establishments mentioned in Sec.4 of the Act, other than those mentioned in Clauses (e) and (f) of Sub-sec.(1). Thus, with regard to Sec.4(1)(a) of the Act, the Government is entitled to issue a notification to the effect that the Act will apply to persons covered by the said sub-section. The Government has issued a notification G.O.Ms.No.4074, Industrial Labour and Housing (Labour), dated 5th October, 1966 by exercising the powers conferred under Sec.5 of the Act, applying all the provisions of the Act to the clause of persons mentioned in Clause (a) of sub-section (1) of Sec.4. Thus, the Act applied to all persons who are employed in any establishment in a position of management. Hence,

the Act will apply to the petitioner also, though he is employed as a supervisor, in a position of management. Hence, the first respondent is clearly wrong in dismissing the appeal of the petitioner on that ground.

K.Chandru, for Petitioner.

T.S.Gopalan, for Respondent.

B.S.

Petition allowed.

of the jewels is an interim order and not of a permanent nature as contemplated under Sec.28, it has to be said that the respondent is not entitled to maintain an appeal against the said order.

V.Prabhakar, for Petitioner.

R.Yashodhavaradhan, for Respondent.

B.S

Petition allowed.

Maruthamuthu, J.

**Seetharaman v.
Vaduvambal.**

7th August, 1992.

C.R.P.No.3072 of 1991.

Hindu Marriage Act (XXV of 1955), Secs.27 and 28(1) and (2) - Civil Procedure Code (V of 1908), Sec.105(1) - Petition by wife under Sec.27 of Hindu Marriage Act for return of jewellery - Dismissed - Appeal against dismissal, if can be maintained.

Sec.105 of the Code of Civil Procedure makes it clear that the respondent cannot prefer an appeal against the order passed in I.A.No.184 of 1989. The order against which the respondent seeks to prefer appeal is not one passed under the Civil Procedure Code but under Sec.27 of the Hindu Marriage Act. In view of Sec.28(1) of the Hindu Marriage Act, it can be stated that the decree passed by the trial Court for dissolution of marriage under Sec.3 is a decree which is appealable, but it cannot be so in the case of the order passed under Sec.27 of the Hindu Marriage Act in I.A.No.184 of 1989. The said order is only an order passed in an interim application and not decree. A combined reading of Sec.28(1)(2) makes it abundantly clear that appeals can be only from orders of permanent nature under Secs.25 and 26. Since the order passed in I.A.No.184 of 1989 for return

Lakshmanan, J.

**A.M.Jain College by Honorary
Secretary, Madras v.
Government of Tamil Nadu.**

14th July, 1992.

W.M.P.No.11880 of 1992 in
W.P.No.8211 of 1992.

(A) Constitution of India (1950), Art.30(1) - Minority institution - Admission of students from minority communities to - Resolution of State Government order directing the institution to make available not less than 30% of annual permitted strength in each branch - Faculty to other condition - If valid - Supreme Court's direction that minority institutions shall make available at least 50% of annual admission to members of communities other than the minority community - Interpretation.

(B) Constitution of India (1950), Arts.29(2) and 30(1) - Law and Institution - Minority institution giving preference to the religious minority candidate in their own institution - If amounts to discrimination and violative of Art.29(2).

The petitioner A.M.Jain College was founded in 1952 and was primarily meant for the benefit of the young men of the Jain community, but it is open to young men of all communities. The institution has been declared a minority institution. As the Jain community is essentially engaged the trading

business and industry, education in commerce and business related subjects were taught to the Jain students. In 1992, 124 Jain students were admitted to B.Com., (evening college) as against the capacity of 150. Similarly, the day college provisional admission cards were issued to 103 Jain students. Jain students were given preference in B.Com. and B.A. (Corporate) courses. The Supreme Court in (1991)2 Scale 1217: (1992)1 S.C.C. 558, directed that the minority institution shall make available atleast 50% of annual admissions to members of communities other than the minority community. After referring to the above decision the State Government issued G.O.Ms.No.561, Education, dated 15.6.1992 directing that the intake of candidates of minority communities should not exceed 50% of the annual permitted strength in each Branch/Faculty and that the minority educational institutions shall make available not less than 50% of the annual permitted strength in each Branch/Faculty to the members of the community other than the minority community. The petitioner challenged the order on behalf of the State, it was contended that the 50% directed by the Supreme Court indicated only 50% of seats in every Branch/Faculty and that the institutional preference for admission based on religious was violative of Art.29(2) of the Constitution of India.

Held: The Supreme Court states that the State may regulate the intake of students from the minority community with due regard to the need of the community in the area which the institution intended to serve. The petitioner college is undoubtedly intend to serve the Jain community in Madras, Tamil Nadu. The Jain students in Madras generally and basically join B.Com. and B.A. (Corporate) course and not in other courses. The impugned G.O. restricting intake of minority community students to 50% in each Branch/Faculty affects the Jain community students in B.Com and B.A. (Corporate) courses also. This will very adversely affect the Jain community people in Madras, which the petitioner college intend to serve, and this also violates the law and the judgment of the Supreme Court. It will also violate Art.30(1) of the Constitution of India. The impugned G.O. is trying to stretch the Supreme Court judgment beyond its scope and intends and lays down fresh rule which interfere with the right guaranteed under Art.30(1) of the Constitution of

India. The language used by the Apex Court should be interpreted by to reason that 50% of the total number of seats in the annual admission of the institution should made available to students of other communities and not 50% in each Branch/Faculty as directed by the State Government in the impugned G.O.

Any preference given to the religious minority candidate in their own institution cannot be a discrimination falling under Art.29(2) of the Constitution of India. The institution in answer is established for the transit of the Jain community and if they are prevented from admitting their own community candidate, the very purpose of establishing the institution would be defeated. Minority institutions are entitled to admit their candidates by preference or by reservation. They are also entitled to admit them to the exclusion of all others and that right, flows from the right to establish and administer the educational institutions guaranteed under Art.30(1) of the Constitution of India. The State can lay down reasonable conditions for obtaining and for admission of students in their institutions but the State has no right to compel the minority institutions to give up their right under Art.30(1) of the Constitution of India.

R.Krishnamurthi, Senior Advocate for *M/s.Surana and Surana*, for Petitioner.

P.Shannmugham, Additional Government Pleader, for Respondents.

B.S.

Petition allowed.

Abdul Hadi, J.

**S.A.Azisullah v.
Sakthivelu.**

16th October, 1992.

C.R.P.No.173 of 1992.

Decree - Decree granting possession of suit site to plaintiff - Mandatory injunction to remove superstructure thereon - Execution petition - Mandatory injunction alone time barred - Execution petition - If liable to be dismissed in toto.

Where a decree in suit grants possession of the suit site and also grants a mandatory injunction directing the defendants to remove the superstructure put up by them on the suit site, an execution petition filed by the plaintiff cannot be dismissed *in toto* merely because the decree for mandatory injunction cannot be executed because of bar of limitation under Art.135 of the Limitation Act. The Court cannot dismiss the E.P. *in toto* but should order the E.P. relating to the possession of the suit land. In such a case the court should grant an opportunity to the judgment-debtors to remove the superstructure. If within the time allowed the judgment-debtors do not remove the superstructure, then the executing Court shall direct delivery of both the site and superstructure to the decree-holder.

V.Krishnan, for Petitioner.
N.Sathiamoorthy, for Respondent.

V.K. ---- *Petition allowed.*

Srinivasan, J.

**M.Devan v.
The Tamil Nadu Civil Supplies
Corporation Limited, Dharmapuri
District.**

18th August, 1992.

W.P.No.183 of 1985.

Domestic enquiry - Charges framed against petitioner for tampering with document - Document not produced during enquiry - Petitioner not given opportunity to make submissions with reference to the said document - Enquiry not concluded having been adjourned at the instance of the petitioner - Termination of services of petitioner, held illegal.

Two charges were framed against the petitioner that he concealed the fact that he did not have the requisite educational qualification for the post of Assistant Quality Inspector and obtained that appointment by giving an application containing false information and that he tampered with the temporary certificate issued by the University by erasing the word 'Mathematics' and writing the word 'Botany' and thus forged the certificates. The petitioner denied the charges and prayed for the production of the documents on which reliance was placed by the respondent. The Enquiry Officer put some questions to the petitioner on 19.9.1984. The petitioner filed a petition for adjournment till the production of the relevant documents. The Enquiry Officer made an endorsement that the enquiry was adjourned. But he submitted a report stating that both the charges were proved to be correct and his services were terminated on the basis of the report. The order was challenged by way of a writ petition.

Held: There can be no doubt whatever that the enquiry has not been conducted properly in accordance with law apart from the fact that the enquiry was not conducted by the Enquiry Officer and sufficient evidence was not on record to substantiate the two charges framed against the petitioner. The respondent ought to have produced the documents before the Enquiry Officer which are relevant for the purposes of the enquiry and which prove the two charges framed against the petitioner and the petitioner ought to have been given an opportunity to make his submissions with reference to the said documents. As the said procedure has not been followed, the Court has no option, but to quash the impugned order passed by the respondent.

Venkataraman, for Petitioner.
V.V.Bhanu for *G.Bhaskaran*, for Respondent.

B.S. ---- *Petition allowed.*

Thanikkachalam, J.

**S.Ramamoorthy v.
The Post Master General**

7th August, 1992.

C.R.P.No.4274 of 1987.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(4)(i) - Premises let out to conduct of Post Office - If entitled to exemption from eviction.

The respondents took the premises on lease for the purpose of conducting a Branch Post Office and for the purpose of residence of the Post Master of that branch. The petitioner filed a petition for eviction of the respondents.

Held: In exercise of the powers under Clause (i) of Sub-sec.(4) of Sec.10 of the Act, the Governor of Madras notified that all Departments of State and Central Governments in the State of Madras will be deemed to be engaged in an essential service for the purpose of the said Sub-sec.(4) of the Act. This notification still holds good. It is neither held as invalid or struck down as *ultra vires*. Therefore, the tenant in the present case is entitled to claim exemption under Sec.10(4) of the Act.

G.Subramaniam, Senior Counsel for B.Rajagopal, for Petitioner.
Mrs.Meera Gupta, for Respondent.

B.S. ---- *Petition dismissed.*

AR.Lakshmanan, J.

**The Annamalai Club, Valparai,
Coimbatore v.
The Government of Tamil Nadu.**

17th August, 1992.

W.P.No.7160 of 1992.

Constitution of India (1950), Art.226 - Natural

justice - Action in violation of principles of natural justice - Effect - Court whether can interfere in writ jurisdiction.

It has been the consistent view of Courts that when there is a violation of basic principles of natural justice, the action impugned is *void ab initio* and this Court has to interfere. It has already been found that the action of the respondents is illegal and the petitioner was not heard. If the action of the respondent is unreasonable and arbitrary, this Court can exercise its writ jurisdiction.

R.Krishnamurthi, Senior Counsel for V.Achuthan and P.Vijayakumar, for Petitioner.
P.Shannmugham, Additional Government Pleader, for Respondent Nos.1 and 2.
P.K.Denny, for Respondent No.3.

B.S. ---- *Petition allowed.*

AR.Lakshmanan, J.

**The All India Amitabh Bachchan's Fans
Association v.
The Government of Tamil Nadu.**

21st August, 1992.

W.P.No.8416 of 1992 and
W.M.P.No.17568 of 1992.

Constitution of India (1950), Art.226 - Natural justice - Applicability to administrative orders - Rights accrued in favour of person - If can be denied or taken away without hearing that person.

It is settled position of law that even administrative orders should conform to the principles of natural justice.

When the petitioner-Association has been granted permission to erect a statue at the junction of the Club House Road, rights have accrued in its favour to erect the statue. That right which had accrued in favour of the petitioner-Association cannot be denied or taken away without hearing the petitioner-Association.

S.Govind Swaminathan, Senior Advocate for *14th September, 1992.*
V.K.Sethukumar, for Petitioner.

P.Shanmugham, Additional Government Pleader,
 for Respondent Nos.1 to 3.

R.Muthukrishnan and *K.A.Ramakrishnan*, for
 Respondent No.4.

L.P.A.No.121 of 1992.

B.S. ---- *Petition allowed.*

K.S.Bakthavatsalam, J.

**Theatre Anna, A partnership firm
 represented by its Managing Partner,
 M.Mylswamy v.
 The Secretary, Home Department.**

4th September, 1992.

W.P.No.12997 of 1992.

*Tamil Nadu Cinemas (Regulation) Act (IX of 1955),
 Sec.9-B - Revision against order revoking 'C' form
 licence - Revisional Authority confirming orders of
 lower authorities - Whether should give reasons.*

The revisional authority need not find out any new reasons for confirming the orders of the lower authorities. The revisional authority cannot search for new reasons to confirm the orders of the appellate authority when he is satisfied with the reasons given by the appellate authority. On a perusal of the impugned order, it is seen that the revisional authority has given a careful consideration to the orders of the appellate authority. As such it is almost a confirmation order of the appellate authority. In the light of the decision of this Court in *Chinnasamy Chettiar v. The State of Tamil Nadu*, 1985 Writ L.R. 813, it cannot be said that the impugned order is passed without assigning any reasons therefor.

R.Thiagarajan, for Petitioner.
M.M.Sunderesh, Government Advocate, for
 Respondents.

B.S. ---- *Petition allowed.*
Mishra and
Mrs.Padmini Jesudurai, JJ.

**Sarada Devi v.
 Revathi alias Jagada Pichiammal.**

*Civil Procedure Code (V of 1908), O.9, Rule 13(1)
 - 'Sufficient cause' - Party filing application to set
 aside ex parte decree stating that she could not attend
 Court due to disputes in the husband's family about
 which a complaint was given to the police - Also that
 she was not well - No contra evidence on behalf of
 respondents - Complaint and certificate showing
 that appellant not unwell not filed in Court - Infer-
 ence that appellant was prevented by sufficient cause
 from coming to Court, if can be drawn.*

Held: True the appellant's husband deposed that he gave a complaint to the police on 14.6.1986 and also that he had a doctor's prescription to support the illness of his wife. But these documents were not produced in Courts. All that can be found on the basis of the above is that there has been evidence on behalf of the appellant and her husband that they were prevented from coming to the Court. There is no contra evidence on behalf of the respondents. If the complaint that the appellant's husband allegedly filed with the police or any certificate showing that the appellant was unwell were not filed in Court all that can be said on this basis is that some corroborative evidence which would have strengthened the case of the appellant was not produced. A Court, in the absence of corroborative evidence, can undoubtedly reject the oral testimony of evidence. In the instant case, however, it seems non-production of the complaint or any certificate to support ailment of the appellant was not on account of any deliberate laches but for the reason that there was no serious challenge to the allegations about the quarrel with the brother as well as the ailment, for the respondents never led any evidence against the same. The Court is inclined, for the above reasons to take a compassionate view and hold that on such facts it is reasonable to infer that the appellant was prevented by a sufficient cause from coming to the Court.

P.Rathinadurai, for Appellant.
P.Peppin Fernando, for Respondent.

B.S. ---- *Appeal allowed.*

K.S.Bakthavatsalam, J.

**V.Srinivas (Minor) represented by
Mr.Babu Rao, father and natural
guardian v.
The University of Madras.**

16th September, 1992.

W.P.Nos.13657 to 13660 of 1992.

Evidence Act (I of 1872), Sec.115 - Promissory estoppel - Prospectus for admission to B.E. Degree course not specifically notifying about cut-off date for passing the qualifying examination - Candidates who passed qualifying examination on 31.7.1991 admitted to the course - Director of Technical Education not granting approval for their admission on the ground of not passing qualifying examination on or before 1.7.1991 - Held principle of promissory estoppel would apply.

The petitioners were selected by the Selection Committee constituted and were admitted to the B.E. Degree course. They paid the fees for the academic year 1991-92. According to the prospectus issued by the College, the last date for submission of applications was 31.7.1991. The petitioners were issued hall-tickets for writing their examination. When they were writing examination, they were informed orally that the approval of their admission was still pending with the Director of Technical Education, Madras. Subsequently, the petitioners came to know that the approval was not granted in view of their not having passed the qualifying examination on or before 1.7.1991. They filed writ petitions against the action contending that the prospectus issued by the College did not stipulate such a condition and that they could not be penalised for the fault committed by the college authorities.

Held: In these cases, the petitioners are not at fault. It is the management which failed to specifically notify in the prospectus about the cut-off date for passing the qualifying examination. The students may not know whether their admission is subject to the grant of approval by the Director of Technical Education, unless it is specifically notified in the prospectus. In these cases, the petitioners have continued their course for more than a

year and have paid their fees for examination, obtained their hall-tickets and also wrote the examination. At this stage, it is not proper for the respondents to say that the petitioners are not eligible to continue their course. The petitioners herein should not be penalised for the mistake committed by the management. It is not stated that the petitioners have given any incorrect information regarding their qualification or their eligibility. They were under the *bona fide* impression that they can continue their course once they have been admitted by the third respondent-college. In view of the rulings of the Apex Court of the land as well as this Court with regard to cases of innocent students being penalised for the *sins* of the management, a direction has to be issued in these cases.

R.Gandhi for M.Kandasamy, L.Chandrakumar, K.Geetha Ravi and P.Selvi, for Petitioner.

P.Jothamani, for Respondent No.1.

Sundaresh, Government Advocate, for Respondent No.2.

B.S.

Petitions allowed.

Janarthanam, J.

**Kasi Nadar v.
V.Doraiswami Nadar.**

30th September, 1992.

C.R.P.No.934 of 1992.

Stamp Act (I of 1899), Sec.35 - Agreement for sale - Agreement between seller and purchaser that it would be treated as conveyance if no conveyance was effected within six months from the date of agreement - If a document conveying title, chargeable to stamp duty and penalty.

The respondent filed a suit for the relief of declaration and consequential injunction in respect of two items of suit properties based on a sale deed. The petitioners (defendants) contended that the first item of the suit properties originally belonged to one Seenai Chettiar who had executed

an agreement of sale on 6.10.1982 with the petitioners and that the entire sale consideration had been paid and possession had also been delivered. It was also contended that it was agreed that if the vendor did not execute a sale deed within six months from the date of agreement, the agreement had to be construed as a sale deed. During the trial, the petitioner wanted to mark the agreement of sale to which the objection was raised by the respondent that it could not be marked unless the Stamp Duty and penalty payable therefor was paid under Sec.35 of the Stamp Act. The trial Court passed an order directing the petitioners to pay a sum of Rs.12,755 as stamp duty and penalty. The petitioners filed a revision petition against that order.

Held: In the backdrop of the principles in the decisions in *Khaji Beev v. Timmalaippa*, (1907)17 M.L.J. 308, *Mt. Viboo v. Raj Saheb Goharam Singh*, A.I.R. 1937 All. 101, *Ram Rattan v. Parama Nand*, A.I.R. 1946 P.C. 51, *Parathapatti Nageswara Rao v. Moka Narayanamurthi*, A.I.R. 1938 Mad. 75 and *The Chief Controlling Revenue Authority, Board of Revenue, Madras v. Thirtiala*, (1979)2 M.L.J. 361, a legal fitment, if given to the facts and circumstances of the case, it goes without saying that the view of the learned District Munsif that the agreement for sale dated 6.10.1982 has to be construed as a document conveying title chargeable to stamp duty and penalty under Sec.35 of the Indian Stamp Act cannot at all be stated to be not maintainable.

P.Seshadri, for Petitioner.

K.Radhakrishnan, for Respondent.

B.S. ---- *Petition dismissed.*

Srinivasan, J.

**M/s.Sita Decor, Prop. Vasantha Raj v.
The State Consumer Disputes Redressal
Commission.**

26th October, 1992

C.R.P.No.2723 of 1992.

Consumer Protection Act (1986), Secs.18 and 12 to

14 - Consumer Protection Rules, Rule 9(6) - Appeal from order in complaint under Sec.12 - Notice to respondent, if obligatory.

Sec.18 of the Act itself states that Secs.12 to 14 would be applicable only with such modifications as may be necessary for the purpose of disposal of the appeal. In the case of original petition before the District Forum, it is absolutely necessary to issue a notice to the respondent as the District Forum will not be in a position to decide the case of the petitioner without hearing the respondent. It cannot, even without giving notice to the respondent pass an order allowing the application filed by the complainant. Consequently, a notice is a must in an original petition. However, the position in the case of appeal is entirely different. The appellant has to make out a case that the order of the District Forum suffers from errors or defects. If the State Forum is not convinced that there was any error or defect in the order of the District Forum, there is no necessity at all to issue notice to the respondent and drag him before the Court. It cannot be said that even after giving notice to the respondent he shall be heard by the appellate forum. After giving notice to the respondent and after hearing the appellant, if the appellate forum thinks that no case has been made out by the appellant, it is certainly entitled to dismiss the appeal without calling on the respondent to argue the same. Thus, the appellate forum is vested with the discretion to decide whether notice should be issued to the respondent on the facts and circumstances of the case. There is no Rule compelling the State Forum to issue notice to the respondent in every appeal whether there is merit in the appeal or not. Sub-rule (6) of Rule 9 provides if in an appeal, a date of hearing is fixed and in such cases if the notice had been issued to the respondent and service had been effected, then the parties or their agent shall be present. Sub-rule (6) does not compel the State Forum to issue notice in every appeal.

Ashok Menon, for Petitioner.

B.S. ---- *Petition dismissed.*

Venkataswami, J.

**Balu Chettiar v.
Solaimalai Chettiar.**

24th November, 1992.

C.R.P.No.3225 of 1990.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) - Applicability - Person not proved to be a tenant - Such person denying title of landlord - Act, held will not apply.

For the purpose of rent control proceedings, the essential factor to be established is that there is a relationship of landlord and tenant. The petitioners could have denied the title of the respondents in any other capacity. Simply because on the basis of a sale deed, the respondents have been found to *prima facie* the owners of the premises in question, it cannot be presumed that the petitioner is a tenant under the respondents. At the most, he could be treated as a person in unauthorised occupation. But, to evict such a person, the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act cannot be invoked.

R.Subramaniam for K.Samipath, for Petitioner.
E.Padmanabhan for P.T.S.Narendravasan, for Respondent.

B.S. ---- Petition allowed.

AR.Lakshmanan, J.

**R.V.Ramalingam v.
Abdul Muthaliff.**

14th December, 1992.

C.R.P.No.98 of 1992.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.18-A - Order of Rent Controller refusing to appoint a Commission - If appealable.

The order of the Rent Controller refusing to issue commission for inspection and preparation of a plan of the premises is a mere procedural order not affecting any right or liability of the parties. The issue of a commission is only a step for assisting the parties in the prosecution of their case. It is open to canvass the error, defect or irregularity if any in the order in an appeal from the final order passed in the proceedings for eviction, but no appeal from the order lay to the Appellate Authority. The order refusing to appoint a Commissioner will not affect the rights of the parties. When the rights of both parties are not in any manner affected by the refusal of the Court to appoint a Commissioner the said order is not appealable.

R.Muthukumaraswami, for Petitioner.
Sathush Sundar for B.Kumar, for Respondents.

B.S. ---- Petition allowed.

AR.Lakshmanan, J.

**Coimbatore Seva Nilayam represented
by its Secretary, T.V.Thilliammal,
Coimbatore v.
R.Narayanaswami Naidu.**

14th December, 1992.

C.R.P.No.1688 of 1992.

Civil Procedure Code (V of 1908), O.6, Rule 17 - Limitation Act (XXXVI of 1963), Arts.137 and 142 - Suit for declaration of title and for recovery of possession of vacant land - One of the defendants putting up construction on land during pendency of suit - Plaintiff filing petition to amend plaint - Limitation for petition - Article of Limitation Act applicable.

The petitioner filed a suit for declaration of title and for recovery of possession of a vacant piece of land. During the pendency of the suit, the 13th defendant put up some construction on the land. The petitioner filed an application for amendment of the plaint. It was dismissed by the trial Court as time barred. In revision,

Held: The order of the trial Court in dismissing the amendment application as time barred is wrong. The learned District Munsif is wrong in stating that Art.137 of the Limitation Act is against the petitioner. The petition for amendment was filed during the pendency of the suit and the amendment sought is in relation to a subsequent event, viz., putting up a construction in the suit property. By allowing the amendment, the nature of the suit or the relief asked for is not at all altered. The relief asked for is declaration of the petitioner's title to the suit property and if it succeeded, then only it will be entitled to the incidental relief of possession of the suit property as on the date of the suit and on that ground, the learned District Munsif ought to have allowed the amendment in the interest of the parties. That apart, the learned District Munsif has also failed to notice the provisions of O.6, Rule 17, Civil Procedure Code, which permits the amendment at any stage of the proceedings provided it does not alter the character of the suit. It is well settled by catena of decisions of this Court and also of the Apex Court that by merely allowing an application for amendment, there is no adjudication of the merits of the amended pleas introduced, that the merits of the amended pleas have got to be adjudicated upon after allowing the opposite side to put forth additional pleadings in answer to the same and that certainly the additional pleadings may take in also the plea of bar of limitation. It is also well settled that the Court may in appropriate cases allow the amendment even after the statutory period of limitation. In the instant case, the suit was originally filed by the petitioner for declaration of title and for recovery of possession of the suit property. Since the petitioner was dispossessed of the land subsequent to the filing of the suit the proposed amendment petition was filed praying for delivery of possession. To such a suit, as held by the Supreme Court in the decision reported in *Abdul Waheed Khan v. Bhawani*, A.I.R. 1966 S.C. 1718, only Art.142 of the Limitation Act applies. By allowing the amendment, no injury or injustice is caused to the respondents herein. No jurisdictional error is also involved in this case because of the amendment being ordered.

P.Kulandaivadivelu, for Petitioner.

A.Kulasekaran, for Respondents.

B.S. ----- *Petition allowed.*

A.R.Lakshmanan, J.

**Kodaikanal Lorry Owners Association v.
State of Tamil Nadu.**

14th December, 1992.

W.P.Nos.8072, 8763, 9258, 9563 and
9834 of 1992.

Tolls Act (VIII of 1851), Sec.2 (as substituted by Madras Act VI of 1938) - Levy of tolls by G.Os. on motor vehicles entering major entry points to the Kodaikanal Township, Nilgiris District and Yercaud Township - Validity - If an unreasonable restriction on the Fundamental Rights under Art.19(1)(g) and violative of Arts.301 to 304 of the Constitution of India - Charging provision if suffers from vice of excessive delegation.

By the impugned G.Os. the Government decided to levy tolls on the motor vehicles entering the major entry points to the Kodaikanal Township, Udhagamandalam District and Yercaud Township. The petitioners filed petitions for the issue of a writ of *certiorari* or any other writ, directions or order quashing the above Government orders contending that the levy of the toll was an unreasonable restriction on the fundamental rights guaranteed under Art.19(1)(g) of the Constitution of India; that the levy was violation of Arts.301 to 304 of the Constitution of India, that the levy was not fair and reasonable and that the Government Orders were unconstitutional and *ultra vires* the Tolls Act.

Held: A toll is a compensatory tax as pointed out by the Supreme Court in the decision reported in *Automobile Transport Rajasthan Ltd. v. State of Rajasthan*, A.I.R. 1962 S.C. 1406. It cannot be said that the power to levy toll is unfettered and unguided and therefore arbitrary. There are enough guidance in the Act itself. It is also significant to notice that none of the petitioners has challenged the validity of the charging section. What is challenged in the writ petitions is only the Notification issued by the Government in exercise of the powers conferred under the Act. The need of the State Government for compensating itself for the expenses incurred in the construction or maintenance of the roads and bridges is sufficient

guidance to fix rates of tolls. Power to levy toll can be exercised for the purpose of creating fund for construction of new bridges and roads in future and maintenance of the existing roads and bridges. Therefore, in respectful agreement with the views expressed by the learned Judge of the Calcutta High Court in *Sushan Chandra Pal v. State of West Bengal*, A.I.R. 1976 Cal. 32, the contentions urged by the petitioners that the charging provision suffers from the vice of excessive delegation and that the actual cost of constitution should be mentioned in the notification has to be reflected. The toll levied by the Government is not only for recovering the expenses incurred by them but also for future maintenance of the repairs of the roads. The petitioners who are benefited by using the roads cannot complain that the compensatory character of the toll is lost because of the creation of the fund for the future maintenance and repairs of the roads in the respective districts. The impugned Government Orders relate to levy of toll in Hill areas like Nilgiris, Kodaikanal and Yercaud. It cannot by calamity like rain, landslip, etc., cause great damage to the roads in the Hill areas and the cost of maintenance will be much more than the amounts extended on the plains. A reading of the counter-affidavits in each of these cases shows that the toll is only compensatory in character and therefore, it cannot restrict the freedom of trade and commerce as contended by the learned counsel for the respective petitioners. It is also impossible, as the Apex Court has said to judge the compensatory nature of a tax by a meticulous test. Hence, the contention that the impugned notification violates Arts.301 and 304(b) of the Constitution of India cannot be accepted. The nature of the toll is only compensatory and the details of the expenditure incurred as disclosed in the counter-affidavit show that the toll is neither disproportionate nor unreasonable nor arbitrary.

V.Radhakrishnan, for Petitioner in W.P.No.8072 of 1992.

Mohan Parasaran, for Petitioner in W.P.No.8763 of 1992.

Malini Ganesh, for Petitioner in W.P.No.9258 of 1992.

M Krishnappan, for Petitioners in W.P.Nos.9563 and 9834 of 1992.

P.Shanmugham Additional Government Pleader, for Respondents.

B.S. ----- *Petitions dismissed.*

A.R.Lakshmanan, J.

**C.T.Abraham v.
J.P.James.**

17th November, 1992.

C.M.P.No.11866 of 1992 in
A.S.No.874 of 1991.

(A) Passports Act (XV of 1877), Sec.10(3)(h) - Impounding of passport under - Power of Court - If can be exercised by a Civil Court.

The power of the Court under Sec.10(3)(h) of the Passports Act has to be exercised either by prohibiting the passport holder from departing India or issuing summons or warrant for appearance or warrant for arrest. The argument that a warrant or summon has to be issued by a Criminal Court on a complaint, either in police case or private complaint and that a disputed money claim in a Civil Court cannot trigger an order for impounding a passport cannot be accepted. Sec.10(3)(h) of the Passports Act provides that the passport authority may impound a passport pursuant to an order issued by the Court if it is satisfied that a *warrant or summons* has been so issued or an order has been so made. Thus, it enables both the Criminal Court and the Civil Court to issue appropriate directions in exercise of its power provided under Sec.10(3)(h) of the Passports Act, 1967. It cannot be gainsaid that summons for personal appearance or arrest of a person can be ordered by both Civil and Criminal Courts. There is no warrant for restricting the applicability of Sub-clause (h) of Sec.10(3) of the Passports Act only to summons or warrants issued by Criminal Courts. In the absence of any such restriction, either express or implied, the aforesaid provision has to be interpreted so as to embrace within the purview of the summons of Civil Courts as well.

(B) *Passports Act (XV of 1967), Sec.10(3)(h) - Power of Court under - Exercise of - Scope and ambit of.*

The power of the Court under Sec.10(3)(h) of the Passports Act to pass an order prohibiting the departure of a person from India has to be made only in exceptional and rare cases where there are necessary grounds and reasons and that power cannot be exercised liberally.

C.Jose Ukkur, for Petitioner.

M.A.Sadanand, for Respondents.

B.S. ---- *Petition dismissed.*

Abdul Hadi, J.

**Rajammal (died) v.
The Idol of Sri Thanthonne-
swaraswami by hereditary trustee
K.Appathurai.**

16th November, 1992.

S.A.No.464 of 1982 and C.M.P.No.15259
of 1982.

(A) *Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.1(3) (as amended by Act of 1979) - Tenancy created prior to amendment - Act, if applies to.*

(B) *Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.9 - Right to purchase vacant site - Claim for - Separate written application, if necessary.*

(C) *Tamil Nadu City Tenants' Protection Act (III of 1922), Secs.9 and 9-A - Tenant filing application for receiving additional written statement and supporting affidavit denying title of landlord - Additional written statement not received by Court - Tenant, whether could be said to have denied title of landlord - Denial of title of landlord after filing of suit for eviction - Tenant if disentitled to benefits of Act.*

The respondent filed a suit, by its hereditary

trustee for the possession of the suit land after removal of the superstructure put up therein by the appellant and for a sum of Rs.144. The defendant-appellant claimed the benefits of the Tamil Nadu City Tenants' Protection Act in the written statement and did not file any separate application for it. The appellant also denied the title of the landlord to the suit site in an application for acceptance of additional written statement and the supporting affidavit. But the additional written statement was not received. The trial Court held that the appellant was not entitled to the benefits of the Act as he did not establish that the tenancy began prior to 1955. On appeal, the lower appellate court set aside the decree and judgment of the trial court and directed the appellant to deliver possession of the suit land after removing the superstructure. The lower appellate court did not deal with the question whether the appellant was entitled to the benefits of the Act. The appellant preferred an appeal. The respondent contended that as the appellant did not file a separate application under Sec.9 of the Act, he was not entitled to claim the benefits of the section and that he was not entitled to purchase the site as he had denied the title of the landlord. The appellant on the other hand contended that the denial of title was only in application for receipt of additional written statement which should not be taken and subsequent to the filing of the suit.

Held: The trial Court was in error in assuming that only to tenancies prior to 1955, the Act applies. In view of the amendment to Sec.1(3) of the Act by the Amendment Act of 1979 which came into force from 3.3.1980, the Act will be applicable even to a tenancy which came into being prior to the said amendment. There is also no dispute and that the abovesaid tenancy came into being prior to 3.3.1980.

The decisions in the *Mouna Mutt Kuttalai Estate v. Andiappan*, 82 L.W. 77 (S.N.) and *Raghava Naicker v. Abdul Hussain Hazarally and Co.*, 1936 M.L.N. 1096, holding that a separate written application under Sec.9 of the Act was not necessary lay down the correct law.

It cannot be contended that what is contained in the additional written statement and the supporting affidavit to the application should not be taken

note of in deciding the suit. The said additional written statement, though was not actually received, in view of the dismissal of the application for its reception, yet the affidavit filed in support of the said application cannot be said to be not a part of the record in the suit. There in a sworn statement, the defendant has stated that she has denied the title of the plaintiff to the suit site and if she is not allowed to file the said additional written statement she would be put to great loss. So from the said affidavit itself, it is clear that the defendant has denied the title of the landlord/plaintiff.

The principle on which (1990)1 L.W.46, held that the denial of title would disentitle the defendant to get the benefits of the Act would equally apply to a case where denial of title is subsequent to the commencement of the suit.

M.N.Padmanabhan, for Appellant.
M.V.Krishnan, for Respondents.

B.S. ---- *Appeal dismissed.*

K.S.Bakthavatsalam, J.

**R.Srinivasan v.
Government of Tamil Nadu.**

14th October, 1992.

W.P.No.12676 of 1992.

(A) Education - Admission - Applications for - Not in order or bereft of particulars - Effect.

(B) Education - Admission cannot be granted contrary to rules and regulations and against conditions of admission as noted in the prospectus.

The petitioner who belongs to a Backward Class and is a handicapped person appeared for the entrance examination for B.L. evening course for the academic year 1992-93. He applied for the course under the handicapped quota. According to newspaper reports, he was selected against the quota. But he did not receive any intimation card.

He contacted the Principal of the Law College, Madras, but did not get any response. He filed a petition for the issue of a writ of *mandamus* directing the respondents to admit the petitioner in the B.L. evening course. The respondent contended that another candidate who had secured more marks than the petitioner in the entrance examination was selected under the category of Schedule Tribe, that the later as he informed that he belonged only to a Backward Class and was handicapped and that therefore he might have to be selected in the place of the petitioner as he had got more marks.

Held: It is well-settled that in cases of admission, the applications have to be rejected if they are not in order or bereft of particulars. When a candidate sends an application form with incorrect particulars, the result always will be that the application has to be rejected summarily.

The petitioner should not suffer because of the action of the respondent authorities who have erred in discharging their duties as per the norms prescribed for admission. The respondent cannot take shelter stating that a candidate who described himself as belonging to a schedule tribe now wants to get an allotment in the backward community-handicapped quota stating that he belongs to backward community. If the admission is granted contrary to the Rules and Regulations meaning thereby against the conditions of admission as noted in the prospectus, the respondent cannot take such a stand before this Court and try to explain why the petitioner has not been admitted into the B.L. course even though he was selected. Hence, the respondents are directed to admit the petitioner into the B.L. three year evening degree course.

K.S.Gnanasambandam, for Petitioner.
Sundaresh, Government Advocate, for Respondents.

B.S. ---- *Petition allowed.*

*Ratnam and
Somasundaram, JJ.*

**L.Lakshmikantham v.
The Tindivanam Co-op. Urban Bank Ltd.**

21st September, 1992.

W.A.No.281 of 1989.

Constitution of India (1950), Art.311(2) - (After the Forty-second amendment) - Domestic enquiry - Delinquent not supplied with copy of enquiry report along with second show cause notice proposing punishment issued by disciplinary authority - Final order passed - Legality.

It is the settled position of law that where the disciplinary authority and the enquiring authority are different authorities and when the enquiry officer sends a report of the enquiry proceedings to the disciplinary authority, the delinquent is entitled to a copy of the report of the enquiry officer and the failure on the part of the disciplinary authority to send a copy of the report of the enquiry officer to the delinquent along with the second show cause notice proposing the punishment would amount to violation of the principles of natural justice and will render the final order illegal.

B.S. ---- *Appeal allowed.*

Srinivasan, J.

**Arumugasamy v.
The Divisional Development Office,
Cheranmahadevi, Tirunelveli District,**

16th September, 1992.

W.P.Nos.7591 and 9423 of 1992.

Constitution of India (1950), Art.226 - Natural justice - Tamil Nadu Water Supply and Drainage Board installing overhead tank in a village imposing condition that individual house service connections, should not be given - Panchayat passing resolution

to provide house service connection and giving connection to certain persons - Beneficiaries filing writ petitions to enforce such right - If maintainable.

Under the Rural Water Supply Scheme, the Tamil Nadu Water Supply and Drainage Board installed an overhead tank for the benefit of the villagers of Kundakulam Panchayat in 1988. While handing over charge of the tank to the Panchayat, the Board imposed a condition that no individual house service connection should be given. The District Collector of Tirunelveli issued an order in 1988 to all the Panchayat Union Commissioners that no individual house service connection should be given from the overhead tanks installed under the above scheme. The Commissioner of the Radhapuram Panchayat Union also passed a similar order to all the Presidents of the Panchayats within his jurisdiction. However, the Kudankulam Panchayat passed a resolution in April, 1989 to provide house service connection and gave connection to some persons. The petitioners in W.P.No.7591 of 1992 filed a writ petition for the issue of a writ of *mandamus* directing the respondents to disconnect all the service connections thus given. The petitioners in W.P.No.9423 of 1992 filed the petition for forbearing the respondents from disconnecting the connections without furnishing the particulars of G.O.No., Rules, directions referred to in the notice sent by the respondents.

Held: On the facts referred to, the petitioners cannot claim any right in them to continue the water connections given to their houses. The very basis of giving connections to their houses was illegal and it was pursuant to a resolution passed by the Panchayat contrary to the instructions given by the authorities and contrary to the conditions stipulated at the time of handing-over the overhead tank to the Panchayat. When the connections given to the petitioners were based on an illegality at the inception, they cannot claim any right to have them continued and contend that they are entitled to get some more particulars from the authorities concerned. All the relevant particulars were made available to them in the counter-affidavit filed by the first respondent in W.P.No.11292 of 1990. Apart from that no particulars are necessary to be given to the petitioners herein or the petitioners in W.P.No.9423 of 1992.

In any event, it has been held by the Supreme Court in several cases that the principle of natural justice need not apply as a matter of rule in every case. They can be excluded in certain cases. In the present case, it has been pointed out by the authority that it is against the interest of the general public of the village to grant house service connection as they would not be able to have sufficient supply of drinking water if individual house service connections are given. That is why even when the tank was handed-over to the Pan-chayat, a condition was imposed. When it is against the interest of the public at large, the Court should take into account only such interest and should not give credit to the grievance of a few individuals of the village. Particularly, when the said benefits were given to the said individuals by the authorities illegally. Hence, the petitioners in W.P.No.9423 of 1992 have no right to be enforced under Art.226 of the Constitution of India. They cannot contend that the connections given to their houses should be continued on the only ground that they have not been furnished with the orders of the authorities and the documents referred to by the authorities in their notice.

P.Peppin Fernando, for Petitioner.

V.R.Rajasekaran, Government Advocate, for Respondent Nos.1 and 3.

B.S. ---- *W.P.No.7591 of 1992 allowed/
W.P.No.9423 of 1992 dismissed.*

Bellie, J.

**Indirani Ammal v.
E.Chandra.**

4th September, 1992.

A.S.No.452 of 1992.

(A) Transfer of Property Act (IV of 1882), Sec.35 - Scope of - "Some transaction" - Transactions if should be under one document only.

Sec.35 of the Transfer of Property Act contemplates 'some transaction' and not 'same instrument'. To be the same transactions, the

transaction need not necessarily be under one document only.

(B) Evidence Act (I of 1872), Secs.107 and 108 - Effect of - Burden of proof that a person is alive - When shifted to person affirming it.

A combined effect of Secs.107 and 108 of the Evidence Act would show that it is only upon proof that a person concerned has not been heard of for seven years by those who would have naturally heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive.

N.Varadarajan, for Appellant.

R.Srinivasan and A.L.Somayaji, for Respondent.

B.S. ---- *Appeal partly allowed.*

Swamidurai, J.

**A.Radhakrishnan v.
Auvadai Ammal.**

3rd September, 1992.

C.R.P.No.1096 of 1992.

Civil Procedure Code (V of 1908), O.6, Rule 17 - Suit for permanent injunction restraining defendants from interfering with his possession - Defendants claiming that they were in possession of suit properties - Plaintiff therefore filing petition to amend the plaint praying for declaration that he is absolute owner of the suit property or in the alternative for a direction to defendants to deliver vacant possession of suit properties - Amendment held must be allowed.

The petitioner originally filed a suit for a permanent injunction restraining the defendants from interfering with his peaceful possession of the suit properties and for costs. The defendants stated in the written statement that they were in possession of the suit properties. Therefore, the plaintiff filed an application for amendment seeking two new prayers, (i) for a declaration that the plaintiff was the absolute owner of the suit property, and (ii) for

a direction to the defendants to deliver vacant possession of the plaint properties failing which to direct the Officer of the trial Court to put the plaintiff in vacant possession of the suit properties. The trial Court dismissed the application holding that the amendment would change the nature of the suit. In revision,

Held: The plaintiff has stated all the facts with regard to his title and also his possession and by way of the amendment, he seeks to introduce a new prayer based on the pleadings already brought by him in the plaint. Applying the ratio in the decision in *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation*, A.I.R. 1967 S.C. 96, the plaintiff is entitled to have the plaint amended and the contention of the learned counsel for the respondents that the plaintiff is introducing a new cause of action or a new case cannot be countenanced. Even after the closing of the evidence, the plaint was allowed to be amended in the judgment reported in 93 L.W. 317. Therefore, the defendants will not be prejudiced in allowing this amendment and in the circumstances the order of the lower appellate court refusing to amend the plaint is not in accordance with law.

T.V. Ramanujam, for Petitioner.
D. Nellaiappan, for Respondents.

B.S. ---- *Petition allowed.*

Held: The tribunal has found, after discussing the evidence on record that the evidence is totally insufficient to hold that the charges are proved. Thus, the tribunal has considered the evidence on record and come to the conclusion that the findings recorded by the domestic enquiry officer are perverse. That, the tribunal is entitled to do.

Mrs. Bhagirathi Narayanan, for Petitioner.

B.S. ---- *Petition dismissed.*

Srinivasan, J.

**Jeeva Transport Corporation v.
The Industrial Tribunal, Madras.**

27th August, 1992.

W.P.No.12954 of 1992.

Industrial Disputes Act (XIV of 1947), Sec. 33(2)(b)
- Application for approval of dismissal of worker -
Findings recorded at domestic enquiry, if can be
referred by Industrial Tribunal.

D.Raju, J.

**Raja D.V.Appa Rao Bahadur v.
The Government of Tamil Nadu
by Secretary, Municipal Admini-
stration and Water Supply Depart-
ment, Madras.**

5th February, 1993.

W.P.Nos.1421 to 1428 of 1993.

(A) Madras City Municipal Corporation Act (IV of 1919), Sch.IV as amended by the Rules, Municipal Administration and Water Supply G.O.Ms.No.1178, dated 10.12.1987 - Levy of property tax - In respect of property situate in the City of Madras on and from 1.4.1993 - Whether illegal - Ultra vires of the rule making powers.

(B) Madras City Municipal Corporation Act (IV of 1919), Sec.100 - Schedule IV, Rules found thereunder - Revision of property tax - With effect from 1.4.1993 - Of the property tax in the Madras City - Based on the returns furnished by the owners/occupiers - Calling upon them to file the proforma return - Whether illegal.

(C) Constitution of India (1950), Arts.14 and 265 - G.O.Ms.No.1178, dated 10.12.1987 relating to levy of property tax - In respect of property situate in the City of Madras - On and from 1.4.1993 - Whether illegal - Ultra vires of the rule making powers - Whether violative of rights guaranteed under the Constitution.

Held: The court is of the view that the apprehension of the petitioners that the proposed revision of the property tax is sought to be made on the basis of the plinth area and not really on the annual value has no basis in law or otherwise. Apart from the candid admissions made by the second respondent in the counter affidavit filed. It is by now well settled by catena of decisions of this Court and that of the Apex Court that the rateable value of a building. Whether tenanted or self occupied is limited by the measure of standard rent arrived at by the Assessing Authority by applying the principles laid down in the Rent Act and cannot exceed the figure of the standard rent so arrived at though in a given case. It may be lower

than such standard rent. It has been held and the law as beyond controversy that within the upper limit of the rateable value of the premises so fixed the Assessing Authority would have to determine the reasonable rent by evaluating factors such as site, situation, locality and condition of the premises and the amenities thereon provided. It has been held that annual value cannot exceed the standard rent and even landlord actually receiving higher rent in an individual case matters very little for determination of the annual value for levying and collecting property tax.

There is no dispute that the proforma return, as such has not been prescribed by the State Government or that any specific authorisation of the second respondent is so made to formulate any such form. But the question would be as to whether the absence of such enabling power undermines the efficiency of the form published. The rules contained 1-C(1) prescribes the particulars that should be furnished by the owner/occupier and the period within which such form should be filed by those liable. In the light of such prescription made, the fact that a format has been devised by the second respondent for the convenience of an owner/occupier or does not militate against its efficiency merely because the format of the return itself has not been so prescribed under rules. The plea on behalf of the petitioners that no time limit or period of limitation as such could have been prescribed under the rules in the absence of specific conferment of power in this regard and the reliance placed upon two decisions of the Apex Court are incorrect and inappropriate. Unlike the ordinary rule making power that was the subject matter of consideration in the decisions of the Apex Court relied upon for the petitioners, the rules in question though made by the State Government are made after two drafts of the same is moved and placed before the Legislature and specifically approved by the State Legislature as required under Sec.347(5) of the Act. That apart, it is a well accepted principle of statutory construction that the rules in the Schedule to the Act are as much part and parcel of the statutes itself and the infirmity alleged cannot be said to exist in such cases so as to affect the legality and validity of the notification prescribing the time limit within which the return visualised has to be filed and the relevant particulars are furnished to facilitate a

time bound finalisation of the assessment proceedings to ensure the effective collection of the tax due to the second respondent.

The notification also states that if no return was filed within the notified time, the Corporation will *suo moto* revise the assessment of the property and the owner of the property shall not be entitled to file an appeal against such assessment, as per the act. The legality or otherwise of the provision disabling on assessee who has not filed his return from filing an appeal will be separately dealt with and need not concern the consideration of this stage. A reading of the rule 1-C(1) of Part 1-A would go to show that the return envisaged thereunder is not of the conventional nature as prescribed in the other taxation laws. Apart from the non-prescription of the form as such the rules contemplate a return containing certain details and information which have been stipulated by the rules themselves. Rule 2 provides also that in case of default in the filing of the return within the notified time the preparation of the return by a person authorised by the Commissioner by entering upon and making an inspection of the assessable item. As a matter of fact, the explanatory note appended to the motion of the draft rules submitted before the Legislature under Sec.47(3) of the Act.

Therefore, it could be seen that the object of the rules itself is to allow participation of the owner/occupier in the very process of assessment/revision by enabling him to disclose certain relevant details relating to the assessable item, in his own interest and even in cases of default cause such details to be ascertained by the inspection assessable item by a person authorised to facilitate assessment/revision. Even under the old rates for assessment/revision the ultimate burden to make the assessment/revision was that of the authorities and the introduction of the system of filing of a return, does not make any change in this regard, except that it extends an extent of participation in the process by the owner/occupier himself of the property concerned. Consequently, the second respondent cannot also be said to be exonerated or relieved of his duties and obligations to cause a due verification of the relevant details relating to the assessable item before proceeding to assess/revise the tax liability of an assessee, in accordance

with the well-settled principles relating to the levy and collection of property tax under the Act. Merely because the owner/occupier fails to file a return as envisaged, the second respondent cannot arbitrarily or whimsically assess/revise the liability in any manner he thinks. It is a well accepted principle of law that the phraseology "Having regard to" do not mean having regard to only those mentioned and that the authority could not take into other relevant, vital or necessary materials or particulars or that such materials not specified are excluded from consideration. Likewise the absence of guidelines issued by the council or even the existence of guidelines do not affect the exercise of power of assessment/revision objectively taking into account only the provisions in the Act, Rules and the law declared by Courts. The guidelines if any, could only fill up any gaps or at any rate, serve as guidelines and cannot either override the law or have any binding effect so as to fetter or freeze the exercise of discretion and discharge powers and duties objectively and independently. I find nothing wrong in the Commissioner being enjoined to have regard to the annual value of the assessable item as on 1st October, 1978, since that was the last of the general revisions made, for purpose of further revision now contemplated. The relevance of the existing assessment for further revision cannot totally be ruled out and no basic or legal infirmity can be said to affect the exercise made by the Commissioner, which as referred to supra, has to be only in accordance with Sec.100 of the Act and the law already declared by the decisions of this Court, keeping in view to the extent possible and permissible the rules in question.

The right of appeal, no doubt, is a creature of the law and the absence of any provision for an appeal or revision against a decision, in the context of modern development of law is viewed as a serious infirmity, particularly in view of the fundamental principle of rule of law enshrined under Art.14 of the Constitution of India. So far as the case on hand, there is no controversy that there is a right of appeal to the taxation appeal tribunal and a further appeal to the Principal Judge, City Civil Court. The question is whether the said right of appeal could be denied to an owner/occupier merely because he failed to file the return envisaged under Rule 1-C(1) of Part 1-A of the IV Schedule. The

failure on the part of the owner/occupier to file the return disclosing the details sought, as held already by me does not absolve the second respondent of his obligation and duty to verify about those details relating to the assessable item or the obligation cast upon him to act objectively and reasonably while exercising his powers of assessment/revision. Consequently, no immunity from challenge could be afforded to an assessment revision made by the second respondent even in such cases and there is no rhyme or reason in Rule 13. In a taxing law, normally orders passed *ex parte* or to the best of judgment due to the non-cooperation of the assessee to complete the assessment process, are also made subject to a right of appeal and or revision and the stipulation contained in Rule 13 not only sounds illogical, arbitrary and unreasonable, but smacks of draconian devilry and cannot be said to be justifiable for any good reason or on sound principle of law or logic. An owner/occupier, who has failed to file a return, called for, is as much entitled to file an appeal as one who has filed a return. Consequently, Rule 13 of the Part V of the IV Schedule to the Act is struck down as arbitrary, unreasonable and violative of Art. 14 of the Constitution of India and declared *null and void*.

Even under the old and substituted rules when the assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Commissioner had to give a public notice specifying the time whom and the place where the books may be inspected and stating that revision petitions will be considered if preferred within 15 days from the date of such notice and the rules also provided that in cases of enhancement in the assessment, a special notice shall issue to the owner/occupier and only after hearing the said person shall amend the assessment books. This Court in the decision reported in *91 L.W. 110*, has held that such notice of enhancement should disclose the reasons or basis for such enhancement to enable the assessee to put forward any effective objections to the same. But, the new rules, apparently for the reason that the assessment invariably would be made on the return filed provides for an assessment/revision without any such opportunity. Rule 6 provides for such an opportunity only in cases where the Commissioner, on verification made of the

particulars in the return after a general revision and before the next general revision seeks to modify the assessment already made from the date on which the assessment was made and not otherwise. No doubt, there is an appeal to the Taxation Appeal Tribunal and a further appeal to the Principal Judge, City Civil Court. A careful analysis of the rules under challenge disclose the following:

(a) After the stage of filing the return or ascertaining particulars in the absence of any such return, the Commissioner assess the property tax or revise the existing assessment of the property to tax;

(b) There is no provision for pre-decisional hearing or making representation as against the proposal of the Commissioner for revision and enhancement;

(c) No provisions exist for communicating the order passed or disclosing the reasons or basis for the enhancement of the levy or for assessment/revision;

(d) Only the supply of a property tax card, with details mentioned therein, and that too to only those who filed the return is contemplated;

(e) Provision has been made for filing an appeal to the Taxation Appeal Committee and a further appeal to the Principal Judge, City Civil Court. The appeal to the Tribunal cannot be entertained unless the appellant deposits in the Corporation the existing tax and also fifty per cent of the difference between the existing tax and the tax as assessed by the Commissioner, in the revision.

It is now well-settled that rules of natural justice or the principle of *audi alteram partem* are not rigid rules but they are not only flexible, but their application depends upon the setting and background of a statutory provisions, nature of the right which may be affected and the consequences which may entail its application or non-application. It is also well-settled that the application of the uncodified rules can be excluded by express provisions or by implication of course subject to the rights of this and the other competent authorities to adjudicate on the constitutionality of doing so. Wherever the

law contemplates by making a suitable provision for a post decisional hearing amounting to a full review of the original order on merits, it can be construed as an exclusion of the *audi alteram partem* principle and if the law is silent with regard to the giving of a pre-decisional hearing to the person affected and the decision taken by the authority involves civil consequences and no full review or appeal on merits against the decision is provided. Courts would hesitate to construe an exclusion of the duty to afford a hearing. Unless viewed pragmatically it would paralyse the administrative process or frustrate the need for utmost promptitude. The courts of law have been enjoined to always make every effort to salvage the cardinal rule of *audi alteram partem* to the maximum extent possible with situation modifications and ensure as far as possible that the person affected has a reasonable opportunity of hearing or showing cause against the proposed action against him.

So far as the cases on hand are concerned, there can be no two views on the claim of the Corporation that a revision of the property tax is long overdue and imminent, having regard to the fact that the last general revision was only in 1978 and the further facts that not only there had been steep rise in the annual value, but substantial increase in the commitments of the Corporation to provide basic amenities and that the increase in the cost of providing such amenities to the residents warrant and justify such a revision. The justification of that cannot justify the adoption of any means or procedure, ignoring completely the prejudice that may be caused to the citizen. Rule 3 obliging the Commissioner to assess the property tax and forming part of Part 1-A relating to assessment of property tax does not exclude the principles of natural justice. Unlike the earlier set of rules there was no opportunity given to make representations by means of a revision to the Commissioner before actually amending or revising or enhancing the assessment and enforcing the same. The rules are silent about giving of any reasons or disclosing the basis of enhancement either before or immediately thereafter by serving any order or proceeding except supplying a property tax card, apparently containing the details relating to property, annual value fixed and the property tax assessed to be paid. In the absence of any of those details or

disclosure of the basis or reasons for enhancement, it would not hold the assessee to effectively even vindicate or his rights in the appeal provided for and formulate the grounds on which the enhancement can be challenged. As a matter of fact, prior to the impugned amendments and even under the earlier rules when an occasion like this arose, this Court in the decision in *91 L.W. 110*, pointed out all these and emphasised the need for disclosing the basis and reasons for enhancement. The Legislature has not and could not be said to have nullified or altered the said position of law by the impugned amendments, particularly in the absence of specific rule or provision to the contrary. The insertion of Rule 21-A to the extent that notwithstanding anything contained in any rule "in this part" it shall not be necessary for the Commissioner to serve any notice for the levy and collection of property tax under Sec.98 cannot have the effect of disposing with the requirements of principles of natural justice at the stage of assessment/revision and enhancement of the levy by the Commissioner. This is obvious from the fact that Rule 21-A has been inserted in Part VI relating to collection of taxes and the rule is also meant to be a *non obstante* clause in respect of anything contained to the contrary or in any rule in Part VI and not the other parts of the IV Schedule particularly Part I-A.

There can be no serious controversy the position that the assessment, levy and collection of tax involve civil consequences. The rules relating to assessment are also silent on the exclusion of the principles of natural justice at the stage of assessment or revision as the case may be. While so, merely from the fact that after an assessment or revision, there is a provision for appeal particularly when the rules do not cast an obligation on the Commissioner to write an order with reasons and communicate them to the assessee, for enabling the assessee to effectively challenge the assessment or enhancement of the tax made. The long lapse of time between the present revision proposed and the earlier general revision in 1978 or the justification or imminent need for a general revision is no ground to jettison the application of rules of fair play. Instead suitable directions may and have to be issued to adjust and harmonise the need for speed and also the obligation to set fairly and modify the measure of its application in

reasonable proportion to the exigencies of the situation. The assessment and communication of the demand either in the form of a notice or the property tax card or both need not necessarily be in the beginning or the first day of the commencement of the half year and it may be either in the course of the first half year or by the close of the succeeding half year concerned (*Vide* Rule 20(3)). This would be in conformity with the mandate of Sec.100(2) of the Act that the annual value of lands and buildings shall be deemed the gross annual rent at which they may 'at the time of assessment' reasonably be expected and inevitably the assessment is an event to follow the date of commencement of the half year concerned. In view of the above the second respondent would not suffer any damage or injury by being directed to adhere to the principle of natural justice to the required possible extent. Consequently, though there is no justification to stall the assessment process set in motion by the issue of the impugned notification under the rules under challenge, it is necessary, for the second respondent to serve a provisional notice containing the proposed revision and the reasons or basis for the enhancement before passing final orders under Rule 3 and give the assessment atleast a period of 15 days time to submit the objections of the assessee and consider them before passing final orders of assessment/revision under rules, though not a personal hearing at that stage. This procedure shall be adopted in respect of all irrespective of the fact whether they filed a return or not as called for under the impugned notification. The adoption of the said course would be in the best interests of both parties before this Court.

For all these reasons stated above, the court summarises its conclusions and directions in the matter as hereunder:

(1) The assessment/revision of the property tax shall be only in accordance with Sec.100 of the Act on the annual value to be ascertained and determined on the principle laid down in *A.I.R. 1980 S.C. 541*, *A.I.R. 1985 S.C. 339* and *(1978)1 M.L.J. 93: 91 L.W. 110*, as also conceded by the second respondent.

(2) The owners/occupiers liable to submit their returns shall have further time to do so till 28th

February, 1993 and the returns may be either in the same format or any other form but must contain all the relevant details and information stipulated in the format and rules or such further or other details relevant for the purpose.

(3) On receipt of the said returns and even where there are no returns filed, the Commissioner shall be at liberty to proceed with the assessment process by serving a provisional notice of enhancement wherever there is reasons for the enhancement giving atleast 15 days time to enable the assessee to file their representations against the proposal, consider the said objections and pass final order, amending the books of assessment.

(4) The assessment so made shall be effective from the first half year of 1993-94 (with effect from 1-4-1993) as notified subject to the provisions governing revision and appeals.

(5) The provisions of Rule 13 is struck down as arbitrary unreasonable and violative of Art.14 of the Constitution of India and consequently *null and void*. The assessee shall be entitled to file an appeal or submit their representations irrespective of the fact whether they have actually filed the returns or not.

(6) Subject to the above declaration and directions, the respondent shall be entitled to and be at liberty to proceed further with the assessment process initiated by the notification issued on 3.1.1993, and

(7) The impugned rules issued in G.O.Ms.No.1178, Municipal Administration and Water Supply, dated 10.12.1987, published in the Tamil Nadu Government Gazette (Extraordinary) dated 10.12.1987 are held valid, but their enforcement shall be subject to the declaration of law and directions given above in this order.

These writ petitions shall stand ordered in the manner and to the extent indicated above. In all other respects the relief claimed shall stand rejected.

K.C.Rajappa, for Petitioner.

P.Sathasivam, Government Pleader, for Respondent No.1.

N.R.Chandran, Senior Counsel for Respondent No.2 conducted by *N.Kannadasan*.

[Full report of the above judgment will be published shortly - Ed.]

R.S. ----- *Petitions ordered.*

A.R.Lakshmanan, J.

**P.Manogaranc, Secretary, The
Pondicherry Bar Association,
Pondicherry v.
Union of India, Union Territory
of Pondicherry represented
by the Chief Secretary,
Government of Pondicherry.**

21st January, 1993.

W.P.Nos.3642, 9391 and 14035 of 1992.

(A) Pondicherry Judicial Service Rules (1980), Rule 8, 9, 11, 12, 30 and 31 - Scope - Appointment of officers to Junior Scale of Pondicherry Judicial Service under Rules 8 and 9 - Proper procedure - Person appointed to Junior Scale (Grade II) not joining post, but serving in executive post - If can be promoted to Junior Scale (Grade I) - Promoting executive officer to discharge judicial functions, if violative of basic structure of the Constitution.

Held on facts: The appointment of the 3rd respondent in the post of Junior Scale (Grade II), Pondicherry Judicial Service, by invoking Rule 8 of the Pondicherry Judicial Service Rules (1980), is bad since the initial recruitment under the Rules were already done earlier. Rule 8 is a transitory provision. It works itself out as the first recruitment is over. Therefore, Rule 8 even though continues in the statute book, shall cease to have effect, use and force for being invoked for the second or third time. Initial recruitment having been made in

respect of the entire sanctioned strength of the service, there cannot be subsequent second initial recruitment in respect of the same posts as and when vacancies arise in the said post on account of retirement etc. of initially recruited officers.

Further, a bare look into the *bio-data* of the 3rd respondent shows that all the offices listed in the *bio-data* and the service particulars are neither judicial nor part of any judicial service, but are appointments under the control of the executive. It is also not disputed that he never acted in any judicial office. Hence, the 3rd respondent was not qualified for appointment as an officer in the Junior Scale (Grade II), Pondicherry Judicial Service and later to be promoted to Junior Scale (Grade I) of the Pondicherry Judicial Service.

Needless to state that the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution of India.

Nor could the appointment of the 3rd respondent be sustained under Rule 9 of the Rules. For regular appointment under Rule 9 read with Rules 11 and 12 of the Rules, a person in Government Service cannot be hand-picked and considered without resorting to Rule 12. Any such selection shall be wholly violative of not only Rule 12 of the Rules, but also Arts.14 and 16 of the Constitution of India. Equality of opportunity of public employment and guarantee against discrimination are constitutional rights which cannot be violated by the Government, much less by the High Court be it in the administrative or judicial jurisdiction.

The 3rd respondent after his appointment to the Pondicherry Judicial Service did not join the service and failed to submit himself to the control of the High Court under Art.235 of the Constitution of India. As a matter of fact, the 3rd respondent continued in the Law Department and even enjoyed several promotions in that department. Hence, a person who had not joined the service cannot claim seniority, promotion and other benefits in the said service. For this reason, the promotion of the 3rd respondent in the higher post of Junior Scale (Grade I) of the Pondicherry Judicial

Service cannot be sustained.

The 3rd respondent, who is essentially an executive officer, cannot be promoted to discharge judicial functions violating the basic structure of the Constitution of India, viz., the rule of law and the independence of the judiciary.

If the 3rd respondent's promotion from Junior Scale (Grade II) to Junior Scale (Grade I) without a day's experience in the lowest post could be sustained, similar promotion from Junior Scale (Grade I) to Senior Scale (Grade II) and then to Senior Scale (Grade I) can also be sustained. In such an event, a person could be given paper appointment to a lower post in the judicial service and allowed to work indefinitely outside the Pondicherry Judicial Service in the executive wing of the Government and one fine morning he could be promoted and appointed as a the Senior most District Judge without any experience as Munsif and Subordinate Judge. If the same analogy is extended, the said person even without working as District Judge, on paper may claim for consideration for appointment to the High Court. If such a thing is allowed to happen, it will be a travesty of independence of judiciary and dispensation of justice and separation of judiciary from executive.

The quality of justice will depend upon the quality of the men who preside over the judiciary and hand down the judgments. Inducting into the judiciary, more particularly, subordinate higher judiciary, men, from the executive who have no proper training and experience in judiciary, shall almost to denial of justice which is a basic structure of the Constitution. Every litigant is entitled to have his case judged by a qualified, trained and experienced judge and not by any other men. Denial of the same shall be violative of a citizen's constitutional right to have real and proper justice.

(B) Constitution of India (1950), Art. 226 - Pondicherry Judicial Service - Ineligible persons appointed in contravention of relevant Rules - Locus standi of Pondicherry Bar Association to challenge by filing writ of certiorari or quo-warranto.

The present writ petitions filed on behalf of the Pondicherry Bar Association are maintainable as

the members of the Bar are aggrieved parties and have personal interest in the independence of judiciary, rule of law and dispensation of justice. Writ of *certiorari* shall also lie in this case since the petitioners individually and the Pondicherry Bar Association are aggrieved persons as their interest and rights are affected inasmuch as the 3rd respondent's appointment both to Junior Scale (Grade II) and Junior Scale (Grade I) of the Pondicherry Judicial Service were made even though he was not eligible and was not recruited in accordance with Rules. Writ of *quo warranto* shall also issue in this case since the 3rd respondent's appointment to the post of Junior Scale (Grade II) and his subsequent promotion to Junior Scale (Grade I) were made in contravention of the Recruitment Rules as he was not eligible to those posts and the methods adopted to recruit and promote him were contrary to the Rules.

(C) Constitution of India (1950), Art. 226 - Writ of certiorari or quo-warranto challenging appointment to a post - If and when liable to be dismissed on the ground of laches.

Even though the 3rd respondent was selected to the post of Junior Scale (Grade II), Pondicherry Judicial Service and his appointment was notified in the Gazette on 2.7.1984, he had not joined the service as a judicial officer for more than seven years and eight months and had not discharged judicial functions in any court until he was promoted to the post of Junior Scale (Grade I), Pondicherry Judicial Service on 28.2.1992. Hence, the writ petition filed on 11.3.1992 immediately on his assumption of charge in the promoted post is not belated. The writ petition can be filed immediately after the assumption of office by the 3rd respondent. Since, the 3rd respondent had not joined the service and assumed the judicial post until 28.2.1992, the writ petition was not filed challenging his appointment and the same was filed as soon as he assumed charge of the office. Hence, it is not hit by laches.

Further, each day the 3rd respondent is in office it gives rise to fresh cause of action. No usurper can sustain his position on the ground of long usurpation, that too, when public interest is affected. Public interest shall override individual inconvenience or injury. Standard of vigilance demanded

from a party seeking remedy to his personal benefit as against another individual, cannot be bodily imported in cases instituted in general and public interest. As regards cases in which illegal acts affecting public interest are exposed, the principle to be applied shall be "better late than never" since Rule of Law and majesty of justice shall prevail above all men and matters.

However, the case of respondents 2 to 5 in the other writ petition is different. They were inducted under the Pondicherry Judicial Service Rules, 1980, as early as 2.7.1984 and if the petitioner wanted to challenge their appointment, he should have done so in 1984 itself. Hence to file a writ petition after eight years is an abuse of the process of courts and the petitioner is trying to unsettle the settled things. Hence, the writ petition is not maintainable.

Even in a *quo warranto* the High Court can reject an application if it is affected by laches.

(D) Pondicherry Judicial Service Rules (1980), Rule 8 - Rule providing for appointment of 'Legal Advisers to Government' as District Judges - If ultra vires Art.233(2) of the Constitution of India.

Obiter: Rule 8 of the Pondicherry Judicial Service Rules insofar as the same provides for the appointment of 'Legal Advisers to Government' as District Judges (Senior Scale in the Pondicherry Judicial Service) is *ultra vires* Art.233(2) of the Constitution of India. As such, any rule and/or appointment made in contravention of Art.233(2) of the Constitution shall be illegal and *ultra vires* the Constitution. Hence, an executive from the law department cannot be appointed to Higher Subordinate Judiciary.

(E) Constitution of India (1950), Arts.233 to 237 - Gist of the provisions discussed.

G.Masilamani, Senior Advocate for *T.P.Manoharan*, for Petitioner in W.P.Nos.3642 and 9391 of 1992. *S.Mahimai Raj*, for Petitioner in W.P.No.14035 of 1992.

R.Krishnamurthi, Senior Advocate, for *K.S.Ahmed*, Government Pleader, Pondicherry for Respondent Nos.1, 2 and 4 in W.P.Nos.3642 and 9391 of 1992 and for Respondent No.1 in W.P.No.14035

of 1992.

R.Muthukumaraswami for *S.Mala* and *P.Punithavathi* for Respondent No.3 in W.P.Nos.3642 and 9391 of 1992 and for Respondent No.6 in W.P.No.14035 of 1992.

N.R.Chandran, Senior Advocate for *S.Manikumar*, for Respondent Nos.2 to 5 in W.P.No.14035 of 1992.

A.S.Venkatachalamoorthy, Special Government Pleader, for Respondent No.5 in W.P.Nos.3642 and 9391 of 1992 and for Respondent No.7 in W.P.No.14035 of 1992.

V.K.

Order accordingly.

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REPORTS

[1993

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Miss.Kantha Kumari Bhatnagar, C.J.
and Srinivasan, J.*

W.A.No.1503 of 1988 *8th July, 1992*

**Hindustan Petroleum Corporation Ltd., by
Deputy General Manager ... Appellant
v.**

**The Inspector of Labour, Madras-6 and others
... Respondents.**

Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act (1981), Sec.5(b) and R.6(4) of the Rules framed under the Act - Persons claiming benefits under Act - Procedure to be followed by Labour Inspector - Discussions held with the persons and management - No settlement reached - Inspector proceeding to pass orders - Sustainability of order.

Respondents 2 and 3 claiming to be entitled to the benefits of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act filed a petition before the Labour Inspector on 11.2.1984. The Inspector issued a notice to the appellant and a counter statement was filed by the appellant. A reply to that statement was filed. The Labour Inspector held discussions on 6.8.1984 and 18.8.1984 and finally on 4.9.1984. No settlement could be reached. The Labour Inspector passed an order dated 20.9.1984 directing the appellant to confer permanent status on respondents 2 and 3. The appellants filed a writ petition which was dismissed. In appeal, it was contended that the appellant was not given a proper opportunity to prove its stand.

Held: The Act as well as the Rules contemplate that the Inspector in charge shall make such enquiry as may be necessary to decide whether the claim put forward by the persons concerned is true or not. In the present case, the claim of

respondents 2 and 3 was that they were entitled to be conferred permanent status in view of the fact that they were workmen within the meaning of the Act and that they had put in the period of service as required by the Act. But the procedure adopted by the Inspector in this case does not seem to be in consonance with the provisions of the Act and the Rules. After finding that there can be no settlement between the parties, the Inspector ought to have given an opportunity to both the parties to produce relevant evidence to substantiate their respective cases. In the absence of such an opportunity, it is certainly open for the affected party to contend that the order of the Inspector of Labour is vitiated. *[Para 11]*

Appeal under Clause 15 of the Letters Patent against the Order of Mohan, J., dated 15.7.1988 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.127 of 1985 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 1st respondent in D.Dis.No.865 of 1984 and quash his orders No.D.Dis.865 of 1984, dated 20.9.1984.

M.R.Narayanaswami, Senior Counsel, for *T.S.Gopalan, P.Ibrahim Kallifullah and S.Ravindran*, for Appellant.

M.A.Sadanand, Government Pleader and *K.M.Ramesh*, for Respondents.

The Judgment of the Court was delivered by *Srinivasan, J.*:- The appellant is a corporation which according to their stand engages the services of certain persons as pump-fitters on specific contracts. According to the appellant, such fitters are engaged only on contracts for particular work and such persons who are employed by the appellant are entitled to work for others also. In short, the case of the appellant is that such persons are free-lance fitters.

2. The respondents 2 and 3 claimed that they are entitled to the benefits of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981. They filed a

petition before the Inspector of Labour under the said Act on 11.2.1984. They claimed that they were working as pump-fitters for five years prior to that date and they were being paid wages at Rs.530 and Rs.350 respectively per mensem. Their complaint was that their names were not shown in the register of permanent employees. The Inspector of Labour issued notice to the appellant and a counter-statement was filed by the appellant. In the said statement, the appellant took the stand that the respondents 2 and 3 were free-lance fitters who were free to take up any assignment and that they were not required to work under the supervision of the officials of the appellant-corporation. It was also stated that there was no compulsion they should attend to the break-down calls of the dealers of the appellant. It was also stated that they are not required to report at the office of the appellant-Corporation.

3. A reply to the said statement was filed on 6.8.1984. Unfortunately, a copy of the same is not made available to us. It is seen from the order of the Inspector of Labour that he had discussions with the parties on several dates. The first discussion was on 6.8.1984. On that date, the respondents filed their statement dated 4.8.1984 and along with it, they filed a wage slip and copies of letters issued by the appellant-corporation and its predecessor. On that date, the appellant-corporation was not present for the discussion.

4. Again discussions were held on 18.8.1984. It was represented by the appellant that it would discuss the issue with the head-office and try to settle the matter including payment of arrears from 1982 to respondents 2 and 3 herein. The matter was adjourned further. Final discussions were held on 4.9.1984, on which date both the parties reported since there was no settlement, they stick to their original stands taken in the statements dated 15.6.1984 and 4.8.1984 respectively.

5. The Inspector of Labour proceeded to pass an order on 20.9.1984. After referring to the discussions, he extracted the provisions of the Act and referred to the documents filed before him by the parties along with their respective statements. Ultimately, he observed as follows:

"There is no dispute with regard to the number of years of service put in by the petitioners as they are employed from 1972 and 1978 respectively. Even on the day of meeting on 18.8.1984, the respondent-management expressed their

willingness for a discussion of the issue of permanency with their head-office and to try to settle the issue including the payment of arrears from the year 1982. But they did not do so for the reasons best known to them and stuck to their original stand. On the other hand, the petitioners and the union have filed their records along with their letter dated 4.8.1984 to substantiate their stand. Even from the enclosures sent by the respondent-corporation with their letter dated 15.6.1984 it is proved beyond doubt that the petitioners are workmen coming under the definition of Sec.2(4) of the above Act, 1981, and they are entitled to inclusion of their names in the register of workmen in Form No.1 under Rule 6(1) of the Rules, 1981 and the respondent-management should have exhibited the list as per Rule 6(2)."

6. He concluded that on the materials placed by the parties before him at the time of the enquiry conducted by him on various dates, he was convinced that respondents 2 and 3 were workers as defined in the Act and they have got prescribed service as stipulated in Sec.3(1) of the Act for conferment of permanent status to them. Hence, by exercising the powers conferred by Rule 6(4) of the Rules framed under the Act, he directed the appellant-management to confer permanent status to respondents 2 and 3 on the date on which they had completed the service as contemplated in the Act and issue necessary orders in that regard.

7. Aggrieved by the said order, the appellant filed W.P.No.127 of 1985. The writ petition was heard by a learned single Judge of this Court and by order dated 15.7.1988, the writ petition was dismissed. The learned Judge referred to the three letters which were produced by respondents 2 and 3 before the Inspector of Labour along with the statement dated 4.8.1984. The first letter was dated 1st March, 1972, It was written by Esso, the predecessor of the appellant corporation, introducing one of the respondents as their new company fitter. It was addressed to one of the dealers. The next letter is dated 20.5.1975. It was written by the appellant. In that letter, one of the respondents was introduced as a new pump fitter for Tirunelveli area. In that letter that is a reference about his salary being fixed at Rs.400 per month. It is also stated that in addition to the salary, actual conveyance and batta of Rs.5 per day is to be paid for staying outside headquarters. The last letter is

dated 21.5.1975 again by the appellant-Corporation to all the dealers in Tirunelveli sales area and introducing one of the respondents as the Company's fitter.

8. Relying on the above letters, the learned Judge held that it was not open to the management to contend that respondents 2 and 3 are not their workmen within the meaning of the Act. The learned Judge proceeded to observe as follows:

"The management is trying to set up this case presently without laying any foundation before the officer concerned. It wants to take advantage of its own omission and cries hoarse saying that no opportunity has been given. As a matter of fact, I was even inclined to grant a remand. But, the reason why I refuse is, if the management is grossly negligent in putting forth its case, it cannot now be allowed to improve its case, when the three documents clinch the issue. The proceedings of the Inspector of Labour will have to be necessarily upheld. It is found that the workmen and the union have filed a record along with their letter dated 4.8.1984 to substantiate their stand."

The learned Judge then dismissed the writ petition upholding the order of the Inspector of Labour.

9. In this appeal it is contended by learned counsel for the appellant that a proper opportunity was not given to the appellant-Corporation to prove its stand taken before the Inspector of Labour. It is stated that in the course of discussion a representation was made that the matter shall be settled by consulting with the head office and in the next discussion when the Inspector of Labour was informed that there was no settlement, he proceeded to pass the order impugned in the writ petition, without any enquiry. According to learned Counsel, if an enquiry had been held by the Inspector of Labour, the appellant would have proved that respondents 2 and 3 were not workmen as defined by the Act and they were only contractors for service and not contractors of service.

10. Sec.2(4) of the Act defines "workman" as a person employed in any industrial establishment to do any skilled or unskilled, manual, supervisory, technical or electrical work for hire or reward, whether the terms of employment be express or implied. It is not necessary to refer to the exceptions mentioned in the definition. Sec.3 of the Act provides for conferment of permanent

status to workmen if certain conditions are satisfied. Sec.4 of the Act provides for appointment of Inspectors. The powers and duties of such inspectors are set out in Sec.5 of the Act. Under Sec.5(b) of the Act, the Inspector may, within the local limits for which he is appointed, make such examination of the industrial establishment and of any registers, records and notices and take on the spot or elsewhere the evidence of such person as he may deem necessary for carrying out the purposes of the Act. In the Rules framed under the Act, Rule 6 provides for maintenance of registers by employers, Rule 6(4) is relevant for the purpose of this case. It reads as follows:

"Any employee who finds his name not entered in the list referred to in Sub-rule (2) or finds that the entries have not been made correctly or finds that though entries regarding his service have been made correctly but he has not attested the entries in the register of workman in Form I may make a representation to the Inspector concerned. The Inspector after examining the representation or after making enquiries may issue suitable directions to the employer for the rectification of the register in Form 1 or for the issue of orders conferring permanent status to the workman concerned."

Rule 6(4) contemplates examination by the Inspector of the representation and making enquiries and thereafter issuing suitable directions to the employer for the rectification of the register, if necessary.

11. Thus, the Acts as well as the Rules contemplate that the Inspector incharge shall make such enquiry as may be necessary to decide whether the claim put forward by the persons concerned is true or not. In the present case, the claim of respondents 2 and 3 was that they were entitled to be conferred permanent status in view of the fact that they were Workmen within the meaning of the Act and that they had put in the period of service as required by the Act. But the procedure adopted by the Inspector in this case does not seem to be in consonance with the provisions of the Act and the Rules. After finding that there can be no settlement between the parties, the Inspector ought to have given an opportunity to both the parties to produce relevant evidence to substantiate their respective cases. In the absence of such an opportunity, it is certainly open to the affected party to contend that the order of the Inspector of Labour

is vitiated.

12. In the present case, no doubt some documents were filed by respondents 2 and 3 along with their letter dated 4.8.1984. Similarly, the appellant could have also filed documents along with the statement dated 15.6.1984. Undoubtedly, the appellant filed an enclosure with the statement dated 15.6.1984, but the copy of which is not made available to us. We do not know what exactly the enclosure contains. In the statement dated 15.6.1984, it is stated that the enclosure is a copy of the bill submitted by one of the free-lance fitters wherein he had clearly indicated that he is a contractor of Hindustan Petroleum Corporation Ltd. If that statement is correct, then the document is certainly relevant for the purpose of deciding the question whether respondents 2 and 3 are workers or not. But no reference is made to the document by the Inspector in his order.

13. Reliance is placed on the Letters issued by the appellant in 1975 and its predecessor in 1972. No doubt, they refer to one of the respondents as company's fitter and they also refer to the salary fixed. But the specific case of respondents 2 and 3 in the statement filed before the Inspector of Labour as well as in the Counter affidavit filed in the writ petition is that they were employed for five years prior to the presentation of the petition to the Inspector of Labour. That would take them to 1979 only. Whether they should be pinned down to that statement and whether the documents of 1973 and 1975 on which reliance is now placed by them are relevant or not have to be considered and that can be done only if proper opportunity is given to respondents 2 and 3 to explain their statement made in the first petition given to the Inspector of Labour and the statement made in the counter affidavit in this Court.

14. Thus, we are satisfied that both sides did not have sufficient opportunity to put forward their respective cases and establish the same before the Inspector of Labour. It is the only ground on which we think that the matter should go back to the Inspector of Labour. We are not deciding the merits of the case as to whether respondents 2 and 3 are workmen within the meaning of the Act. That can be decided only after entire evidence is recorded and considered by the authority in question, namely, the Inspector of Labour, II Circle, Madras-600 006.

15. We are aware that the matter is very old and the

interests of justice require an early disposal of the matter. The Inspector of Labour is directed to conclude the enquiry on or before 30.9.1992. Both parties shall place all the records on which they want to rely before the Inspector of Labour within the time to be given by him for such purpose. If any party is at default with regard to filing of records, such party has to suffer. The matter should not be prolonged beyond 30.9.1992.

16. The writ appeal is allowed with the above direction. The order of the learned single Judge dated 15.7.1988 made in W.P.No.127 of 1985 and the order of the Inspector of Labour dated 20.9.1984 are set aside and the matter is remanded to the file of the Inspector of Labour, II Circle, Madras-600 006 for fresh disposal in the light of the observations made above and in accordance with the relevant provisions of Law. There will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Ratnam, J.

C.R.P.No.1840 of 1992 *4th September, 1992 and
25th September, 1992.*

P.Premchand Bandhia

... Petitioner

v.

Mrs. Yashbala R.Prohit

... Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Secs.2(6), 10(8) and 10(3)(a)(i) - Tamil Nadu Buildings (Lease and Rent Control) Rules (1974), Rule 11(3) - Eviction petition signed and verified by general power of attorney agent - Maintainability - Bona fide requirement of landlady held established.

It is seen from Secs.2(6) and 10(8) of the Act as well as the Rules, that a general power of attorney agent, as in this case, duly empowered to initiate proceedings in eviction, can also sign and present applications for and on behalf of the principal and

such an application cannot be said to be not maintainable for the reason that it has not been signed by the landlady herself. The signing of the application as well as the verification therein, by the general power of attorney, as in this case, cannot be regarded as a defect, which affects the jurisdiction of the Controller to entertain the application.

[Para 7]

In other words, a general power of attorney agent, as in this case, when he signs the application for eviction, under Rule 11(3) of the Rules, it shall be as good as having been signed by the applicant landlady herself. Thus, on a due consideration of the provisions of the Act, the contents of the power executed by the landlady in favour of the agent and on the facts of this case, it cannot be said that there was any violation of Rule 11(3) of the Rules framed under the Act and the application for eviction was rightly entertained.

[Para 7]

Held on facts that the need of the landlady to join her husband along with her children, in a premises of her own, cannot be characterised to be lacking in *bona fides*.

[Para 10]

Cases referred to:

Basdeo v. John Smidt, I.L.R. 22 All. 55 (Paras 4 and 7).

A.S. Subbaraj v. M. Muthiah, (1953) 2 M.L.J. 377: A.I.R. 1954 Mad. 336 (Paras 4 and 7).

Pahalajmal Khatumal v. K. Govindarajulu, 74 L.W. 828: (1961) 1 M.L.J. 150 (Paras 4 and 6).

Abdul Ravooof v. South Indian Tanners & Dealers Association, Ranipet, 76 L.W. 589 (Paras 4 and 7).

Jamena Beevi v. Easwarlal Patel, (1979) 2 M.L.J. 355 (Paras 4 and 7).

Bichawa v. M. Venkatesan, 92 L.W. 589 (Para 6);

Rajitram v. Kateswarnath, 18 All. 396 (Para 7).

Petition under Sec. 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended Act 23 of 1973 praying the High Court to revise the order of the Appellate Authority, Court of Small Causes (VII Judge), Madras, dated 27.4.1992 and made in R.C.A.No.1080 of 1990 (R.C.O.P.No.1550 of 1986 on the file of the Court of the Small Causes (XIII Judge), Rent Controller, Madras.

K. Doraisami, Senior Counsel, for *M/s. Muthumani Doraisami, S. Venkateswaran and T. Mathivanan*, for Petitioners.

R. Sundaravaradhan, Senior Counsel, for *M/s. P.B. Ramanujam and J.R.K. Bhavanantham*, for Respondent.

The Court made the following

ORDER: 4.9.1992: This civil revision petition, at the instance of the tenant, has been preferred against the order of eviction passed against the petitioner, by the Appellate Authority, on an application taken out by the respondent herein, under Sec. 10(3)(a)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act 23 of 1973 (hereinafter referred to as 'the Act'). Briefly stated, the circumstances giving rise to this C.R.P., are as follows:

The premises bearing door No. 60, Ellis Road, Madras-2, belongs to the respondent and the petitioner is in occupation of the first floor in that property, as a tenant, on a monthly rent of Rs. 625. The respondent was in occupation, as a tenant, of door No. 4, IV Cross Road, C.I.T. Colony, Madras-4, belonging to one Sri T.A. Ramachandran and the furniture and other house-hold articles belonging to her, were kept in the rented premises, when the landlady was obliged to be away from Madras and the respondent as well as the other members of her family, stayed in the rented premises, whenever they were in Madras. In order to secure her own premises for her use and occupation, as she did not have any other residential premises of her own in the city of Madras, the respondent issued a notice to the petitioner on 16.9.1984 calling upon him to vacate and hand over vacant possession, for which, the petitioner sent a reply declining to comply with the demand. The respondent stated that she requires the premises in the occupation of the petitioner for her own use and occupation, viz., residence for herself and other members of her family whenever they are at Madras and also for keeping her furniture and other household articles, valuables, etc., and that she *bona fide* requires the first floor in the occupation of the petitioner for her own use and occupation. Accordingly, she prayed for an order of eviction against the petitioner under Sec. 10(3)(a)(i) of the Act.

2. In the counter filed by the petitioner, he put forward the plea that the petitioner was not residing as a tenant at Door No. 4, IV Cross Road, C.I.T. Colony, Madras-4 and further denied that the respondent did not own any other property in the city of Madras. That the respondent was *bona fide* in need of the building, was also denied by the petitioner. Stating that the respondent belongs to Gujarat and her husband was employed, in the

Sultanate of Oman and she is permanently settled with her husband at Muscat, the petitioner questioned the *bona fides* of the requirement of the respondent and prayed for the dismissal of the eviction petition.

3. Before the Rent Controller (XIII Judge, Court of Small Causes), Madras, on behalf of the respondent, Exs.P-1 to P-4 were marked and P.Ws.1 and 2 gave evidence, while, on behalf of the petitioner, Exs.R-1 to R-6 were filed and R.Ws.1 and 2 were examined. In the course of the proceedings before the Rent Controller, the petitioner also raised an objection that the application for eviction filed by the respondent, was defective, in that, it did not conform to the requirements of Rule 11(3) of the Rules framed under the Act. On a consideration of the oral as well as the documentary evidence, the learned Rent Controller took the view that the eviction petition filed by the respondent had been signed by the power of attorney agent of the respondent and not by herself and that would render the application for eviction not maintainable. Dealing with the question of *bona fides* of the requirement of the respondent, the Rent Controller found that the inaction of the respondent from 1981-82 to 1984 and again between 1984 and 1986, in the matter of taking proceedings against the petitioner seeking his eviction, would throw doubts on the *bona fides* of the requirement of the respondent and that, therefore, the respondent was not entitled to an order of eviction as prayed for by her. Ultimately, the Rent Controller dismissed the eviction petition filed by the respondent, against which, the respondent filed R.C.A.No.1080 of 1990, before the Appellate Authority (VII Judge, Court of Small Causes), Madras. On a consideration of the definition of the word 'landlord' under Sec.2(6) of the Act and the contents of the power of attorney, the Appellate Authority took the view that the power of attorney empowered the agent to initiate action for eviction and the verification of the application having been made in accordance with the terms of the power, the conclusion of the Rent Controller that the application was not maintainable, as there was no compliance with Rule 11(3) of the Rules framed under the Act, was not correct. In addition, the Appellate Authority, on a consideration of the evidence of P.Ws.1 and 2 and R.W.1, found that the respondent did not own any other residential premises of her own, but that she was a tenant in Door No.4 IV Cross Road,

C.I.T. Colony, Madras-4 and that she and the members of her family, whenever they visited Madras, stayed in the rented premises and the respondent cannot be denied the relief of eviction against the petitioner on the ground that such a claim lacked in *bona fides*. On the conclusions so arrived at, the Appellate Authority reversed the order of the Rent Controller and ordered eviction of the petitioner from the premises in his occupation, the correctness of which is questioned in this C.R.P.

4. In support of the revision, learned counsel for the petitioner, inviting attention to Rule 11(3) of the Rules framed under the Act, contended that the eviction petition had been signed, verified and presented by the power of attorney agent of the respondent and this is in violation of Rule 11(3) of the Rules, which requires the application to be signed by the applicant and his counsel. Elaborating this, learned counsel pointed out that the signing of the application should be done by the applicant and his counsel, though the presentation of the application to the Controller or the officer authorised by him, may be either by the applicant personally or by his recognised agent or counsel and that, in this case, there has been a violation of the first part of Rule 11(3) of the Rules, requiring the signing of the application by the landlady. On the other hand, learned counsel for the respondent, referring to the power of attorney, marked as Ex.P-1 and Secs.2(6) and 10(8) of the Act, submitted that the power of attorney himself is the landlord for the purposes of the Act, in this case, as there was no restriction on the scope of his authority, as contemplated under Sec.10(8) of the Act and that there was no violation whatever of Rule 11(3) of the Rules, under those circumstances. Maintaining that the signing and verification of an application, are matters collateral to the main application, and would not in any manner affect the jurisdiction of the court to entertain the application, learned counsel invited attention to the decisions reported in *Basdeo v. John Smidt*, I.L.R. 22 All. 55 and *A.S.Subbaraj v. M.Muthiah*, (1953) 2 M.L.J. 377: A.I.R. 1954 Mad. 336. In addition, reference was also made to the decisions reported in *Pahalajmal Khatumal v. K.Govindarajulu*, *Power of Attorney Agent of T.V. & Bros. and Abhaichand Vendavan*, 74 L.W. 828: (1961) 1 M.L.J. 150, *Abdul Ravoof v. South Indian Tanners & Dealers Association*, Ranipet, 76 L.W.

589, *Jameena Beevi v. Easwarlal Patel*, (1979)2 M.L.J. 355.

5. From the eviction petition filed, it is seen that Mr. M. Subramania Rao, in his capacity as the power of attorney agent of the respondent, has signed the application as well as the verification and had also presented it. Ex.P-1, dated 4.1.1984 is the general power of attorney executed by the landlady in favour of the power of attorney agent. From the provisions of Ex.P-1, it is seen that the agent has been authorised to receive rents, damages for use and occupation, in respect of the property bearing Door No.60, Ellis Road, Madras-600002, issued valid receipts and discharges for the payments received, induct tenants, execute lease deeds and receive advance of rents, in respect of whole or portions of the property, to institute suits, petitions and proceedings for ejectment and possession of whole or portions of the property, to sign and verify complaints, petitions, pleadings, for the purpose of institution of suits, petitions and proceedings, to levy execution of decrees, obtained in suits, petitions and proceedings and take delivery of possession, to take possession of properties and be in actual possession of whole or portions of the property and to do all other acts incidental to secure the aforesaid objects. Further, the landlady has also undertaken to ratify all the acts done by the agent within the scope of the power. Under Sec.2(6) of the Act, which contains an inclusive definition of the expression 'landlord', a person receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another, or as an agent, trustee, etc., would also be a landlord. Sec.10(8) of the Act provides that a person, who is receiving or is entitled to receive the rent of a building, merely as an agent of the landlord, shall not, except with the previous written consent of the landlord, be entitled to apply for the eviction of a tenant. Considering the scope of the power executed by the landlady in favour of the agent, that cannot be construed to be one executed merely for the receipt of rents of a building, without anything more. In other words, in view of the wide scope of the authority conferred on the agent by the landlady in this case, under the terms of Ex.P-1, he would himself be the landlord, for the purposes of the Act under Sec.2(6) of the Act and the signing and verifying of the application for eviction by the agent, has to be regarded as having been done by the landlady herself.

6. In *Pahalajmal Khatumal v. K. Govindarajulu, Power of Attorney Agent of T.V. & Bros. and Abhaichand Vendavan*, (1961)1 M.L.J. 150: 74 L.W. 828, the order of eviction was assailed on the ground that the agent of the landlord, who filed the eviction petition, was not authorised to file such a petition. The learned District Judge took the view that the general power of attorney conferred the necessary power upon the agent and was not against the tenor of Sec.7(7) of the Tamil Nadu Buildings (Lease and Rent Control) Act 1949. In dealing with the contention that the eviction petition was not maintainable because the agent was only collecting the rent, Srinivasan, J. pointed out that the argument that notwithstanding that the agent holds a general power of attorney, which specifically includes the power of attorney agent to take steps in eviction proceedings, on behalf of the landlord, even then, there should be a separate written consent for that purpose, could not be accepted and that the power of attorney rendered the agent competent to appear, continue, prosecute and defend all the legal proceedings and that included a right to take eviction proceedings and therefore, the application filed by the agent, was maintainable. In *V. Bichawa v. M. Venkatesan*, 92 L.W. 589, a Division Bench has approved of the view taken by Srinivasan, J. in *Pahalajmal Mutumal v. K. Govindarajulu Power of Attorney Agent of T.V. & Bros. and Abhaichand Vendavan*, (1961)1 M.L.J. 150: 74 L.W. 828.

7. In *Abdul Ravoof v. The South Indian Tanners & Dealers Association, Ranipet*, 76 L.W. 43 (S.N.), it was held that an application laid by a non-member paid secretary authorised by a resolution of the Executive Committee of the Association, responsible for carrying on the administration, according to the objects of the Association to sign applications for eviction and to engage counsel for the conduct of proceedings before, the appropriate forums, was not in any way repugnant to the provisions of the Madras Buildings (Lease and Rent Control) Act 18 of 1960, as the application was competently laid by the Secretary acting as the representative of the registered Society. In *Jameena Beevi v. Easwarlal Patel*, (1979)2 M.L.J. 355. Ramprasad Rao, C.J., had occasion to consider the question of the maintainability of an application filed by a power of attorney agent under the terms of the power of attorney, which enabled the agent to initiate proceedings for eviction of the

tenants, fixation of fair rent, etc., before the competent authorities. It was held that the definition of the word 'landlord' under Sec.2(6) of the Act, would include a power of attorney agent and so long as such agent was not merely an agent for collection of rent, proceedings in eviction could be initiated and that an undertaking given by the power of attorney in that case, satisfied the requirements of Sec.14(2)(b) of the Act. It is thus seen from Secs.2(6) and 10(8) of the Act as well as the Rules, that a general power of attorney agent, as in this case, duly empowered to initiate proceedings in eviction, can also sign and present applications for and on behalf of the principal and such an application cannot be said to be not maintainable for the reason that it has not been signed by the landlady herself. The signing of the application as well as the verification therein, by the general power of attorney, as in this case, cannot be regarded as a defect, which affects the jurisdiction of the Controller to entertain the application. It would be useful in this connection to refer to *Rajitram v. Kateswarnath*, 18 All. 396 (M), where a Full Bench of the Allahabad High Court observed that it would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court. Again in *Basdeo v. John Smidt*, I.L.R. 22 All. 55 at 61, the learned Judges, quoted with approval the following passage from *Mr. Venflee's Law of Collateral Attack on Judicial Proceedings*. 'The statutes require many kinds of petitions to be verified. This includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty and in some States, complaints or petitions in all cases. Such verification adds no allegation to the pleadings and tenders no issue. Its only object is to show the good faith of the petitioner..... Like any other formal merits, its absence is waived by a failure to object and if its entire absence does not affect the jurisdiction, of course, more defects in it cannot'. The observations to similar effect in *A.S.Subbaraj v. M.Muthiah*, (1953)2 M.L.J. 377: A.I.R. 1954 Mad. 336, may also be referred. Venkatarama Ayyar, J. dealing with the question of the need to dismiss an election petition for defective verification, took the view that defective verification is a mere irregularity and does not affect the jurisdiction of the court to entertain the proceeding, notwithstanding the fact that the rule provided that the

verification shall be in the manner prescribed therein. Even on the footing that the application for eviction and the verification therein had been made by the general power of attorney and not the landlady, that would at best be a mere irregularity and would not in any manner affect the jurisdiction of the Rent Controller to entertain the petition. It is also significant that while the first part of Rule 11(3) refers to signing by the applicant and his counsel, the latter part relating to presentation speaks of the same by the applicant himself personally or by his recognised agent. The difference in the language employed in the first and latter parts of the rule is also not without significance, as, in the latter part, the presentation should be by the applicant personally or by recognised agent, while, with reference to the signing by the applicant, it has not been stated that it should be signed personally by the applicant. In other words, a general power of attorney agent, as in this case, when he signs the application for eviction, under Rule 11(3) of the Rules, it shall be as good as having been signed by the applicant herself. Thus, on a due considerations of the provisions of the Act, the contents of the power executed by the landlady in favour of the agent and on the facts of this case, it cannot be said that there was any violation of Rule 11(3) of the Rules framed under the Act and the application for eviction was rightly entertained.

8. Learned counsel for the petitioner next contended that the application for eviction filed by the landlady lacked in *bona fides*. According to learned counsel, the landlady is a citizen of United Kingdom and cannot at her will, visit this country and if she is not able to obtain the necessary visa, there is no question of her coming down to India for the purposes of staying in the premises in the occupation of the petitioner and this would establish that the requirement is not *bona fide*, but oblique and motivated. On the other hand, learned counsel for the respondents submitted that the evidence of P.Ws.1 and 2 clearly established that the respondent as well as the members of her family were living here in a rented house and had also kept their furniture, valuables and other belongings in the rented house and the respondent desired only to have her own premises for keeping her house-hold articles and other valuables and to use the same whenever she came down to this country. Indeed, learned counsel

drew attention to the specific evidence of P.W.2 to the effect that she was preparing to come down to this country once and for all with bag and baggage and that would necessitate her staying permanently in this country and contended that when her husband is already here and she desires to join him along with her children, the requirement of that purpose, cannot at all be characterised to be lacking in *bona fides*.

9. The premises in the occupation of the petitioner is the only residential building in the City owned by the landlady. There is no dispute regarding this. Though the petitioner denied that the landlady was in occupation of a tenanted premises, Ex.P-2 clearly establishes that she was in occupation of the first floor of Door No.4, IV Cross Road, C.I.T. Colony, Madras-4, as a tenant under one Mr.T.A.Ramachandran. The husband of the landlady, examined as P.W.1, has also spoken to this. The petitioner, examined as R.W.1, had also accepted that the husband of the landlady is living in Door No.4, IV Cross Road, C.I.T. Colony, Madras-4 and that he was permanently staying in Mylapore and whenever he was in Madras, he used to stay at that place in C.I.T. Colony. R.W.1 also accepted that from 1968, the landlady had let out her premises and was living in a rented premises. From this, it is seen that the landlady was in the occupation of a rented premises only. Though in the course of his evidence, the petitioner, as P.W.1, stated that the husband of the landlady owned door No.58, he admitted that that building was a non-residential building. The landlady or any member of her family, is thus established to be not occupying a residential building of their own in the City of Madras. The only other requirement to be made out is the *bona fides* of the claim. In this connection, the evidence of P.Ws.1 and 2 is relevant. P.W.1 in his evidence, had stated that he had retired in 1984, after serving in Muscat in 1980. He had also spoken to the landlady and his second son having come down to India in 1986, to enable his son to complete his studies in Ahmedabad. Referring to his coming down to Madras in 1989. P.W.2 stated that he intended to stay here permanently and that his wife and second son were expected to come down in August or September, 1989. P.W.1 also referred to his temporary stay in a room in the house belonging to his brother and stated that he cannot stay there permanently. P.W.1 had also referred to his wife having stayed for 25

years in the building from 1956 till 1981 and that his wife and another daughter had also decided to come down to this place. A suggestion that his wife and second daughter are going to permanently stay in U.K. was denied by him. Yet another suggestion that the application for eviction was the outcome of a refusal to accede to the demand for payment of enhanced rent, was also denied by P.W.1. P.W.1 had also stated that whenever his wife and other children desired to come, they could do so. Examined as P.W.2, the landlady stated that she came down to India on 26.11.1989 and that she was proceeding to London on 21.3.1990 to bring back the family with bag and baggage. In the course of her cross examination, P.W.2 stated that at the time of her examination in Court on 20.3.1990 she was a tenant of door No.44, Habibullah Road, T.Nagar, Madras-17 and its owner was one A.R.Srinivasan, P.W.2 further stated that the premises in the occupation of the petitioner, was required for her own use and the use of her husband and family. She also stated that she cannot permanently stay in the U.K., but that she can go out. A suggestion that she did not have any idea whatever of coming down and staying at Madras, was denied by her. Yet another suggestion that the refusal of the petitioner to pay a higher rent occasioned in the filing of the eviction petition, was denied by her. The petitioner, examined as R.W.1, stated that P.W.1 was living permanently in Mylapore as a tenant in Door No.4, IV Cross Road, C.I.T. Colony, Madras-4 and that he used to stay in that place in C.I.T. Colony, Madras-4, whenever he came down from Muscat. R.W.1 also stated that there was a demand for enhanced rent and that he was not agreeable, though he also accepted that he had not stated so in his counter. The brother-in-law of the petitioner examined as R.W.2, in his evidence stated that in 1982, the landlady was residing as a tenant in C.I.T. Colony and that she and her husband used to come down. He had also referred to the demand for enhanced rent and the refusal of the petitioner to pay that. In his cross examination, he admitted that he had not received summons for giving evidence and that at the instance of his uncle, he came and gave evidence.

10. On a consideration of the evidence thus made available, it is seen that though P.W.1 earlier was outside this country in connection with his work, he has since retired and is now permanently in

Madras, living in a small room belonging to his brother. The landlady has also in her evidence as P.W.2, stated that she is desirous of coming down to Madras along with her children. The evidence also discloses that the landlady and the members of her family, whenever they are in Madras, have been staying only in a rented premises, either in C.I.T. Colony or in some other place. The need of the landlady, wife of P.W.1 to join her husband along with her children, in a premises of her own, cannot be characterised to be lacking in *bona fides*. Though it was said that the landlady and her children may not be permitted to come down to India, that in my view, is not really decisive of the question of *bona fides*, especially when the evidence clearly establishes that on a prior occasion, the landlady and her children had been here along with P.W.1 and had stayed here also. The only other circumstance that was sought to be put against the respondent as showing lack of *bona fides*, was that there was a demand for a higher rent and the petitioner refused to pay the same. To support this, there is absolutely no material. The petitioner had not even raised a plea to this effect in the counter filed by him, though something about that had been stated in the oral evidence. There is no other material at all to doubt the *bona fides* of the requirement of the landlady. A consideration of the available materials, clearly establishes that the landlady, whose husband is now permanently in Madras, is desirous of joining him along with the children or other members of the family, and to come to live with her husband permanently in Madras and that requirement of the landlady is clearly established to be genuine and *bona fide* and not oblique or motivated. The appellate authority was, therefore, quite right in its conclusion in this regard. No other point was urged. The C.R.P., is, therefore, dismissed with costs.

11. At the conclusion of the hearing of the revision, counsel on both sides were asked to inform the court about the time that may be required in the event of the order of eviction passed by the appellate authority being upheld. Learned counsel for the respondent was fair enough to agree to grant four months' time to the petitioner for vacating and handing over vacant possession of the premises in the occupation of the petitioner, but learned counsel for the petitioner wanted a year's time, to which, learned counsel for the

respondent was not agreeable. Under those circumstances, the petitioner is granted four months' time from today to vacate and hand over vacant possession of the premises in his occupation to the respondent, but this will be subject to the petitioner filing an affidavit of undertaking to that effect before this Court within 10 days from to-day, failing which, the order of eviction can be put into execution forthwith.

The Court made the following

ORDER 25-9-1992: While disposing of C.R.P.No.1840 of 1992 on 4.9.1992, four months time from that date was granted to the petitioner to vacate and hand over vacant possession of the premises in his occupation to the respondent, but that was made subject to the filing of an affidavit of undertaking by the petitioner in the civil revision petition to that effect before this Court within ten days from 4.9.1992. What was intended was the filing of an affidavit of unconditional undertaking by the petitioner, as a condition precedent for the grant of time. The affidavit now filed does not conform to the order passed. Therefore, that part of the order in the C.R.P. granting time, will stand deleted.

V.K.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Padmini Jesudurai, J.

O.S.A.Nos.75 and 76 of 1985 29th July, 1992.

N.Babu Janardhanam ...Appellant
v.

**M/s.Golden Films (P) Ltd., (In Liquidation) by
Official Liquidator, High Court, Madras and
another** ...Respondents.

Companies Act (I of 1956), Secs.456, 457 and 460 - Companies (Court) Rules (1959), Rule 272 - Winding up of company - Official Liquidator appointed - Property of company whether vests in Official Liquidator - Liquidator selling movable and immovable property and actionable claim of company with sanction of court - Sale whether required confirmation by court - Liquidator's acts

affecting property of company - Right of creditors and contributories to move court - Principles applying to court sales under C.P.C., whether applies to sale by Liquidator.

In dealing with a case of a company, on a winding up order being made, the property of the company does not vest in the Official Liquidator as in the case of insolvency. The property of the company remains the property of the company and the liquidator is only given custody of the property. Sec.456 of the Companies Act, 1956 leaves no ambiguity in this behalf. The liquidator thus appointed gets his powers under Sec.457 of the Act with the sanction of the court for the sale of the movable and immovable property and actionable claims of the company by publication or private contract with power to transfer the whole thereof to any person or body corporate or to sell the same in parcels. But even this power has been subject to the right given to the creditors and contributories under Sec.457(3). It may be pertinent to say that the liquidator's custody of the company under liquidation is next to that of the court and for any act affecting the properties of the company under liquidation, he has to obtain the sanction of the court and if there is any act of the liquidator in this behalf not acceptable to the creditors and contributories, they have been given the right to move the court for suitable directions and orders. If the facts of the instant case are seen in the light of the aforementioned legal provisions, it has to be noticed that the order of the court directing the liquidator to sell the property to the first respondent-Corporation only conforms to the rule that the liquidator on his own could not sell the property; he had to do so only with the sanction of the court. The order to sell which, in the instant case, came in the hands of the liquidator stipulated conditions that the corporation had to pay a sum of Rs.5 lakhs within one week of the order and the remaining 15 lakhs of rupees on delivery of possession. There is nothing on the record to show how the liquidator without any sanction of the court devised a mode of delivery of possession in parcels also received payments from the corporation in instalments. There were some acts of the Official Liquidator affecting the properties which undoubtedly gave to the creditors and the contributories occasion to come to the court to question the conduct of the liquidator and that of the purchaser-Corporation and the object to

the confirmation of the sale in favour of the corporation. A mere glance at Rules 272 of the Companies (Court) Rules, 1959 is enough to convince that liquidator must have first the sanction of the court to sell the property and after such sanction alone he should sell the property. After sale, there is a requirement of confirmation by the court because the sale by the liquidator with the previous consent of the court unless confirmed will not become final. The principles which apply with respect to the court sale under O.21 and confirmation under Rule 92, C.P.C. as prescribed thereunder are applied with respect to the sale by a liquidator with the consent of the court or under the orders of the Court. [Paras 5, 6, 7, 8 and 9]

Cases referred to:

Navalka and Sons v. Ramanys Doss, A.I.R. 1970 S.C. 2037. (Para 4).

Amba Tankin and Pharmaceuticals v. Official Liquidator, (Bombay 45 Comp.Cas. 457 @ 465). (Para 4).

Universal Dyestuff Industries, In re., 63 Comp.Cas. 842 (Para 9).

Taj Clay Works Ltd. v. Official Liquidator, A.I.R. 1960 A.P. 429: (1960)30 Comp.Cas. 434: 1960 An.L.T. 320 (Para 9).

Brindaban Agarwala v. Official Liquidator, Saraswathi Soap and Oil Mills Ltd., (1952)22 Comp.Cas. 75: A.I.R. 1952 All. 113 (Para 9).

Soundararajan v. Khake Mohamed Ismail Saheb, A.I.R. 1940 Mad. 42: 186 I.C. 11 (Para 9).

Appeal under Clause 15 of the Letters Patent read with O.36, Rule 11 of Original Side Rules and Sec.483 of the Companies Act against the order of Shanmukham, J., dated 19.4.1985 and 11.3.1985 and made in the exercise of the Ordinary Original Civil Jurisdiction.

P.Seshadri for *N.S.Nandakumar*, *R.Mahesh* and *R.Radhakrishnan*, for Appellants.

G.Viswanathan, for Respondent No.1.

N.Veeramani for *S.Seshadri*, for Respondent No.2.

The Judgment of the Court was delivered by *Mishra, J.*:- These two appeals arise out of a proceeding in C.P.No.30 of 1963. Since our judgment in O.S.A.No.76 of 1985 is going to give to the appellant in O.S.A.No.75 of 1985 opportunity to have a say at the stage of confirmation of sale of the property in question we propose to deal with only the order in Application No.768 of 1984 in C.P.No.30 of 1963.

2. Most of the facts are admitted on all sides and

they only need a narration. Briefly stated however, the facts are that by an order in C.P.No.30 of 1963 the Golden Films Private Ltd., hereinafter referred to as 'the Company', was directed to be wound up and the Official Liquidator was appointed as the Liquidator thereof. A sister concern of the Golden Films (P) Ltd. by name Golden Studios (P) Ltd. was also ordered to be wound up in C.P.No.8 of 1972. By an order dated 23.12.1976 a learned single Judge of this Court directed sale of 23 acres and 66 cents of land belonging to the company to Mrs.B.Sakunthala, the appellant, for a consideration of 22 lakhs payable in six equal monthly instalments. She, however, paid no instalment and thus, the question of sale came up for consideration again. Some persons gave their offers of amounts higher than Rs.22 lakhs but the learned company Judge decided to order for the sale in favour of the Central Warehousing Corporation, hereinafter referred to as 'the Corporation', for a sum of Rs.20 lakhs only. The learned Judge, it seems, had reasons for doing so although the amount offered by the Corporation was less than the amount offered by others.

3. The order, however, in this behalf stipulated that the Corporation shall pay a sum of Rs.5 lakhs within one week from the date of the order viz., 17.12.1976 and the balance within a week after taking delivery of possession. It appears, however, that the Corporation paid a sum of Rs.5 lakhs within one week of the order but delivery of possession of the entire extent of land sold was not effected on one date but on several dates and the balance of amount of Rs.15 lakhs of the purchase money of Rs.20 lakhs was also not paid in one lump sum as ordered but in different instalments. So much so even though the entire property was handed over to the Corporation it kept some money with it and deposited it later on applications in the proceedings before the learned company Judge.

4. The appellant, aforementioned, however, raised several objections and filed a petition saying that she intended to purchase the property and objected to the sale in favour of the Corporation. The learned company Judge, however, who has disposed of the petition, (No.768 of 1984), noted as follows:

"The present applicant would now seek is set aside the sale deed pursuant to the order made on 17.12.1976 on the ground that the

purchaser was shown certain concessions by the Official Liquidator himself in the former making the payments, that the Official Liquidator had arbitrarily delivered possession of the property at various stages, that there were felling down of trees by the Official Liquidator without the permission of the court and that virtually from and out of the income of the property, the first respondent purchaser had made the payments subsequently. It is emphasised by Mr.V.Suresham, learned counsel for the applicant that the total payment came to be made more than two years, after the date of the order directing the sale. The learned counsel also brought to my notice the decision of the Supreme Court in *Navalka and Sons v. Ramany Doss*, A.I.R. 1970 S.C. 2037, and also the decision in *Amba Tankin and Pharmaceuticals v. Official Liquidator, Bombay*, 45 Comp.Cas. 457 @ 465). He would submit that the sale is yet to be confirmed by this Court and, therefore, this court has the competence to interfere and pass such necessary orders as would promote the interest of the members of the company as also its creditors. It is no gainsaying that the application is laid eight years after the said order and also that the price of immovable property has shot up beyond imagination. But for the escalation in price, I am quite certain that the present application would not have been before this Court."

"In view of the order made by Suryamurthy, J. I am unable to entertain the argument that the sale made to the first respondent is subject to confirmation of court. I had already referred to the text of the order, in particular the direction that the Official Liquidator shall execute a sale deed in favour of the Central Warehousing Corporation. There is also specific direction directing the Official Liquidator to sell 23 acres and 66 cents of land, building, etc., belonging to the company to the Central Warehousing Corporation for a sum of Rs.20,00,000. Thus the court itself had directed sale and also directed the Official Liquidator to execute the sale deed. In the teeth of such directions, it is impossible to countenance the argument that the sale is subject to confirmation of court. On the other hand, there had been a sale by this Court itself except that the Official Liquidator was called upon to execute a sale deed to accept

the purchase price and to effect delivery of the property to the purchaser-first respondent."

"If the parties were really aggrieved against the said order made by the learned Judge, their remedy is to have preferred an appeal. That was not done. The order has, therefore, become final and sitting in the company court I shall respect it. Above all, it is relevant to notice that an attempt to review the said order was negatived by the same learned Judge in C.A.No.656 of 1976. Thus, it is patent that the order of the learned Judge dated 17.12.1976 had become final."

5. It has to be borne in mind, however, in dealing with a case of a company, that on a winding up order being made the property of the company does not vest in the Official Liquidator as in the case of insolvency. The property of the company remains the property of the company and the liquidator is only given custody of the property. Sec.456 of the Companies Act, 1956 leaves no ambiguity in this behalf as it says,

"(1) Where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled."

and sub-sec.(2) thereof reads,

(2) All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding-up of the company."

6. The liquidator thus appointed gets his powers under Sec.457 of the Act with the sanction of the court for the sale of the movable and immovable property and actionable claims of the company by publication or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels. But even this power has been subject to the right given to the creditors and contributories under sub-sec.(3) thereof which reads as follows:

"Sec.457. Powers of Liquidator: (3) The exercise by the Liquidator in a winding-up by the Court of the powers conferred by this action shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of the powers conferred by this

section."

The law in various provisions of the Companies Act has given to the Official Liquidator many freedoms to deal with the assets of the company under liquidation but the control of the Court has been acknowledged at every place and besides, the Court's power in this behalf, as noticed above, under sub-sec.(6) of Sec.460 of the Act wherein it is stated that,

"(6) Any person aggrieved by any act or decision of the liquidator may apply to the court; and the Court may confirm, reverse or modify the act or decision complained of, and made such further order as it thinks just in the circumstances."

certain rights to the creditors and the contributories such as the one in sub-sec.(1) of Sec.460 of the Act, which reads,

"Sec.460: Exercise and control of liquidator's powers: (1) Subject to the provisions of this Act the liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection" are given."

7. It may thus be pertinent to say that the liquidator's custody of the company under liquidation is next to that of the court and for any act affecting the properties of the company under liquidation, he has to obtain the sanction of the Court and if there is any act of the liquidator in this behalf not acceptable to the creditors and contributories, they have been given the right to move the court for suitable directions and orders. If we see the facts of the instant case in the light of the aforementioned legal provisions, we have to notice that the order of the court directing the liquidator to sell the property to the first respondent-Corporation only conforms to the rule that the liquidator on his own could not sell the property; he had to do so only with the sanction of the court. The order to sell which, in the instant case, came in the hands of the liquidator stipulated conditions that the corporation had to pay a sum of Rs.5 lakhs within one week of the order and the remaining 15 lakhs of rupees on delivery of possession. There is nothing on the record to show how the liquidator without any sanction of the court devised a mode of delivery of possession in parcels also received

payments from the corporation in instalments. These were some acts of the Official Liquidator affecting the properties which undoubtedly gave to the creditors and the contributors occasion to come to the court to question the conduct of the liquidator and that of the purchaser-Corporation and the object to the confirmation of the sale in favour of the Corporation.

8. What has really struck most to us is the approach taken by the learned company Judge that since the court ordered for sale in favour of the Corporation the sale became final and no confirmation of sale was required by the court thus in effect taking away altogether the right of the creditors and contributories to complain to the Court about the violations of the order of sale by the Corporation and the liquidator. We have Companies (Court) Rules, 1959 framed by the Supreme Court of India after consulting the High Courts, in exercise of the powers conferred by sub-secs. (1) and (2) of Sec. 643 of the Companies Act in which rules with regard to sales by the Official Liquidators have been framed. Rule 272 says,

“272. Sale to be subject to sanction and to confirmation by Court: Unless the Court otherwise orders, no property belonging to company which is being wound up by the court shall be sold by the official liquidator without the previous sanction of the court and every sale shall be subject to confirmation by the court.”

A mere glance at this rule is enough to convince that liquidator must have first the sanction of the court to sell the property and after such sanction alone he should sell the property. After sale, there is a requirement of confirmation by the court because the sale by the liquidator with the previous consent of the court unless confirmed will not become final.

9. A Division Bench of the Gujarat High Court dealt with a case of sale of property of a company under liquidation as directed by the court in the case of *Universal Dyestuff Industries In re.*, 63 Comp.Cas. 842. That was a case in which the learned company Judge directed the liquidator to sell the property to the highest bidder. The court, however, declined to confirm the sale. One of the highest bidders appealed. The Bench hearing the appeal noticed the argument of the learned counsel, similar to the one dealt with by the learned company Judge in the instant case, in these words:

“Mr. Shah, learned counsel appearing for the

appellant, mainly contended that the direction dated December 11, 1987, has specifically given powers to the provisional liquidator to sell all the articles on an “as and where is” basis after inviting offers from the intending purchasers and accepting the highest offer. Thus, from the order itself, it is clear that the Court has impliedly given confirmation of the provisional liquidator accepting the highest offer for the articles in question, Mr. Shah further submits that there is automatic confirmation of the offer of the highest bidder. In support of his contention, Mr. Shah invited our attention to the decision in the case of *Taj Clay Works Ltd. v. Official Liquidator*, A.I.R. 1960 A.P. 429; (1960) 30 Comp.Cas. 434; 1960 An.L.T. 320. This decision has followed the rulings in *Brindaban Agarwala v. Official Liquidator, Saraswathi Soap and Oil Mills Ltd.*, (1952) 22 Comp.Cas. 75; A.I.R. 1952 All. 113 and *Soundarajan v. Khake Mohamed Ismail Saheb*, A.I.R. 1940 Mad. 42; 186 I.C. 11. In this Andhra Pradesh Judgment, it has been specifically held in paragraph 8 as under (at page 435 of *Taj Clay Works Ltd. v. Official Liquidator*, 30 Comp.Cas.):

“The observations of the learned Judges in that case are pertinent in the present context:” It is only right and proper that the sale should be subject to the confirmation of the court. The condition is a safeguard against irregularity of fraud in connection with the sale and against property being sold at an inadequate price’.

This principle has been strictly followed in the present case also. The observation and the principles enunciated in this decision and other decisions referred to above clearly support the order passed by the learned judge.”

Dealing further with the law on the subject in the above judgment, *Universal Dyestuff Industries, In re.*, 63 Comp.Cas. 842, it is said that,

“Sec. 457 of the Companies Act, 1956, deals with the powers of the liquidator. This section clearly enumerates the power of the liquidator in winding up proceedings ordered by the court. Sec. 457(3) provides that the exercise by the liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court; and any creditor or contributory may apply to the court with respect to the exercise of proposed exercise of

any of the powers conferred by this section' This, reading both the section and the rule, it is clear that the control of the court for the purpose of deciding as to the genuineness of sale and confirming the same is paramount and it cannot be said that the court has abdicated its power by simply asking the provisional liquidator to sell the property to the highest bidder. At the stage of confirmation, as stated in the decision referred to above, the inadequacy of the price can be a relevant ground for the court to interfere in such sales and that in the interest of the company, the court can make such direction for the purpose of getting an adequate price for the properties belonging to the company in liquidation."

10. The case before a Bench of this Court in *Soundararajan v. Khake Mohamed Ismail Saheb*, A.I.R. 1940 Mad. 42: 186 I.C. 11, referred to in the Gujarat judgment above, was one with respect to a court sale under O.21, Rule 92, C.P.C. It is obvious thus that the principles which apply with respect to the court sale under O.21 and confirmation under Rule 92, C.P.C. as prescribed thereunder are applied with respect to the sale by a liquidator with the consent of the court or under the orders of the court. The Bench of this Court in *Soundararajan v. Khake Mohamed Ismail Saheb*, A.I.R. 1940 Mad. 42: 186 I.C. 11, has observed that 'it is only right and proper that the sale should be subject to the confirmation of the Court. The condition is a safeguard against irregularity or fraud in connexion with the sale and against property being sold at an inadequate price'.

11. We have exercised restraint and not entered into any controversy on the merits for, if we do so, we shall be really doing what the learned company Judge must do with respect to the sale which is yet to be confirmed. When we have observed that creditors and contributories can make complaint and noticed certain irregularities alleged by them we have done so only for the purpose of showing how the appellant got *locus standi* to appear to object to the confirmation of sale and we should not be understood to have held that what they allege is true and acceptable.

12. Since we have found that an error of law has been committed by the learned company Judge in holding against the appellant that no confirmation was required because the sale had been ordered by the court, we are inclined to interfere

with the impugned order but propose to remit the whole matter for a rehearing and disposal in accordance with law.

13. In the result, the appeals are allowed. The impugned order is set aside and the case is remitted to the learned company Judge for a rehearing and decision whether to confirm the sale or not. No costs. In view of the assistance that learned counsel for the liquidator has offered to the court we fix his hearing fee at Rs.2,500.

B.S.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Bellie and Thanikkachalam, JJ.

A.S.No.680 of 1981 3rd July, 1992.

R.Anandavalli ...Appellant

v.

Alagammal and others ... Respondents.

Evidence Act (I of 1872), Sec.21 - Admission - Evidentiary value of - Defendant making admission - Not showing that admission was wrong - Court, if can think that it may not be true.

Admission is the best form of evidence and the plaintiff can certainly rely on it. In the present case, no attempt whatsoever has been made by the defendants to show that the said admission was wrong. When the defendants themselves have not given any explanation, the court cannot on some presumption think that the admission may not be true. [Paras 11 and 12]

Cases referred to:

R.Selvaraj v. R.Radhakrishna Pillai, (1976)1 M.L.J. 105. [Para 10]

Narayan Bhagwant Rao Gosavi Balajiware v. Gopal Vinayak Gosavi, A.I.R. 1960 S.C. 100: (1960)1 S.C.R. 773. [Para 12]

Avadh Kishore Das v. Ram Gopal, A.I.R. 1979 S.C. 861: (1979)4 S.C.C. 790. [Para 12]

Panyam Thirumalappa v. Alasyam Ramappa, A.I.R. 1938 Mad. 133. [Para 13]

K.S.Ahmed, for Appellant.

M.Velusamy for Respondent Nos.1 to 6.

V. Kunchithapatham, for Respondent No.9.

The Judgment of the Court was delivered by

Bellie, J.:- The appellant-plaintiff R. Anandavalli is one of the daughters of Raju Konar, the first defendant being his wife, defendants 2 to 6 sons and defendants 7 and 8 daughters.

2. The case of the plaintiffs is that her father Raju Konar has himself earned money and acquired the properties and the bank deposits described in the suit schedule from his meat shop. Raju Konar died intestate on 12.3.1971. Each of the plaintiff and defendants 1 to 8 are entitled to equal share in the properties. While so the defendants producing a false release deed alleged to have been executed by the plaintiff withdrew the deposit amount from the bank on 13.12.1974. The plaintiff has claimed 1/9 share in the suit properties.

3. Defendants 1 to 6 defended the case by filing written statement. They denied that the suit properties are the self-acquired properties of Raju Konar and the plaintiff is entitled to 1/9 share. They contended that the plaintiff received a sum of Rs.8,000 in cash and executed a release deed dated 13.12.1974 relinquishing her right in the suit properties. It is further contended that she is not entitled to any share in the amount deposited in the bank. Raju Konar inherited the meat shop business from his father Subbaiya Konar and the properties were acquired from out of the income of the meat shop. The said meat shop left by Subbaiya Konar was being run by Raju Konar and also defendants 2 to 4 and out of the income earned from that joint family business Raju Konar purchased the suit properties and some amounts were deposited in banks. The plaintiff was entitled to only 1/54th share in the suit properties but even that share she relinquished by executing the said release deed. Thus the plaintiff is not entitled to any share in the suit properties. It is also contended that Raju Konar did not leave any gold jewels described in the schedule.

4. Defendants 7 and 8 remained *ex parte*. Defendants 9 and 10 banks filed written statements stating that since the plaintiff executed a release deed they paid the bank deposits to the second defendant with the consent of others.

5. The trial court on consideration of the evidence held that the suit properties were not self-acquired properties of Raju Konar as pleaded by the plaintiff and they are joint family properties and therefore the plaintiff was entitled to 1/54

share as contended by the contesting defendants. It further held that the plaintiff failed to prove that Raju Konar left any gold jewels or promissory note or any movables described in the schedule. On these findings the trial Court decreed the suit in favour of the plaintiff for 1/54th share in the suit properties excepting the alleged gold jewels and promissory note-items (a); (b) and (c) in Part III and movables in Part IV schedule properties. Aggrieved the plaintiff has filed this appeal.

6. The main point that was argued by Mr. K.S. Ahmed, learned counsel for the appellant-plaintiff is that the finding of the trial court that the suit properties are joint family properties is erroneous.

7. As regards the issue whether the plaintiff, as contended by the defendants, executed Ex.B-18 release deed, the finding of the trial court is perfectly right and there is absolutely no reason to interfere with that. The release deed itself has not been filed and only a certified copy has been produced. None of the defendants has gone into the witness box to speak with regard to the alleged release deed whether the plaintiff and her husband have testified as P.Ws. 1 and 2 that the alleged release deed is false and fabricated one. This is sufficient to hold that the alleged release deed is a false one.

8. The only main point that has to be considered is whether the finding of the trial court that the suit properties are not the self-acquired properties of Raju Konar as pleaded by the plaintiff is not correct. It is not in dispute that the suit properties (Items I and II immovables) were purchased by Raju Konar. No document has been filed, but according to the plaintiff they are with the second defendant and that is quite possible because the second defendant is the first son of Raju Konar and he is the eldest of all the sons and daughters. The question is whether the said properties were purchased out of the income earned by Raju Konar himself or out of the income of any joint family business as contended by the defendants.

9. As stated above the properties were purchased by Raju Konar. If it is contended that they were purchased by him out of the income of the joint family business and therefore they are joint family properties that has to be proved. The defendants case appears to be that Raju Konar's father Subbaiya Konar was having a meat shop business and that business was inherited by Raju Konar and the suit

properties were purchased out of the income from that business. In this regard there is no clear averments in the written statement. Even without stating that Subbaiya Konar had a meat shop it is merely stated, as if it is admitted that there was a meat shop, that "Subbaiya Konar the father of Raju Konar was running the mutton shop?" It is not stated as to where the meat shop was.

10. May be Subbaiya Konar had a meat shop but from that alone it cannot be stated that the very meat shop was inherited by Raju Konar. It is quite possible that Subbaiya Konar had a meat shop in one place and Raju Konar had a meat shop in another place. In this connection Mr. K.S. Ahamed, learned counsel for the appellant-plaintiff relied on a Division Bench judgment of this Court in *R. Selvaraj v. R. Radhakrishna Pillai alias R.R. Krishna Pillai and another*, (1976) 1 M.L.J. 105, wherein it is held that,

"There is no presumption that a business conducted by a member of the joint family is a joint family business. On the other hand the presumption is to the contrary. The person alleging such a state of affairs should prove the same by acceptable and clinching evidence. The fact that the business started by one of the members was of the same nature as the business which was carried on by his ancestors will not by itself be a sufficient discharge of the burden of proof on the part of the person alleging that such business is ancestral business."

11. Whereas the plaintiff who has examined herself as P.W.2 and also her husband as P.W.1 have asserted that no meat shop was inherited by Raju Konar none of the defendants have got into the witness box to repudiate it. On the other hand in Exs. B-11 and B-13 Claim Forms sent by the defendants in connection with the amount deposited by Raju Konar in the banks they have clearly stated that the amount was the self-acquired property of Raju Konar. No reason whatsoever has been given as to why they have said so if really the amount was not self-acquired property of Raju Konar. In view of this admission of the defendants it does not lie in their mouth now to say that it was joint family property. Admission is the best form of evidence and the plaintiff can certainly rely on this.

12. The Supreme Court in *Narayan Bhagwant Rao Gosavi Balaji wale v. Gopal Vinayak Gosavi and others*, A.I.R. 1960 S.C. 100: (1960) 1 S.C.R. 773, has stated that,

"An admission is the best evidence that an opposing party can rely upon, and, although it is not conclusive, is often decisive of the matter unless it can be successfully withdrawn or proved to be erroneous."

In another judgment in *Avadh Kishore Das v. Ram Gopal and others*, A.I.R. 1979 S.C. 861: (1979) 4 S.C.C. 790, the Supreme Court has held that,

"Evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted."

In the present case, no attempt whatsoever has been made by the defendants to show that the said admission was wrong. When the defendants themselves have not given any explanation, the Court cannot on some presumption think that the admission may not be true.

13. Varadachariar, J. in *Panyam Thirumalappa v. Alasyam Ramappa and others*, A.I.R. 1938 Mad. 133, observed that,

"A Judge when asked to consider the weight of an admission by a party cannot ignore it on some guess of his own without plea or explanation by the party making the admission."

Therefore the said admissions in Exs. B-11 and B-13 must be given the full weight.

14. Further in a meat shop there will not be any stock in trade. Every day the stock of meat got in the morning has to be disposed of latest by the evening. Even if it is true that Raju Konar had his meat business in the same place where his father was doing business it cannot be stated that Raju Konar inherited from his father his meat business. As stated above none of the defendants has chosen to get into the witness box to speak in support of their case; instead they have examined D.W.1 one Samraj Moses who has nothing to do with the family and he alone has stated that Raju Konar inherited the meat shop business of his father Subbaiya Konar. He too has not stated in the chief examination in which place the meat shop of Subbaiya Konar was and only in the cross examination he has stated that "the meat shop was in the place belonging to a minor in G.S.T. Road." He has then stated that he does not know what asset Subbaiya Konar left behind. This witness is a

retired man who was working as an Accountant in a school. I do not think that it would be proper to rely on this evidence of a sole witness who was not connected with the family in any manner without any corroborative evidence of any other witness. This is more so in the face of the abovesaid admission by the defendants in Exs.B-11 and Ex.B-13. All these would lead to the only legitimate conclusion that the suit properties are the self-acquired properties of Raju Konar as pleaded by the plaintiff. Therefore the plaintiff will be entitled to 1/9th share on the date of suit. It is now said that one of the children of Raju Konar died. In that case the plaintiff will be entitled to 1/8th share. Accordingly the judgment of the trial court is modified. The appeal is thus allowed. Considering the relationship of the parties and other circumstances of the case there will be no order as to costs. The respondents will pay the court fees due to the Government.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Srinivasan, J.

C.R.P.No.2956 of 1992 5th November, 1992.

M.Krishnappa Chetty and another ...Petitioners
v.

P.E.Chandrasekaran @ Chandran ... Respondent.

Civil Procedure Code (V of 1908), Sec.148-A and O.52, Rule 6 - Proper procedure to be followed in cases where caveat has been filed - Filing of separate vakalat in suit or application by counsel of caveator - If necessary - Procedure to be followed if counsel for caveator evades service.

The proper procedure to be adopted in all cases where caveat has been filed is for the plaintiff/petitioner to serve copies of the plaint and application on the caveator's counsel or the caveator before filing them in court. He must inform the caveator or his counsel as the case may be, the date on which he will move the application before court. He must also file acknowledgments of the

receipt of copies obtained from the caveator's counsel or the caveator as the case may be, in court along with the application. On receiving such papers the office of the court shall, while fixing the date for the first hearing of the application prepare a note and bring it to the notice of the presiding officer concerned that caveat has been entered and the caveator's counsel or the caveator has been served with copies of plaint and the application. The presiding officer shall direct the office of the court to issue notice to the caveator's counsel or the caveator, as the case may be, specifying the date on which the matter will be heard in the first instance. The court shall inform the petitioner's counsel also of the said date and on that date both sides shall be heard before any interim order is passed. This procedure shall strictly be followed by all the subordinate courts. There shall be no lapse in following this procedure. [Para 4] There is no necessity for the caveator's counsel to file a separate vakalat in the suit or the application once again. The vakalat filed in the caveat will hold good for the main suit as well as the application filed therein unless the caveat has expired before the filing of the suit and application.

[Para 5]

It is said that sometimes the caveator's counsel evades service deliberately with a view to delay the matter. Such conduct on the part of counsel will amount to grave dereliction of duty and wilful obstruction in the administration of justice. It is hoped that no lawyer will adopt such dilatory tactics. In such cases the court can record a finding as to such wilful evasion and proceed to pass interim orders in the application and direct notice to the party himself. In all such cases, such counsel shall file fresh vakalat in the main proceedings if they want to appear therein. [Para 6]

Petition under Art.227 of the Constitution of India praying the High Court to revise the order of the City Civil Court (18th Assistant Judge) Madras, dated 16.8.1991 and made in I.A.No.13577 of 1991 in O.S.No.5731 of 1991.

N.Jothi, for Petitioners.

T.Thirumaran, for Respondent.

The Court made the following

ORDER:- This revision has been filed against an order dated 16.8.1991 in I.A.No.13577 of 1991 in O.S.No.5731 of 1991 on the file of the 18th Assistant Judge, City Civil Court, Madras. The said order is one granting interim injunction.

Originally the matter was posted to 2.9.1991 for service of notice. Again, the interim order was extended and the matter was being adjourned from time to time. Ultimately, on 22.10.1991 the order passed was,

“Hearing advanced from 29.10.1991 to to-day as per order in I.A.No.16229 of 1991. Counter filed, Stayed by P.O. in C.M.P.No.1341 of 1991 till 8.11.1991.”

All that happened in the court of the Fourth Assistant Judge, City Civil Court, Madras. Thereafter the proceedings were transferred to the file of the 18th Assistant Judge by order of the Principal Judge, City Civil Court, Madras. Then onwards the matter was being adjourned from time to time without any reasons being recorded by the Judge for such adjournments. It is now stated by learned counsel for the respondent that there is no interim order as the injunction order was not continued after 29.10.1991. As at present, the interlocutory application stands posted to 13.11.1992, the said application shall be disposed of immediately. Though there is no interim order, it is in the interests of justice that the court hears both parties and disposes of the application which is one under O.39, Rules 1 and 2, C.P.C. Hence with the consent of parties who are appearing before me, I direct the 18th Judge, City Civil Court, Madras, to hear I.A.No.13577 of 1991 on 13.11.1992 and if necessary, on subsequent dates continuously and pass appropriate orders in accordance with law. Orders shall be passed in the said application on or before 30.11.1992 and a report thereof submitted to this Court.

2. The petitioners have got another grievance which is more important than the grievance set out earlier. That is this. The petitioners had entered caveat in the proceedings and as per the provisions of Sec.148-A and O.52, C.P.C. the respondent before filing the suit and the interlocutory application for injunction had served copies thereof on the petitioners' counsel. But at the stage neither the suit nor the application was numbered and no date had been fixed with the result that the copies served on the petitioners' counsel did not contain the number of the suit and the number of the interlocutory application. Petitioners were not, therefore, in a position to know the date to which the suit and the application were posted; nor were they informed by the respondent's counsel that he would be moving the

application for orders on a particular date.

3. Under Sec.148-A(3) and Rule 6 of O.52 of the C.P.C., where after a caveat has been lodged, any application is filed in a suit, appeal or revision or any other proceeding the court shall serve a notice of the application on the pleader for the caveator, if any, or the caveator in the manner provided for service on defendant, respondent or opposite party of summons to appear and all provisions applicable to such summons shall apply to the service of such notice. Thus the rule imposes a duty on the court to serve a notice of the application on the caveator's pleader or caveator just in the same manner as a summons would be served. In this case, the court did not serve any notice on the caveator's counsel or the caveator after fixing the date for the hearing of the application in the first instance. The court passed an order of interim injunction on 16.8.1991 and directed notice to the defendants-respondents. The procedure adopted by the court is clearly erroneous and in violation of Sec.148-A(3) and Rule 6 of O.52, C.P.C.

4. The proper procedure to be adopted in all cases where caveat has been filed is for the plaintiff/petitioner to serve copies of the plaint and application on the caveator's counsel or the caveator before filing them in court. He must inform the caveator or his counsel as the case may be, the date on which he will move the application before court. He must also file acknowledgments of the receipt of copies obtained from the caveator's counsel or the caveator as the case may be, in court along with the application. On receiving such papers the office of the Court shall, while fixing the date for the first hearing of the application prepare a note and bring it to the notice of the presiding officer concerned that caveat has been entered and the caveator's counsel or the caveator has been served with copies of plaint and the application. Then the presiding officer shall direct the office of the court to issue notice to the caveator's counsel or the caveator, as the case may be, specifying the date on which the matter will be heard in the first instance. The court shall inform the petitioner's counsel also of the said date and on that date both sides shall be heard before any interim order is passed. It shall not pass any order before a notice is served on the caveator or his counsel as per Rule 6 of O.52, Civil Procedure Code. This procedure shall be strictly followed by all the subordinate courts; otherwise the purpose

of introduction of Sec.148-A and O.52, Civil Procedure Code will be lost. There shall be no lapse in following this procedure.

5. There is no necessity for the caveator's counsel to file a separate vakalat in the suit or the application once again. The vakalat filed by the counsel for the caveator in the caveat will hold good for the main suit as well as the application filed therein unless the caveat has expired before the filing of the suit and application. The office of the court shall enter the number of the suit and the application on such vakalat and kept it on record.

6. It is brought to my notice that sometimes the caveator's counsel refuses to receive notice in the application or evades service deliberately with a view to delay the matter. Such conduct on the part of counsel will amount to grave dereliction of duty and wilful obstruction in the administration of justice. I hope no lawyer will adopt such dilatory tactics. In such cases the court can record a finding as to such wilful evasion and proceed to pass interim orders in the application and direct notice to the party himself. In all such cases, such counsel shall file fresh vakalat in the main proceedings if they want to appear therein.

7. With the above directions, this civil revision petition is dismissed and as directed earlier the 18th Assistant Judge, City Civil Court, Madras, shall pass orders on I.A.No.13577 of 1991 on or before 30th November, 1992 and report to this Court. No costs.

V.K

Order accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Thanikkachalam, J.

C.R.P.Nos.26 and 27 of 1987 4th September, 1992.

S.Chhaganmull Bafna and others ...Petitioners
v.

Miss.C.G.Rajalakshmi ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Secs.10(2)(i) and 10(3)(a)(i) - Spinster landlady living with aged mother and aged

mother's brother - Filing eviction petition in order to induct her brother for the sake of her protection - Requirement for occupation by brother, if bona fide. Wilful default - Proof.

Held:- The fact remains that the landlady is an unmarried person and she is residing with her aged mother and her aged mother's brother. Therefore there is some substance in stating that she required some male assistance and protection from her brother. In fact, there is nothing wrong or improper or unreasonable on the part of an unmarried sister in seeking the help of her brother for her protection. Therefore the conclusion arrived at by the authorities below that the landlady required the residential portion under the occupation of the tenants *bona fide* for the use and occupation of her brother is in order. Accordingly the order of eviction passed by the authorities below under Sec.10(3)(a)(i) cannot be interfered with.

[Para 15]

Held further, that the Rent Control Appellate Authority was correct in coming to the conclusion that the tenants committed wilful default in payment of rent for the petition period in respect of both the residential and non-residential portions and hence they are liable to be evicted on this ground also.

[Para 14]

Case referred to:

M.Meenakshisundaram v. S.Venkatesan, (1981)2 M.L.J. 288: A.I.R. 1981 Mad. 277. [Para 14]

G.V.Subramania Iyer, M/s.Surana and Surana, for Petitioners.

T.Thirumaran for *N.Srivatsamani*, for Respondent.

The Court made the following

ORDER:- Civil revision petition No.26 of 1987 is directed against the order passed in R.C.A.No.1293 of 1984, which in turn arose out of the order passed in R.C.O.P.No.3583 of 1982. C.R.P.No.27 of 1987 is directed against the order passed in R.C.A.No.1314 of 1984, which in turn arose out of the order passed in R.C.O.P.No.3798 of 1982. The tenants are the petitioners in both these revisions. The 1st petitioner and the 2nd petitioner are the husband and wife. The landlady is common in both these revisions. The petition premises is situate at No.3, Kariappa Mudali Street, Purasawalkam, Madras-7.

2. The case of the landlady in H.R.C.O.P.No.3583 of 1982 is as under:

This petition for eviction was filed under Sec.10(2)(i)

and Sec.10(3)(a)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act, Act 18 of 1960 as amended by Act 23 of 1973 (hereinafter referred to as 'the Act'). The tenants are in occupation of a residential portion consisting of four big rooms, a bath room and a flush-out in the downstairs of the premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras on a monthly rent of Rs.400. Besides the rent, a sum of Rs.70 is payable for electricity charges every month. The tenants failed and neglected to pay the rent from 1.9.1981 to 31.7.1982 and thus committed wilful default in payment of rent and thereby rendering themselves liable to be evicted under Sec.10(2)(1) of the Act. The landlady's brother C.B.Gopalakrishnan is residing in a rented premises at No.64, Guruvappa Chetty Street, Chintadripet, Madras-2. The landlady's brother is not having any premises of his own in Madras City. He is paying Rs.275 per month towards rent for the premises in which he is residing. The landlady is an unmarried person and she is residing with her aged mother in the front of the premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras. For the sake of protection and assistance, she is desirous of having her brother with her in the premises in which she is residing. Therefore, she required the petition premises under the occupation of the tenants *bona fide* under Sec.10(3)(a)(i) of the Act. The landlady sent a notice dated 28.4.1982 to the tenants calling upon them to pay the arrears of rent as well as to quit and deliver vacant possession of the petitioner premises. On 11.5.1982 the tenants sent a reply refusing to vacate the petition premises.

3. In the counter filed by the tenants, it is stated as under:

The rent for the petition premises is Rs.180 per month, and not Rs.400 per month as alleged by the landlady. So far as the electricity charges are concerned, it is only Rs.25 per month and not Rs.70 per month as alleged by the landlady. It is not correct to state that the tenants committed wilful default in payment of rent. The tenants paid the rent regularly upto June, 1979. On 5.6.1979, the landlady executed a promissory note for a sum of Rs.40,000 with interest at 18% per annum in favour of the 2nd respondent, who is the wife of the 1st respondent. On the very same date, a rental agreement was also executed between the parties. According to the rental agreement, the tenants need not pay the rent and the landlady need not

pay the interest on the sum of Rs.40,000. Therefore, it is not correct to state that there is arrears of rent from 1.9.1981 to 31.7.1982. Therefore, the tenants did not commit any wilful default in payment of rent. There is no *bona fide* on the part of the landlady in requiring the petition premises for the occupation of her brother. Her brother is living along with his family elsewhere and there is no need for him to come and reside in the petition premises. The landlady is being looked after by her mother and her maternal uncle. Therefore, it is not correct on her part to state that she requires the presence of her brother for her help and protection. It was, therefore, pleaded that there is no *bona fide* on the part of the landlady in requiring the petition premises under Sec.10(3)(a)(i) of the Act.

4. The landlady examined herself as P.W.1 and her brother was examined as P.W.2. Chhaganmull Bafna examined himself as R.W.1. The landlady filed three documents. The tenants filed 31 documents.

5. Considering the facts arising in this case, the Rent Controller came to the conclusion that the tenants did not commit wilful default in payment of rent as alleged by the landlady. However, the rent controller came to the conclusion that the requirement of the petition premises by the landlady for the occupation of her brother is *bona fide*. Accordingly, the Rent Controller ordered eviction under Sec.10(3)(a)(i) of the Act. Aggrieved, the tenants preferred an appeal, R.C.A.No.1293 of 1984. The Rent Control Appellate Authority, on appraising the facts arising in this case came to the conclusion that the Rent Controller was correct in holding that the landlady required the petition premises *bona fide* under Sec.10(3)(a)(i) of the Act. In so far as the ground relating to wilful default in payment of rent is concerned, the Rent Control Appellate Authority set aside the order passed by the Rent Controller and held that the tenants committed wilful default in payment of rent for the petition period. Accordingly, eviction was ordered under Sec.10(2)(i) of the Act also. In the result, the Rent Control Appellate Authority ordered eviction on both these grounds.

6. In so far as the petition for eviction H.R.C.O.P.No.3798 of 1982 is concerned, it was filed under Secs.10(2)(i) and 10(3)(a)(i) of the Act. In the said eviction petition, the case of the landlady is as under:

The tenants are in occupation of a portion admeasuring 14 feet x 11 feet in premises No.3, Kariappa Mudali Street, Purasawalkam, Madras-7. According to the landlady, the portion is meant for a garage to park the vehicle. The tenants are carrying on their pawn broking business in the said portion. The landlady required the said portion *bona fide* for the purpose of parking her vehicle and the vehicle of her brother. According to the landlady, the rent for that petition premises is Rs.100 per month. Apart from that the tenant is also liable to pay electricity charges amounting to Rs.20 per month. According to the landlady, the tenants committed wilful default in payment of rent from 1.9.1981 to 31.7.1982 and thereby rendering themselves to be evicted under Sec.10(2)(i) of the Act. The landlady sent a notice on 5.12.1982 calling upon the tenants to pay the arrears of rent and to quit and deliver the vacant possession of the petition premises. The tenants sent a reply on 11.5.1982 refusing to vacate the petition premises. Hence, the petition for eviction.

7. In the counter filed by the tenants, it is stated as under:

The tenants are using the petition premises for the purpose of their pawn broking business and the rent for the petition premises is Rs.50 and not Rs.100 per month as alleged by the landlady. According to the tenants, the electricity charge is Rs.20 per month as alleged by the landlady. The tenants submitted that the landlady is not having any vehicle of her own. Therefore, her requirement of the petition premises for parking her vehicle *bona fide* is not correct. In so far as the arrears of rent is concerned, according to the tenants, they did not commit any wilful default in payment of rent as alleged by the landlady. According to the tenants, the landlady executed a promissory note for a sum of Rs.40,000 in favour of the wife of Chhaganmull Bafna, promising to repay the same with interest at 18% per annum. On the very same date, an agreement was also entered into between the parties. According to the said agreement, the tenants need not pay the rent for the petition premises and the landlady need not pay the interest on the abovesaid sum of Rs.40,000. It was, therefore, pleaded that there is no arrears of rent as alleged by the landlady.

8. Considering the fact arising in this case, the Rent Controller came to the conclusion that there is no *bona fide* on the part of the landlady in

requiring the petition premises under Sec.10(2)(a)(ii) of the Act. So also the Rent Controller came to the conclusion that the tenants did not commit wilful default in payment of rent as alleged by the landlady. Accordingly, the petition for eviction was dismissed. On appeal, appraising the facts arising in this case, the Rent Control Appellate Authority came to the conclusion that the Rent Controller was correct in holding that there is no *bona fide* on the part of the landlady in requiring the petition premises under Sec.10(3)(a)(ii) of the Act. In so far as the ground relating to Sec.10(2)(i) of the Act is concerned, the Rent Control Appellate Authority held that the tenants committed wilful default in payment of rent for the petition period. Accordingly, the Rent Control Appellate Authority reversed the order of the Rent Controller passed under Sec.10(2)(i) of the Act, and ordered eviction.

9. Aggrieved over the orders passed by the Rent Control Appellate Authority in R.C.A.Nos.1293 of 1984 and 1314 of 1984, the tenants are in revision before this Court.

10. Learned counsel for the tenants/petitioners herein submitted as under:

The authorities below were not correct in holding that the rent for the residential portion is Rs.400 per month and the rent for the non-residential portion is Rs.100 per month. The authorities below were also not correct in holding that the electricity charges for the residential portion is Rs.70 per month. On the other hand, the rent for the residential portion is Rs.180 per month and the rent for non-residential portion is Rs.50 per month. Ex.R-28 is the Corporation tax receipt, which would go to show that the half yearly tax is only Rs.351.66. Therefore, the authorities below ought to have accepted the contentions of the tenants that the rent is only Rs.180 per month. In fact, if the rent is Rs.400 per month for the petition premises, then the half yearly tax would have been more than Rs.600. Therefore, the authorities below were not correct in determining the rent at Rs.400 per month for the petition premises. The electricity charges for both these portions is only Rs.50 per month. There is no evidence on the side of the landlady to prove the rate of rent and the electricity charges as pleaded by her. Since the landlady is in occupation of the premises, the petition for eviction ought to have been filed under Sec.10(3)(c) of the Act. The petition

premises is predominantly a residential one. The landlady, her mother and her mother's brother are residing in the front portion of the premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras-7. The portion under their occupation is sufficient for their use. Therefore, they are not in need of the portion under the occupation of the tenants. The landlady filed these eviction petitions only as a counterblast to the suit O.S.No.5402 of 1982 filed by the tenants to recover a sum of Rs.40,000 due from the landlady on a promissory note executed by her. Ever since the marriage, the brother of the landlady and his family were happily living elsewhere and they do not require the petition premises for their own occupation. The landlady is also having a portion in the upstairs. She let out the same recently. If she really required any further accommodation she could have been utilised the same. But she did not do so. The present premises where the brother of the landlady is residing is situate by the side of his mother-in-law's house. Therefore, there is no necessity for him to come and reside in the petition premises along with the landlady. Therefore, her requirement of the petition premises for the use and occupation of the brother is not *bona fide*. On the date when the promissory note was executed by the landlady in favour of the 2nd petitioner herein, an agreement was entered into between the parties. According to the said agreement, the tenants need not pay the rent and the landlady need not pay interest on the amount due on the promissory note. Therefore, it is not correct to state that the tenants committed wilful default in payment of rent for the petition period. The originals of Exs. R-30 and R-31 had stolen away as evidenced by Exs.R.29 and R-32 which are complaints made to the police. In view of the above said agreement Exs.R-30 and R-31 the tenants are not bound to pay the rent for the petition premises to the landlady. Since the originals of Exs.R-30 and R-31 were lost, the xerox copies of the same were filed. Under Sec.65 of the Indian Evidence Act, secondary evidence is permissible when the original is got lost. It was, therefore, pleaded that the Rent Control Appellate Authority was not correct in ordering eviction under Sec.10(2)(i) of the Act in so far as both the petitions are concerned and under Sec.10(3)(a)(i) of the Act in so far as the petition R.C.O.P.No.3583 of 1982 is concerned. 11. On the other hand, learned counsel appearing

for the landlady/respondent herein submitted as under:

The landlady is employed as Superintendent in Industrial Investment Corporation of India. She is unmarried and living with her mother and her mother's brother. Four big rooms, one bath-room and a flush-out in the downstairs of premises No.3, Kariappa Mudali Street, Purasawalkam, Madras were let out to the tenants on a monthly rent of Rs.400. The garage in the abovesaid premises was let out to the tenants on a monthly rent of Rs.100. The electricity charges for the residential portion is Rs.70 per month and for the non-residential portion is Rs.20 per month. The tenants are carrying on their pawn broking business in the garage. The tenants failed and neglected to pay the rent for both the residential and non-residential portions from 1.9.1981 to 31.7.1982 and thus committed wilful default in payment of rent and thereby rendering themselves liable to be evicted under Sec.10(2)(i) of the Act. It is not correct to state that the rent for the residential portion is Rs.180 per month and the rent for the non-residential portion is Rs.50 per month. It is also not correct to state that electricity charges for both these portions is Rs.50 per month as alleged by the tenants. There is no evidence on the side of the tenants to substantiate their version on this aspect. It is not correct to state that the landlady executed a promissory note as alleged by the tenants. There is also no agreement between the parties as alleged by the tenants. The tenants did not produce the originals of the alleged promissory note and the alleged agreement. The tenants filed a false suit against the landlady to recover the alleged amount of Rs.40,000 due on the promissory note with interest. In the absence of any evidence on the side of the tenants, the authorities below were correct in accepting the rate of rent and the electricity charges as stated by the landlady. Since the landlady is a spinster living with her aged mother and the aged brother of her mother, she requires some protection. Therefore, she is desirous of having her brother with her. Her brother is residing with his family in a rented premises. He is not having any premises of his own in the city of Madras. It is not correct to state that the landlady and his brother are not in good terms. Simply because half yearly Corporation tax for the premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras-7 is Rs.351-66, it does not mean that the rent should

not be at Rs.400 plus Rs.100 per month as alleged by the tenants. It is not correct to state that premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras-7 is predominantly a residential building. The tenants are carrying on their pawn broking business in a portion of the building. Therefore, it is both residential and non-residential. Under such circumstances, the tenants were not correct in stating that the petition should be filed under Sec.10(3)(c) of the Act instead of Sec.10(3)(a)(i) of the Act. The landlady required the inspection of the promissory note. But that was not given to her. In O.S.No.5402 of 1982, the alleged agreement is not the subject matter. Both the authorities concurrently came to the conclusion that the requirement of the landlady of the residential portion for the use and occupation of her brother is *bona fide* under Sec.10(3)(a)(i) of the Act. Therefore, no interference is called for with the findings on this aspect. In so far as the wilful default in payment of rent is concerned, the 1st appellate court on appraising the facts arising in this case held that the tenant committed wilful default in payment of rent for both residential as well as non-residential portions. Inasmuch as this conclusion was arrived at on the basis of facts, no interference is called for with regard to this finding also. No argument was advanced with regard to the *bona fide* requirement of the garage portion.

12. I have heard the rival submission.

13. The fact remains that the respondent in both these revisions is the landlady in respect of the premises No.3, Kariappa Mudali Street, Purasawalkam, Madras-7. The petitioners herein are husband and wife. They are tenants under the landlady in respect of four big rooms, a bath-room and a flush-out in the downstairs of the said premises. The tenants are also in occupation of a garage in the abovesaid premises. The same is being used by the tenants for conducting their pawn broking business. There is no dispute with regard to the relationship of landlord and tenant between the parties. So far as the extent of the portion occupied by the tenants also there is no dispute. The dispute is with regard to the monthly rent and the rate of electricity charges payable by the tenants. According to the landlady, the rent for the residential portion is Rs.400 per month along with the electricity charges of Rs.70 per month. In so far as the non-residential portion is concerned, the rent is Rs.100 per month and the electricity charge is

Rs.20 per month. But according to the tenants, the rent for the residential portion is Rs.180 per month and the rent for the non-residential portion is Rs.50 per month. In so far as the electricity charges are concerned, for both these portions the amount payable is Rs.50 per month. In support of their contention that the rent is only Rs.180 per month for residential portion and Rs.50 per month for the non-residential portion and the electricity charges payable for both is Rs.50 per month, the tenants relied upon Ex.R-28 Corporation tax extract. According to Ex.R-28, the half yearly tax is only Rs.351-66 for the abovesaid premises. Therefore, according to the tenants, the rent could not be Rs.400 for residential portion and Rs.100 for the non-residential portion. But this line of argument based upon Ex.R-28 cannot be accepted because it is always not necessary that the premises should be let out in accordance with tax payable per half year. Apart from this, there is no other evidence on the side of the tenants to show that the electricity charges for both these portions is Rs.50 per month. The tenants submitted that there is a written rental agreement between the parties. The original of the said agreement was not produced. The landlady sent a notice (Ex.A-2) dated 28.4.1982 to the tenants, wherein she has clearly stated that the rent for residential and non-residential portions are Rs.400 and Rs.100 respectively and the electricity charges for both is Rs.90 per month. Since there is no evidence on the side of the tenants to prove the rate of rent as alleged by them, both the authorities below accepted the rate of rent furnished by the landlady for both these portions. Even before this Court, no further material was produced to dislodge the concurrent findings given by the authorities below on this aspect. Therefore, I do not see any infirmity in the findings given by the authorities below, that the rent for the residential portion is Rs.400 per month and the rent for the non-residential portion is Rs.100 per month and the electricity charges payable for the residential and non-residential portions are Rs.70 per month and Rs.20 per month respectively.

14. The landlady submitted that the tenants committed wilful default in payment of rent from 1.9.1981 to 30.1.1982. According to the landlady, inspite of repeated demands, the tenants failed and neglected to pay the rent for the petition period. Therefore, they are liable to be evicted

under Sec.10(2)(i) of the Act. According to the tenants they are not liable to pay the rent to the landlady. They pleaded that the landlady executed a promissory note on 5.6.1979 for Rs.40,000 in favour of the 2nd petitioner herein, promising to repay the same with interest at 18% per annum. According to the tenants on the very same day, an agreement was entered into between the parties, whereby it was agreed that the landlady need not pay the interest due under the promissory note and the tenants need not pay the rent to the landlady. The landlady sent a notice to the tenants on 28.4.1982 calling upon the tenants to pay the arrears of rent as well as to vacate and hand over vacant possession. No doubt the tenants sent a reply on 11.5.1982, refusing to vacate the petition premises. According to the tenants, the rent is adjustable towards the interest payable on Rs.40,000 borrowed by the landlady. Therefore, it is for the tenants to prove that the landlady borrowed the sum of Rs.40,000 and executed a promissory note as alleged by the tenants. The originals of the said promissory note and the subsequent agreement dated 5.6.1979 were not produced before the Court. The tenants have produced only the xerox copies of the said documents. According to the tenants, the originals of these two documents were stealthily removed by somebody which were kept in a bag in a two-wheeler, while the 1st petitioner was attending to the repairs towards the two-wheeler. According to the tenants they have also given a police complaint. The original police complaint given to the police is marked as Exs.R-29 and R-32. The authorities below were not prepared to act upon the xerox copies of the documents filed before them by the tenants. Therefore, the Rent Control Appellate Authority came to the conclusion that there was no evidence on the side of the tenants to show that they are not liable to pay the rent as alleged by them. According to the learned counsel for the tenants based upon these two documents the authorities below ought to have held that there is no wilful default in payment of rent for the petition period as alleged by the landlady. In support of this contention, the learned counsel for the tenants relied upon a decision of this Court reported in *M. Meenakshisundaram v. S. Venkatesan*, (1981) 2 M.L.J. 288; A.I.R. 1981 Mad. 277. The learned counsel further submitted that Exs.R-29 and R-32 would go to show that what was stated by the tenants in respect of the loss of

the original documents is true and believable. Ex.R-37 is the xerox copy of the alleged agreement. This was not written in the regular stamp paper. The tenants seem to have paid Rs.27.50 by way of penalty. As already stated it is the tenants who came forward with the case that there was a promissory note and an agreement and according to those documents, they are not liable to pay the rent, therefore, the burden is on them to prove the same. But they did not discharge the burden placed upon them. Further, the facts on record would go to show that the tenants are unable to establish the case put forward by them in this regard. The authorities below rightly refused to act upon these xerox copies. According to the tenants, the landlady always used to obtain financial assistance from them. In support of this contention Ex.R-2 was filed by the tenants. According to the 1st appellate court, this document would go to show that the 1st petitioner is rendering financial assistance to the landlady. According to the 1st petitioner the landlady used to borrow monies for the purpose of putting up constructions in the premises at No.3, Kariappa Mudali Street, Purasawalkam, Madras-7 and in that process she owes a sum of Rs.40,000 to him. It is under these circumstances, the 1st petitioner states that the promissory note was executed by the landlady in favour of the 2nd petitioner, who is the wife of the 1st petitioner. The landlady sought permission to inspect those two disputed documents by notices dated 9.6.1982 and 10.6.1982. But she was not permitted to inspect those documents. But the fact remains that in the absence of original promissory note the case put forward by the 1st petitioner cannot be accepted. It is significant to note that the tenants filed the Suit O.S.No.5402 of 1982 against the landlady to recover the amount due on the alleged promissory note along with the interest. When the tenants demanded the amount due on the promissory note along with interest, at the same time they cannot plead that the interest due on the promissory note is adjustable for the arrears of rent. Further according to the alleged promissory note the interest is payable on the principal sum at the rate of 18% per annum. The interest at the rate of 18% per annum on Rs.40,000 would come to Rs.7,200 per year. If that is so, for a month it amounts to Rs.600. If the rent is adjustable towards interest due as alleged by the tenants, the interest should be proportionate to meet the

liability of the rent. The rate of rent as pleaded by the tenants and the rate of interest chargeable under the promissory note do not go to support the case put forward by the tenants. Therefore, ultimately the fact remains that the tenants did not pay the rent for the petition period. Hence, in the absence of the alleged original promissory note and the agreement, the Rent Control Appellate Authority was not prepared to accept the defence put forward by the tenants that they are not liable to pay the rent and therefore they did not commit wilful default in payment of rent. On a careful consideration of the facts arising in this case, I am also of the opinion that the Rent Control Appellate Authority was correct in coming to the conclusion that the tenants committed wilful default in payment of rent for the petition period in respect of both the residential and non-residential portions and hence they are liable to be evicted on this ground. Therefore, the order of eviction passed by the Rent Control Appellate Authority in respect of both residential and non-residential portions under Sec.10(2)(i) of the Act, is in order. Accordingly, I am not inclined to interfere with the same.

15. In R.C.O.P.No.3583 of 1982, the landlady required the petition premises *bona fide* under Sec.10(3)(a)(i) of the Act. According to her she is a spinster. She is residing along with her aged mother and her mother's aged brother. Therefore, she required the assistance of her brother, who is residing in a rented premises. The landlady stated that her brother is residing in a rented premises at No.28, Gurusvappa Chetty Street, Madras-2 on a monthly rent of Rs.275. When the landlady states that her brother is residing in a rented premises and he is not having any premises of his own, there is no evidence contra on the side of the tenants to disprove this version. The fact remains that the landlady is an unmarried person and she is residing with her aged mother and her aged mother's brother. Therefore there is some substance in stating that she requires some male assistance and protection from her brother. The tenants submitted that the sister and the brother are not in good terms. But there is no evidence on record to support this version. The tenants further submitted that her brother is residing in a premises which is next to the premises of his mother-in-law. Therefore according to the tenants he would not come to the petition premises. This line of argument is not

acceptable because it is always not proper for a son-in-law to live by the side of the premises of his mother-in-law. In fact, there is nothing wrong or improper or unreasonable on the part of an unmarried sister in seeking the help of her brother for her protection. Therefore, the conclusion arrived at by the authorities below that the landlady required the residential portion under the occupation of the tenants *bona fide* for the use and occupation of her brother is in order. Accordingly, I am not inclined to interfere with the order of eviction passed by the authorities below under Sec.10(3)(a)(i) of the Act in so far as the residential portion is concerned. On the side of the landlady the ground relating to the requirement of the non-residential portion for parking the vehicle under Sec.10(3)(a)(ii) of the Act was not pressed. In that view of the matter, the order of eviction passed by the Rent Control Appellate Authority under Sec.10(2)(i) of the Act in respect of both the residential and non-residential portions is sustained. In addition to that the order of eviction passed under Sec.10(3)(a)(i) of the Act in respect of the residential portion is also sustained.

16. Accordingly, both the revisions are dismissed with costs. Time of eviction three months.

V.K.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- A.R.Lakshmanan, J.

W.P.Nos.6503 and 6504 of 1992

13th October, 1992.

V.Tamil selvan

...Petitioner

v.

The State of Tamil Nadu represented by its Secretary, Industries Department, Madras and others
...Respondents.

(A) Constitution of India (1950), Art.226 - Writ petition - Petitioner suppressing relevant and materials facts and trying to mislead court - Not entitled to any relief - Award of heavy costs justified.

The remedy under Art.226 of the Constitution is

an extra-ordinary and discretionary remedy. The High Court would be fully justified in refusing to exercise its discretion in favour of a person who has abused the process of court and suppressed material and relevant factors and obtained orders from the High Court. It is on the strength of such orders, the petitioner is now claiming relief in the present writ petitions. The court should not be a party and extend its helping hand to a person who has played a fraud on court. [Para 28]

The petitioner has not come to court with clean hands and failed to disclose material facts. If all the relevant facts are mentioned in the present writ petitions, the court would not have even entertained the writ petitions. The petitioner has been misleading the court and obtained favourable orders and is trying to mislead the court further. Hence this Court should decline to grant any relief to the writ petitioner in the exercise of its jurisdiction under Art.226 of the Constitution of India. [Paras 29 and 33]

Accordingly both the writ petitions in the present case are dismissed with costs of Rs.2,500 in each case. The award of heavy cost is justified in view of the unfair conduct of the petitioner. (A.I.R. 1984 S.C. 953, Rel. on) [Para 33]

(B) *Professional etiquette - duty of lawyers to place all matters before court stressed - Conduct of counsel in the present case strongly disapproved.*

Per A.R.Lakshmanan, J.:- ".....lawyers as officers of court owe a duty to the court to place all matters before the court..... It would be the saddest day if counsel behave in a manner making the court lose faith in the words and representations of lawyers. However, I cannot help observing that the conduct and behaviour of the petitioner as well as his counsel M/s.V.Santhanam and V.Seshayyan are most reprehensible and deserve to be deprecated. The petitioner and his counsel have not even tendered unqualified apology and sought mercy from the court. However, M/s.V.Santhanam and V.Seshayyan have very cleverly sought permission of this court to permit them to withdraw the writ petitions, which was rejected by me. They wanted to withdraw the writ petitions on coming to know of the turn of events that has taken place in the present writ petitions during the course of hearing. I, however, part with this case with a heavy heart expressing my strong disapproval of their conduct and behaviour." [Para 36]

Cases referred to:

K.Marappa Gounder, K.M.S.Bus Service v. The Central Road Traffic Board, Madras, (1956)1 M.L.J. 324. [Para 33]

Dr.Vijay Kumar Kathuria v. State of Haryana, A.I.R. 1984 S.C. 953: (1983)3 S.C.C. 333. [Para 33]

V.Santhanam and V.Seshayyan, for Petitioner.

P.Shannugham, Additional Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT:- These two writ petitions have a chequered history. These two writ petitions can be cited as an example as to how people like the writ petitioner abuses the process of Court by obtaining orders by fraudulent means and by suppression of material and relevant facts.

2. Before advertng to the facts of the present two writ petitions, it is necessary for this Court to refer to the previous writ petitions and the writ appeal filed by the very same petitioner for the same subject matter. The first in the series is W.P.No.1835 of 1991. The prayer in the said writ petition is as follows:- To issue a writ of *certiorarified mandamus* or any other appropriate writ or direction, calling for the records of the 2nd respondent/ District Collector, Salem, relating to his Proceedings Roc.No.515 of 1989 dated 22.6.1989 and Clause 4 of the lease deed relating to the period of expiry of the lease, quash the same as illegal, and direct the 2nd respondent to grant quarry lease for complete three years from 19.7.1990 to 18.7.1993 in respect of carrying on quarry operation in Survey No.2 (Part) and Survey No.61/1 (part), measuring in all an extent of 6.15 acres at Ettikuttapatti Village, Omalur Taluk, Salem District.

3. The averments made by the petitioner in W.P.No.1835 of 1991 are as follows:- According to the petitioner, he participated in the public auction conducted by the Tahsildar of Omalur, and was declared as the highest and successful bidder in the auction held on 13.2.1989 for leasing out the stone quarries situate in Survey No.2 (part) over an extent of 5.15 acres in Adaikanur village, Omalur Taluk and in Survey No.61/1 (part) over an extent of 1 acre in Ettikuttapatti Village, Omalur Taluk, Salem District. He had also remitted the bid amount along with local cess and local cess surcharge into the State Bank of India and that the 2nd respondent/District Collector, Salem, in his proceedings Roc.No.515 of 1989 (Mines-B) dated 22.6.1989 confirmed the lease in favour of the petitioner for both the quarries mentioned above, for a period of

three years. According to the petitioner, the lease agreement was executed on 19.7.1990 and was registered as Document No.1346 dated 26.9.1990 in the Office of the Sub Registrar, Omalur. He was given possession of the demised area after demarcation only on 26.9.1990 after the registration of the lease agreement.

4. Even though the petitioner has remitted the lease amount along with local cess and local cess surcharge for the second year in the State Bank of India by chalan dated 7.11.1990, he was permitted to commence quarrying operation only on 26.9.1990. The petitioner objected to the stipulation regarding expiry of the lease period as 30.6.1991. According to the petitioner, the notification granting quarry lease by public auction specifically stated that the lease would be granted for three years and on the basis of such representation, he was forced to knockdown for the highest amount. There was considerable delay in holding the public auction, confirmation of lease, execution of the lease agreement and handing over possession. Having notified that the lease would commence on 1.7.1988, the 2nd respondent/District Collector, Salem, should have arranged for holding the public auction and execution of the lease agreement well in advance to the date of commencement of the lease, i.e., 1.7.1988, whereas the public auction was held on 13.2.1989 and the confirmation order was passed on 8.3.1990 and the lease was executed on 19.7.1990. The petitioner was permitted to quarry from the date of registration of the lease on 26.9.1990 and the 2nd respondent acted arbitrarily in incorporating a stipulation that the lease would expire on 30.6.1991, while the notification mentions that the lease would be for three complete years. Hence, the action of the 2nd respondent/District Collector, Salem, is arbitrary in stipulating that the period of lease would commence on 1.7.1988 and expire on 30.6.1991. According to the petitioner, the quarry operation was commenced only on 19.7.1990 and the lease would expire only on 18.7.1993 whereas the District Collector, Salem, has issued the impugned proceedings in Roc.No.515 of 1989 dated 22.6.1989 containing a stipulation that the lease would expire on 30.6.1991.

5. The said W.P.No.1835 of 1991 came up for admission before K.S.Bakthavatsalam, J., on 14.2.1991 and the learned Judge dismissed the writ petition at the admission stage itself. It is useful to extract paragraph 4 of the said order,

which runs as follows:-

"After considering the arguments of the learned counsel for the petitioner, I am not able to agree with the learned counsel on the contentions raised. It is true that the auction was for three years from 1.7.1988 to 30.6.1991 and the petitioner was also given possession when the lease agreement was executed on 19.7.1990. But, there is a clause which was inserted in the lease deed, as extracted above, which limits the period to 30.6.1991. The petitioner with open eyes has accepted the lease deed and executed the lease deed. Having executed the lease deed, I do not think, the petitioner can turn back and say that he is entitled to have the lease for three years. Even otherwise, Condition 10 of the confirmation order says that the petitioner has to remit the security deposit before the execution of the lease deed. The petitioner has not remitted the security deposit of Rs.2,000 till November, 1989, and it is not on the part of the respondents to delay the execution of the lease deed. Taking into consideration the delay made by the petitioner in paying the security deposit, I am not able to say that the respondents are bound by the principle of promissory estoppel. Even otherwise, with open eyes, the petitioner has entered into a lease deed, in which it is stated that the lease will come to an end on 30.6.1991. In my view, it is not open to the petitioner to get out of the lease deed executed by him accepting the conditions of the lease deed."

6. Aggrieved against the order of K.S.Bakthavatsalam, J., dated 14.2.1991 in W.P.No.-1835 of 1991, the petitioner filed W.A.No.429 of 1991. It is pertinent to notice that the Writ Appeal was filed by the very same counsel M/s.V.Santhanam and V.Seshayyan. The Division Bench consisting of the Hon'ble Chief Justice Dr.A.S.Anand (as he then was) and D.Raju, J., dismissed the Writ Appeal by order dated 9.4.1991 at the admission stage itself. The judgment of the Division Bench is reproduced hereunder.

"Invoking the doctrine of promissory estoppel, the appellant herein filed W.P.No.1835 of 1991 which came to be dismissed by a learned single Judge vide judgment dated 14th day of February, 1991. Hence this appeal.

2. The appellant participated in the auction for stone quarry over an extent of 6.15 acres in

Ettikuttapatti Village. The auction was for a period of three years from 1.7.1988 to 30.6.1991. After the auction the appellant was requested to furnish the security deposit. The same was done by him on 17th November, 1989. After the security deposit was remitted, the agreement was executed between the parties on 19th of July 1990. Clause 4 of the agreement provided that the premises shall be held by the lessee for the term of period from 19th day of July, 1990, to the 30th day of June, 1991, which shall, however, be determinable in the manner provided in the agreement itself. According to Clause 4, the period of lease would expire on 30th of June, 1991. Alleging that the appellant had relied upon some representation and assurance as given by the authorities and invested huge amount and thereby changed his position, the appellant sought that the period of three years should commence from 1990 and end in 1993. This argument had been raised before the learned single Judge and was rightly repelled. It has been reiterated before us. The argument is thoroughly misconceived. Even though there is not even the minimal factual foundation laid down in the writ petition for invoking the doctrine of promissory estoppel, for the sake of argument even if it be assumed that there was some understanding between the parties prior to the execution of the lease agreement on 19th of July, 1990, that understanding stood superseded by the document executed between the parties wherein it was clearly stipulated that the period of lease would expire on 30th of June, 1991, unless determined earlier. The appellant executed the document and he is bound by it. The so-called earlier representation cannot be preferred to the written agreement executed between the parties. The effort of the appellant appears to be to rewrite the lease agreement and substitute Clause 4 through writ proceedings. That cannot be permitted. The writ petition was rightly dismissed by the learned single Judge and we see no reason to take a different view.

The appeal fails and is dismissed."

7. The very same petitioner filed another writ petition viz., W.P.No.9008 of 1991 on 1.7.1991 through M/s.S.Silambannan and P.Venkatachalapathi. I may state here that the writ petitioner has purposely engaged a different counsel

in order to obtain an order from this Court by suppressing material facts, which I will deal with in the later part of this judgment.

8. W.P.No.9008 of 1991 was filed for the following relief:- To issue a writ of *certiorarified mandamus* calling for the records of the 2nd respondent/District Collector, Salem, relating to his proceedings Roc.No.515 of 1989 dated 22.6.1989 and Clause 4 of the lease deed relating to the period of expiry of the lease, quash as illegal and direct the 2nd respondent/District Collector, Salem, to grant quarry lease for complete three years commencing from 19.7.1990 to 18.7.1993 in respect of carrying on quarry operation in Survey No.2 (part) and Survey No.61/1 (part), totally measuring an extent of 6.15 acres at Ettikuttapatti Village, Omalur Taluk, Salem District.

9. It is seen from the affidavit filed in support of W.P.No.9008 of 1991, that the very same allegations, which have been made in W.P.No.1835 of 1991, have been repeated in this writ petition. That apart, as in W.P.No.1835 of 1991, Clause 4 of the lease deed relating to the period of expiry of lease has also been challenged. It is significant to note that the petitioner has purposely and with an ulterior motive has failed to mention about the dismissal of his earlier writ petition (W.P.No.1835 of 1991) for the same relief and the confirmation of the order of the learned single Judge in W.P.No.1835 of 1991 by a Division Bench in W.A.No.429 of 1991. The affidavit is very silent on this aspect. The prayer in the present writ petition (W.P.No.9008 of 1991) is to grant quarry lease for complete three years commencing from 19.7.1990 to 18.7.1993 in respect of the quarry in question. W.P.No.9008 of 1991 was dismissed by S.Ramalingam, J., at the admission stage itself on 4.7.1991 by permitting the petitioner to submit an application for renewal on or before 30.7.1991 and further directing the District Collector, Salem, to dispose of the said application for renewal within three weeks from the date of receipt of such application. The order of S.Ramalingam, J., in W.P.No.9008 of 1991 is as follows:-

"The prayer in the writ petition is for quashing Clause 4 of the lease deed relating to the period of expiry of the lease and for a direction to the 2nd respondent to grant quarry lease for a complete period of three years commencing from 19.7.1990 and expiring on 18.7.1993. Since

the quarry lease was only for the concerned faslis which expired on 30.6.1991, the petitioner cannot have a vested right to claim that the period of lease should be according to English Calendar year for three years commencing from 19.7.1990 and ending with 18.7.1993. However, taking note of the fact that the lease is normally granted for a period of three years and it would be economic and viable if the lessee is permitted to enjoy the quarry rights for a full period of three years, there will be an order in this writ petition directing the 2nd respondent to entertain an application from the petitioner for renewal of the quarry rights and pass orders thereon so as to enable the petitioner to have the privilege of quarrying at least for three full calendar years. The petitioner is enabled to submit an application for renewal on or before 30.7.1991 and on receipt of that application, orders thereon shall be passed by the 2nd respondent within three weeks from the date of receipt of such application. Till the disposal of the application for renewal, the quarry shall not be leased to any third parties. The writ petition is ordered on the above terms. No costs."

10. It is seen from the file produced before this Court by the learned Additional Government Pleader, that the order of S.Ramalingam, J., in W.P.No.9008 of 1991 has not so far been challenged by the respondents by filing a Writ Appeal, though they were contemplating to file a Writ Appeal against the said order.

11. On going through the file, I also find that the very same petitioner has filed W.P.No.5793 of 1992 to quash the proceedings of the District Collector, Salem, in Roc.No.515 of 1989/Mines-B dated 18.3.1992. It is appropriate to notice at this stage the proceedings of the District Collector, Salem in Roc.No.515 of 1989/Mines-B dated 18.3.1992. It is a notice issued by the District Collector, Salem, to the petitioner, on receipt of information of illicit quarrying of rough stones in Survey Nos.2 (part) and 61/1 (part), poramboke land in Ettikuttapatti Village. It is seen from the notice that the Deputy Director of Geology and Mines, Salem, along with the Special Deputy Tahsildar, Assistant Geologist No.1, Salem and the Sub Inspector of Survey (Mines), Salem, inspected the said land on 12.2.1992 and reported that the lessee V.Thamilselvan/writ petitioner

quarried and removed the quantity of 366 lorry loads of rough stone from 1.7.1991 till date of the said notice and that the quantity of 1,905 lorry loads of rough stone was quarried and removed by the lessee upto 30.6.1991 from the date of executing the lease deed *i.e.*, 19.7.1990 and that totally, a quantity of 2,271 lorry loads of rough stone was quarried and removed by the lessee from the date of the execution of the lease deed *i.e.*, 19.7.1990. It is further averred in that notice that the lessee has got transport permit only for the quantity of 117 lorry loads of rough stone and that he has not got transport permit for the remaining quantity of 2,154 lorry loads of rough stone. It is also stated in that notice that the lessee/writ petitioner has violated the lease deed condition Nos.6(4), 6(7) and 10(5). The District Collector, Salem, has directed the petitioner to show cause within 15 days from the date of receipt of the notice as to why a penalty amount of Rs.11,50,775 should not be levied under Rule 3(3) of the T.M.M.C.Rules, 1959, and under Sec.25 of the Mines and Minerals (Regulation and Development) Act, 1957, for having quarried and transported blue metal without valid permits from Survey Nos.2 (part) and 61/1 (part) in Ettikuttapatti Village, Omalur Taluk. The lessee/writ petitioner was also directed to explain in writing within 15 days of receipt of the said notice for having violated the lease deed conditions laid down in 6(4), 6(7) and 10(5) of the lease deed.

12. The petitioner submitted his written explanation during April, 1992. The exact date is not mentioned but the same was received by the Deputy Director of Geology and Mines, Salem, on 16.4.1992. But, however, it is seen from the letter dated 30.4.1992 of Mr.P.Gunaraj, Addl. Government Pleader, High Court, Madras, addressed to the Secretary to Government, Industries Department, Madras-9, with a copy to the District Collector, Salem, that the petitioner has challenged the proceedings of the District Collector, Salem, in Roc.No.515 of 1989/Mines-B dated 18.3.1992 by filing W.P.No.5793 of 1992, and the same was dismissed by this Court on 23.4.1992 by J.Kanakaraj, J. The petitioner has thereafter filed the present two writ petitions W.P.Nos.6503 and 6504 of 1992.

13. The prayer in W.P.Nos.6503 of 1992 is as follows:- To issue a writ of mandamus forbearing the respondents from interfering with the quarrying operations of the petitioner in Survey Nos.2

(part) and 61/1 (part), totally measuring an extent of 6.15 acres in Ettikuttapatti Village, Omalur Taluk, Salem District, till 18.7.1993 pursuant to the proceedings of the 2nd respondent/District Collector, Salem in Roc.No.515 of 1989/Mines-B dated 12.9.1991, for rough stones, jellies, blue metal, etc., and transporting the same to a business place of the petitioner's choice and consequently direct the respondents to issue necessary permit for the transportation of the quarried rough stones jellies, blue metal, etc.

14. The prayer in W.P.No.6504 of 1992 is as follows:- To issue a writ of mandamus directing the respondents to allow the petitioner to execute the lease deed in favour of the respondent in respect of the quarry comprised in Survey Nos.2 (part) and 61/1 (part), totally measuring an extent of 6.15 acres and situate in Ettikuttapatti Village, Omalur Taluk, Salem District, for a period of three years from 19.7.1990 to 18.7.1993.

15. As stated above, W.P.No.5793 of 1992 was filed on 22.4.1992 by the petitioner challenging the proceedings of the 2nd respondent/District Collector, Salem, in Roc.No.515 of 1989/Mines-B dated 18.3.1992, and the same was dismissed by this Court on 23.4.1992. The present writ petitions viz., W.P.Nos.6503 and 6504 of 1992 were filed on 29.4.1992 by the petitioner through M/s. V.Santhanam and V.Seshayyan. The petitioner has signed the affidavit on 24.4.1992, i.e., the next day after the dismissal of W.P.No.5793 of 1992, and filed the same into Court on 29.4.1992. In the affidavit filed in support of the writ petitions, after setting out the previous history, the petitioner has referred to W.P.No.9008 of 1991 filed by him, wherein also he has challenged Clause 4 of the lease deed relating to the period of expiry of the lease. It is further stated in the affidavit by the petitioner that as per the directions of S.Ramalingam, J., in W.P.No.9008 of 1991, the 2nd respondent/District Collector, Salem, passed an order for carrying out quarrying operations by the petitioner in the said quarries from 19.7.1990 to 18.7.1993, that the petitioner was put in possession of the quarries and permitted to carry on mining operation by virtue of the orders passed by the District Collector, Salem, and the Deputy Director of Geology and Mines, Salem, that in spite of several representations to the District Collector, Salem, to issue transport permit to the petitioner for local sales in respect of the quarried

blue metal jelly, the same was not given to him and that the respondents are keeping his application pending for long time since 14.2.1992. Hence, the petitioner is approaching this Court to direct the respondents to issue necessary permits to him in respect of the quarried rough stone jellies, etc., for transporting them for local sales. Thus, the petitioner has filed W.P.No.6503 of 1992 for a mandamus forbearing the respondents from interfering with the quarrying operations by the petitioner of the subject quarry pursuant to the proceedings of the 2nd respondent/District Collector, Salem in Roc.No.515 of 1989/Mines-B dated 12.9.1991, and to direct the respondents to issue necessary permits for the transportation of the quarried stones, etc.

16. On the very same allegations, W.P.No.6504 of 1992 was filed by the petitioner through the very same counsel and on the very same date. In this writ petition also, the petitioner has made a reference only to W.P.No.9008 of 1991 wherein he prayed for extension of lease, and after referring to the order of S.Ramalingam, J., the petitioner has prayed to issue a writ of mandamus directing the respondents to allow the petitioner to execute the lease deed in favour of the respondents in respect of the quarry in question for a period of three years from 19.7.1990 to 18.7.1993.

17. Both the writ petitions were admitted by J.Kanakaraj, J., on 30.4.1992, and on the same date notice was ordered to the respondents in the two Writ Miscellaneous Petitions viz., W.M.P.Nos. 9339 and 9340 of 1992, which are for interim injunction restraining the respondents from interfering with the quarrying operations and to direct the respondents to allow the petitioner to execute the lease in respect of the quarry in question respectively.

18. I have carefully gone through the averments made in the above two writ petitions. It is rather unfortunate and painful to notice that the petitioner has purposely omitted and suppressed very important and relevant factors such as filing of W.P.No.1835 of 1991, which was dismissed by K.S.Bakthavatsalam, J., on 14.2.1991, W.A.No.429 of 1991, which was dismissed by the First Bench of this Court on 19.4.1991 and the filing of W.P.No.5793 of 1992 and its dismissal on 23.4.1992 by this Court. The petitioner has conveniently mentioned only his filing of W.P.No.9008 of 1991 and the exparte order passed by S.Ramalingam, J., on

4.7.1991 at the admission stage. In my view, the petitioner has suppressed very many material facts. The affidavits filed in support of W.P.No.9008 of 1991 and W.P.No.5793 of 1992 and in the present two writ petitions W.P.Nos.6503 and 6504 of 1992, were not candid and do not fully state the facts but suppressed the material facts. The petitioner has stated certain facts in such a way as to mislead the Court as to the true facts. It is the well settled proposition of law that it is the duty of a person invoking the special writ jurisdiction of a Court to make a full and true disclosure of all relevant facts. He could not suppress any fact. The Court ought, for its own protection, and to prevent an abuse of its process, can always refuse to proceed any further with the examination of the merits in the present two writ petitions. In my view, the petitioner has suppressed material and relevant facts with regard to the earlier Court proceedings, which, if brought to the notice of S.Ramalingam, J., in W.P.No.9008 of 1991 when applying for a *rule nisi*, should certainly have influenced the said Court in deciding one way or the other, and such suppression, in my view, was certainly calculated to deceive the Court into granting the order of *rule nisi*. The petitioner is not entitled to any relief in the present two writ petitions since the whole claim of the writ petitioner is based on the earlier order obtained by him from S.Ramalingam, J., in W.P.No.9008 of 1991, which, as I have stated above, was obtained on suppression of material and relevant facts. Hence, on this short ground, both the writ petitions are liable to be dismissed. 19. It is also to be noticed that W.P.No.9008 of 1991 was disposed of by the learned Judge at the time of admission itself by giving certain directions to consider the application for renewal. That writ petition was not even admitted, though it is seen from the order, that the name of Mr.J.R.K.Bhavanantham, Additional Government Pleader was mentioned in the order. It appears that the Additional Government Pleader, who was present in Court, was asked to take notice on behalf of the respondents.

20. As stated above, W.P.No.1835 of 1991, W.A.No.429 of 1991, W.P.No.9008 of 1991, and W.P.No.5793 of 1992 were disposed of by this Court at the admission stage itself. It is seen from the file produced by the learned Additional Government Pleader, that the copy of the order in W.P.No.1835 of 1991 was received by the District

Collector's Office, Salem, on 28.1.1992, and the order in W.A.No.429 of 1991 was received by District Collector's Office, Salem, on 17.7.1991, i.e., after the order of S.Ramalingam, J., in W.P.No.9008 of 1991 dated 4.7.1991, which was sent by the petitioner to the District Collector on 15.7.1991.

21. After receipt of conflicting orders from this Court, the District Collector, Salem, and other authorities came to know about the writ proceedings initiated by the petitioner without mentioning the true and correct facts. In the meanwhile, the petitioner has sent a petition for renewal, which was received by the Collector's Office, Salem, on 15.7.1991, and the three weeks time granted by this Court would expire on 1.8.1991. In the above circumstances, the matter was referred to Mr.K.Ravirajapandian, Additional Government Pleader, High Court, Madras, for his opinion on the orders of the High Court, Madras, in W.P.No.9008 of 1991, for taking further action, as to how two different orders for one and the same case can be given effect to, and also to take necessary action to file an appeal against the order dated 4.7.1991 in W.P.No.9008 of 1991. On 25.7.1991, the then Additional Government Pleader, Mr.K.Ravirajapandian, has stated thus as his opinion:

"It is a good case to expose the petitioner before the Court. Please send the entire file with the affidavits filed in the earlier W.P.No.1835 of 1991 immediately."

This opinion is available at page 160 of the file.

22. Since there was delay in obtaining the opinion from the then Additional Government Pleader, the matter was referred to Mr.M.A.Sadanand, Government Pleader, High Court, Madras, on 17.8.1991, as by that time Mr.K.Ravirajapandian, Additional Government Pleader, handed over charge to the Government Pleader. Mr.M.A.Sadanand, Government Pleader, High Court, Madras, has given his opinion as follows:

"Though a Division Bench has held that the lease date is the one mentioned in the deed, since no appeal has been filed against the instant order, which is to be implemented on or before 19.8.1991, there is no option but to obey the order which may be a wrong one. Delay in seeking advice has caused this apparent subversion of justice. Please pass orders lest you should be hauled up for Contempt of

Court.

(Sd.) M.A.Sadanand, 17.8.1991, G.P.”

In order to avoid contempt proceedings, orders were passed by the District Collector, Salem, in Roc.No.515 of 1991/Mines-B dated 12.9.1991 granting the lease to quarry rough stones, etc., for the period from 19.7.1990 to 18.7.1993, subject to the provisions contained in Tamil Nadu Minor Mineral Concession Rules, 1959.

23. As stated above, this is a typical case of gross abuse of the process of Court. Admittedly, the petitioner filed W.P.No.1835 of 1991 through his counsel M/s. V.Santhanam and V.Seshayyan seeking a writ of *certiorarified mandamus* to quash Clause 4 of the lease deed dated 19.7.1990 relating to the period of the lease executed by the petitioner in favour of the District Collector, Salem. That writ petition was dismissed *in limine* by my learned Brother K.S.Bakthavatsalam, J. The petitioner herein unsuccessfully challenged the said order in W.A.No.429 of 1991. As a matter of fact, the First Bench consisting of Hon'ble Chief Justice A.S.Anand, as he then was, and D.Raju, J., while dismissing the writ appeal *in limine*, has held that the petitioner having signed the lease agreement, is bound by Clause 4 of the lease deed, which provided that the lease shall be valid for the term from 19.7.1990 to 30.6.1991 and that the effort of the petitioner was to re-write the lease agreement and substitute clause 4 of the lease deed through writ proceedings, which is impermissible.

24. However, the writ petitioner, totally suppressing the above writ petition (W.P.No.1835 of 1991) and the Writ Appeal (W.P.No.429 of 1991), filed W.P.No.9008 of 1991 with the identical prayer as in W.P.No.1835 of 1991. In W.P.No.9008 of 1991, an order was passed by this Court directing the District Collector, Salem, to entertain an application from the petitioner for renewal of the quarry right and pass orders thereon so as to enable the petitioner to have the privilege of quarrying at least for three full calendar years. The writ petitioner got the above order from this Court by misleading the Court as if he is approaching the court for the first time and also by totally suppressing the material fact that an identical prayer was denied and declined by a learned single Judge and the same was confirmed by a Division Bench.

25. It is on the strength of the above order dated 4.7.1991 in W.P.No.9008 of 1991, the petitioner obtained lease of the quarry for the period from

19.7.1990 to 18.7.1993. There is also no dispute that no lease deed has been executed by the District Collector, Salem, pursuant to the proceedings in Roc.No.515 of 1989/Mines-B dated 12.9.1991 of the District Collector, Salem.

26. In the above background, the petitioner has filed W.P.No.6503 of 1992 for issuing a writ of mandamus forbearing the respondents from interfering with the quarry operations of the petitioner pursuant to the proceedings in Roc.No.515 of 1989/Mines-B dated 12.9.1991 of the District Collector, Salem, and W.P.No.6504 of 1992 has been filed for directing the respondents to allow the petitioner to execute the lease deed for a period of three years from 19.7.1990 to 18.7.1993.

27. The conduct of the petitioner deserves strong condemnation. On the strength of the order W.P.No.9008 of 1991, the petitioner had managed to obtain the proceedings in Roc.No.515 of 1989/Mines-B dated 12.9.1991 from the District Collector, Salem. Based on the aforesaid proceedings of the District Collector, Salem, the petitioner is seeking certain reliefs in W.P.Nos.6503 and 6504 of 1992.

28. I am concerned with the question whether the petitioner can claim any relief in the present two writ petitions. The remedy under Art.226 of the Constitution is an extra-ordinary and discretionary remedy. This Court would be fully justified in refusing to exercise its discretion in favour of a person who has abused the process of court and suppressed material and relevant factors and obtained orders from the High Court. It is on the strength of such orders, the petitioner is now claiming relief in the present writ petitions. In my view, Court should not be a party and extend its helping hand to a person who has played a fraud on court.

29. It is also significant to notice that the writ petitioner has not chosen to mention about W.P.No.1835 of 1991 and W.A.No.429 of 1991 in the present two writ petitions. The petitioner has not come to court with clean hands and failed to disclose material facts. The reason for not mentioning the above facts is also obvious. If the petitioner were to disclose the earlier writ proceedings in W.P.No.9008 of 1991, the Court would have not only declined the relief but also frowned on the petitioner. Equally, if all the relevant facts are mentioned in the present writ petitions, the court would not have even entertained the writ

petitions. I have no doubt in my mind that the petitioner has been misleading the court and obtained favourable orders and is trying to mislead the court further. Though I would be justified in not embarking on the merits of the case, yet, I do not find any ground to grant the reliefs claimed. The relief asked for in W.P.No.6503 of 1992 cannot be granted unless the petitioner succeeds in W.P.No.6504 of 1992. No relief can be granted in W.P.No.6504 of 1992 because the proceedings dated 12.9.1991 of the District Collector, Salem, came to be issued because of the orders of this Court in W.P.No.9008 of 1991, and the favourable orders in the above writ petition (W.P.No.9008 of 1991) has been passed because the petitioner has misled the Court by suppressing the material facts.

30. It is also necessary to mention that a show cause notice dated 18.3.1992 has been issued by the District Collector, Salem, to the petitioner for violation of the lease deed conditions in Clauses 6(4), 6(7) and 10(5), and the petitioner has sent a reply on 16.4.1992.

31. The learned Additional Government Pleader produced all the records. On going through the records, I find that the writ petitioner has filed another W.P.No.5793 of 1992 challenging the proceedings in Roc.No.515 of 1989/Mines-B dated 18.3.1992. The very same counsel who filed W.P.No.1835 of 1991 and W.A.No.429 of 1991 have filed W.P.No.5793 of 1992. W.P.No.5793 of 1992 was dismissed by J.Kanakaraj, J., on 23.4.1992. The order passed by J.Kanakaraj, J. is as follows:

"The petitioner challenges the show cause notice dated 18.3.1992. It is stated in the show cause notice that the Sub Inspector of Survey (Mines), Salem, inspected the land on 12.2.1992 and reported the lessee (petitioner) quarried and removed the quantity of 366 lorry loads of rough stones from 1.7.1991 till date of show cause notice. Based on the date of execution of the lease deed, the show cause notice called upon the petitioner to show cause as to why penalty should not be levied for conducting quarry operations contrary to the lease deed and the provisions of the Tamil Nadu Minor Mineral Concession Rules, 1959. The cost of the rough stones quarried from the lands is also worked out and the petitioner is asked to show cause as to why the said sum should not be demanded from the petitioner. The contention of the petitioner is that he has a subsisting

lease and therefore, the show cause notice is not warranted. I do not think that this contention can be accepted at this stage because it has to be seen whether the lease deed authorises the petitioner to quarry rough stones and whether the lease deed was subsisting during the period when the illicit quarrying is said to have taken place. These are all matters which the authority has to enquire into on the basis of the explanation that the petitioner will submit, in response to the show cause notice. It is too early to come to any conclusion one way or the other. Therefore, I am not inclined to interfere at this stage. It is open to the petitioner to submit his explanation. If he is ultimately aggrieved by the order, it is open to him to challenge the same in the manner known to law. The writ petition is dismissed."

32. It is after the dismissal of the aforesaid writ petition (W.P.No.5793 of 1992) on 23.4.1992, the petitioner has filed the two writ petitions in question on 29.4.1992. The petitioner has sworn to the affidavit on 24.4.1992 and the writ petitions have been signed by the advocates on the very same day viz., 24.4.1992. Significantly, the very same counsel had appeared in W.P.No.5793 of 1992 as well as in the present two writ petitions. I have absolutely no hesitation in my mind in coming to the conclusion that a member of the Bar, who is expected to assist the court, has joined hands with the unscrupulous petitioner and has taken the Court for a ride. It is very painful to note that a member of the Bar has failed in his duty to the Court and has been a party to the unholy act of the petitioner. I must also mention the fact that when the learned Additional Government Pleader brought to my notice about the filing of W.P.No.6504 of 1992, I confronted the petitioner's counsel Mr.V.Santhanam and asked him to tell the Court whether any such writ petition has been filed. Mr.V.Santhanam, learned counsel for the petitioner, gave an evasive answer that he has to verify the same even though he himself has filed both the writ petitions together on the very same day.

33. Again, these material facts have been suppressed in W.P.Nos.5793, 6503 and 6504 of 1992. Consequently, the petitioner is not entitled to any consideration at the hands of this Court in view of the landmark decision of Rajagopalan, J., in the case reported in *K.Marappa Gounder, K.M.S.Bus Service v. The Central Road Traffic Board, Madras*,

(1956)1 M.L.J. 324. Hence this Court should decline to grant any relief to the writ petitioner in the exercise of its jurisdiction under Art.226 of the Constitution of India. Accordingly, both the writ petitions (W.P.Nos.6503 and 6504 of 1992) are dismissed with costs of Rs.5,000 *i.e.*, Rs.2,500 in each case. The award of heavy cost is justified in view of the unfair conduct of the petitioner. Such award of cost has been held to be proper and justified by the Apex Court in the decision reported in *Dr.Vijay Kumar Kathuria v. State of Haryana, A.I.R. 1984 S.C. 953; (1983)3 S.C.C. 333*. 34. Out of the costs of Rs.5,000 awarded, a sum of Rs.2,000 (Rs.1,000 in each case) shall be paid to Mr.P.Shanmugham, learned Additional Government Pleader, towards his fees, but for whom the fraudulent and unfair conduct of the writ petitioner would not have been unearthed and brought to the notice of the Court. The fee of Rs.2,000 (in both the cases) is fixed by the Court to Mr.P.Shanmugham, learned Additional Government Pleader, taking into consideration of the excellent work done by him in protecting the interest of the State.

35. Further, I direct the respondents to remove all the materials quarried by the petitioner, sell the same and appropriate the sale proceeds towards the amounts due to the State from the petitioner and take further action for recovery of the balance, if any.

36. Before parting with this case, I must also point out that the lawyers as officers of court, owe a duty to the court to place all matters before the court. The earlier proceedings in W.P.No.1835 of 1991, W.A.No.429 of 1991 and W.P.No.5793 of 1992, and the present writ petitions have been filed by one and the same counsel. Hence, it was obligatory on the part of the lawyers to have ascertained as to how the petitioner has obtained the order in W.P.No.9008 of 1991 in spite of the dismissal of the earlier W.P.No.1835 of 1991 and W.A.No.429 of 1991, and mentioned all the facts in the present writ proceedings. I am also tempted to feel that the petitioner has changed the counsel for appearing in W.P.No.9008 of 1991 with a view to wriggle out of the legal implications flowing from the dismissal of W.P.No.1835 of 1991, as confirmed in W.A.No.429 of 1991 since the present counsel appearing for the petitioner are fully aware of the same. It would be the saddest day if counsel behave in a manner making the court lose faith in the

words and representations of lawyers. However, I cannot help observing that the conduct and behaviour of the petitioner as well as his counsel M/s.V.Santhanam and V.Seshayyan, are most reprehensible and deserve to be deprecated. The petitioner and his counsel have not even tendered unqualified apology and sought mercy from the Court. However, M/s.V.Santhanam and V.Seshayyan have very cleverly sought permission of this court to permit them to withdraw the writ petitions, which was rejected by me. They wanted to withdraw the writ petitions on coming to know of the turn of events that has taken place in the present writ petitions during the course of hearing. I, however, part with this case with a heavy heart expressing my strong disapproval of their conduct and behaviour.

37. In the result, both the writ petitions are dismissed with costs of Rs.5,000 *i.e.*, Rs.2,500 in each case. Out of the costs, a sum of Rs.2,000 (Rs.1,000 in each case) is fixed by me as the fees of Mr.P.Shanmugham, Additional Government Pleader, for the reasons mentioned *supra*. As directed earlier, the respondents are at liberty to forthwith remove all the materials quarried by the petitioner pursuant to the order obtained by him by suppression of material facts in W.P.No.9008 of 1991, sell the same and appropriate the sale proceeds towards the amount due to the State from the petitioner, and take further appropriate action for recovery of the balance, if any.

V.K.

---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.1324 of 1989 and A.A.O.No.68 of 1991
27th April, 1992.

Janaki and another ... *Appellants*

v.

Kiliambal and others ... *Respondents.*

Tamil Nadu Pension Rules, Rules 45(5) and 48 - Pension and death-cum-retirement - Gratuity of public servant - Nomination for - Nomination in

respect of pension in favour of person who is not the legally married wife - Nomination in favour of son while legally wedded Wife is alive - Validity of.

One Narasinghan, a public servant died on 28.6.1984. He was married to the first plaintiff in June, 1946 and had one daughter the second plaintiff. He had illicit intimacy with the first defendant and had a son the second defendant through her. The deceased had nominated the first defendant as the person entitled to service family pension and with regard to the gratuity, he made two nominations the first in favour of the first defendant only and the second in favour of the defendants 1 and 2 with a direction that each shall be paid half thereof. Plaintiffs 1 and 2 filed a suit for a declaration that they and the eighth defendant were entitled to receive the amounts due to the deceased by way of service benefits provident fund, death cum-retirement gratuity, pension etc. It was decreed. On appeal, the lower appellate court modified the same holding that besides the plaintiffs, the second defendant would also be a legal heir. Defendants 1 and 2 preferred a second appeal.

Held: As regards the first defendant, the nomination is clearly invalid as she is not a member of the family of the deceased Narasinghan. As she is not the legally wedded wife of the deceased, she cannot claim to be a member of the family. Rule 46 of the Tamil Nadu Pension Rules is to the effect that the gratuity payable under Rule 45 shall be paid to the person or persons on whom the right to receiving the gratuity is conferred by means of a nomination under Rule 48. Rule 48 provides that the Government servant shall make a nomination in Form 1 or Form 2 as may be appropriate in the circumstances of the case conferring on one or more persons the right of receiving the death-cum-retirement gratuity payable under Rule 45. The proviso to the rule is to the effect that the nomination shall not be in favour of any person or persons other than the members of his family and such nomination shall be in the order laid down in sub-sec.(5) of Rule 45. Hence the nomination made by deceased Narasinghan with regard to his family pension and death-cum retirement gratuity are not valid as they are not in accordance with Rules 45 and 48 of the Tamil Nadu Pension Rules. In so far as the pension is concerned, the only nominee is the first defendant. She not being a member of the family as defined under Rule 45(5) of the Tamil Nadu Pension Rules, the nomination

is invalid. With regard to the death-cum-retirement gratuity, the nomination is invalid because it is not in the order specified in Rule 45(5). It takes in the first defendant who is not the legally wedded wife of the deceased. The first entry relates to the wife; the second to the husband and the third entry relates to the sons. In this case, the first plaintiff is the legally wedded wife of the deceased Narasinghan. So long as she is alive, there cannot be any nomination in favour of the second defendant who is a son. Hence the nominations made by the deceased in favour of the first and second defendants are not valid in law and they cannot be acted upon. Moreover, even before the nomination was finalised by sending the same to the appropriate authority. Narasinghan died on account of the accident and the process was not complete. In the circumstances defendants 1 and 2 cannot make any claim on the footing of the nominations made by deceased Narasinghan. [Paras 7, 8, 9 and 10]

Case referred to:

Valliammal v. Kamalambal, (1990)1 L.W. 461. [Para 12]

Appeal against the decree of the Principal District Court, South Arcot at Cuddalore, dated 23.1.1989 in Appeal Suit No.18 of 1988, preferred against the decree of the Court of the District Munsif, Panruti, dated 30.12.1987 in Original Suit No.1258 of 1984 etc.

G.Rajagopal, for Appellants.

V.Prabhakar for Respondent No.2.

S.Kaman, Government Advocate, for Respondent Nos.3 to 5.

R.Vijayan, for Respondent No.6.

The Court delivered the following

JUDGMENT: Second Appeal No.1324 of 1989:-

This appeal has been filed by defendants 1 and 2, who claim to be the wife and son of one Narasinghan, who died on 28.6.1984. He met with an accident on 23.6.1984 and died on 28.6.1984. He was employed as an Assistant (Agricultural Demonstration), in the Office of the Assistant Director (Agriculture), Seed Centre, Cuddalore. The suit has been filed by respondents 1 and 2 herein for a declaration that the plaintiffs and the eighth defendant Poongothai are the only legal heirs of the deceased Narasinghan and they are entitled to receive the amounts due to the deceased by way of service benefits, provident fund and death-cum-retirement gratuity, pension, etc. The dispute, in short, is between the plaintiffs on the one hand

and defendants 1 and 2 on the other. According to the plaintiffs, the first plaintiff was married to Narasinghan somewhere in June, 1946 and the second plaintiff was born to them. It is the case of the plaintiffs that the first defendant was having illicit intimacy with the deceased and he drove the first plaintiff away from the house after he came into contact with the first defendant. Per contra, the case of defendants 1 and 2 is that the plaintiffs are not the legal heirs of deceased Narasinghan and the first defendant got married to him in January, 1948 and she was the only legally wedded wife. It is the case of defendants 1 and 2 that the second defendant was one of the sons born to the first defendant and Narasinghan, and the other children were dead. It is also contended by them that deceased Narasinghan had nominated them to receive the service benefits and in view of the nomination the plaintiffs cannot claim any right to the same.

2. The trial court granted a decree in favour of the plaintiffs as prayed for by them and declared that the plaintiffs and the 8th defendant are the only legal heirs of the deceased Narasinghan. On appeal, the lower appellate court modified the same by holding that besides the plaintiffs the second defendant would also be a legal heir as he is a legitimate son of deceased Narasinghan by virtue of the provisions of Sec.16 of the Hindu Marriage Act, 1955 as amended. Defendants 1 and 2 are aggrieved of the grant of decree in favour of the plaintiffs and they have preferred this appeal. There is no memorandum of cross objections at the instance of the plaintiffs.

3. The question whether the first plaintiff is the legally wedded wife of deceased Narasinghan is a question of fact. The courts below have considered the entire evidence on record and come to the conclusion that the first plaintiff was married to deceased Narasinghan somewhere in 1943 and she was a properly wedded wife. It is also found on facts that the second plaintiff and the 8th defendant are children born to the first plaintiff and Narasinghan. The findings of the courts below are attacked by learned counsel for the appellants on this ground. According to him the evidence given by the witnesses examined by the plaintiffs is wholly discrepant in material particulars and no reliance could have been placed by the courts of fact on such evidence. It is submitted that according to the first plaintiff as P.W.1 she was married about 47

years prior to her deposition while according to P.W.2 she was married thirty years prior to his deposition. It is submitted that according to P.W.3 the marriage took place 40 years prior to his evidence and according to P.W.7 the marriage took place in 1943. No doubt there is discrepancy with regard to the year of the marriage. But that has been taken note of by both the courts below. When the matter is spoken to by witnesses after more than three decades it is quite natural that they are not in a position to give the date or year correctly. The witnesses are not highly educated so as to remember it precisely. Their natural deficiencies have been taken into account by the courts below and it is found that the first plaintiff was married to deceased Narasinghan somewhere in 1943. One important circumstance is that P.Ws.2 and 3 are the brothers of deceased Narasinghan and they have given evidence in support of the plaintiffs' case. That evidence cannot certainly be ignored by Courts. The evidence of P.W.7 is also taken into account properly by the courts below. I do not find any infirmity in the discussion of the evidence by the courts below. Ex.A-8 is a copy of the invitation issued for the marriage of the eighth defendant. That describes the eighth defendant as the daughter of Narasinghan. The marriage took place in 1966. The postal seals found on Ex.A-8 show that it was a genuine invitation posted in 1966 to the addressee and the courts below have rightly placed reliance on the same. Taking an overall picture of the entire evidence it is very clear that the findings of the courts below are unassailable on this aspect of the matter. There is no warrant for interfering with the same.

4. Coming to the marriage of the first defendant it is her case that she got married three days before the death of Mahatma Gandhi, i.e., she got married in the beginning of 1948. Reliance is placed upon the oral evidence adduced by the first defendant herself and her son, the second defendant. According to the evidence of the second defendant as D.W.1 the marriage took place in the year 1949. According to him he heard from his mother that the marriage took place in 1949. The evidence adduced by the defendants has been fully considered by the Courts below. There is no evidence worthy of acceptance to hold that the first defendant was married to Narasinghan in 1948 as contended by her. Nothing can be inferred from the date of birth of the second defendant in favour of

the defendants' contention. On the other hand, it is seen from the records that the first defendant must have been born somewhere in 1939. In fact, the date of birth of the first defendant is clearly given by Narasinghan himself in Ex.B-13, in the nomination forms signed by him. According to Ex.B-13 the first defendant was born on 7.3.1939. The second defendant was born on 10.11.1962. The first defendant could not have been married at the age of nine years in 1948. Her version that she got children even from 1949 onwards cannot be accepted as she would have been hardly ten years' old at that time. Hence the version put forward by the defendants has been rightly disbelieved by the courts below. There is no justification for interference with the same.

5. It is vehemently contended by learned counsel for the appellants/defendants 1 and 2 that the nominations being in favour of defendants 1 and 2 the plaintiffs cannot claim any right to the service benefits. According to him, the provisions of the Provident Fund Act and the Rules framed thereunder are peculiar and they exclude the normal rules of succession. His contention is that the rulings relating to nomination in insurance policies and nomination with regard to other funds will not apply to a case of nomination with reference to provident fund. He referred to a number of judgments to support his contention. I find it wholly unnecessary in this case to decide this question as there is nothing on record to show that any nomination was made by deceased Narasinghan in favour of defendants 1 and 2 or anybody else with regard to his provident fund. Ex.A-12 which is equivalent to Ex.B-13 shows that there was no nomination with regard to the provident fund. As deceased Narasinghan was due to retire on 30.6.1985 his pension papers were prepared and forwarded to the concerned authorities. They included the nomination forms also. While making the nomination with reference to family pension and gratuity the deceased Narasinghan did not make any nomination for provident fund or family benefit fund. A letter written by the Assistant Director (Agriculture), Seed Centre, who is the third defendant in the suit, to the Joint Director, who is the fourth defendant, on 27.10.1984 under Reference No.A/8529/84 shows clearly that there was no nomination whatever with regard to the provident fund. In the absence of any evidence on record to show that the deceased made a

nomination with reference to provident fund it is unnecessary for me to decide the question of law argued at some length by learned counsel for the appellants-defendants.

6. With regard to the family pension the deceased nominated the first defendant alone as the person entitled to receive the same. With regard to the gratuity he made two nominations. In the first he nominated the first defendant only and in the second nomination he nominated the first and second defendants, with a direction that each shall be paid half thereof.

7. As regards the first defendant the nomination is clearly invalid as she is not a member of the family of the deceased Narasinghan. As she is not the legally wedded wife of the deceased, she cannot claim to be a member of the family.

8. The Tamil Nadu Pension Rules define a family as follows: (*Vide* Rule 45(5)):

"45(5) for the purposes of this rule and rules 46, 47 and 48 'family', in relation to a Government servant means:

(i) wife or wives, including judicially separated wife or wives in the case of a male government servant;

(ii) husband, including judicially separated husband, in the case of female Government servant.

(iii) sons including step sons and adopted sons.

(iv) to (xi) xxxxxxxxxxxx."

Rule 46 is to the effect that the gratuity payable under Rule 45, shall be paid to the person or persons on whom the right to receive the gratuity is conferred by means of a nomination under Rule 48. Rule 48 provides that the Government servant shall make a nomination in Form 1 or Form 2, as may be as appropriate in the circumstances of the case conferring on one or more persons the right to receive the death-cum-retirement gratuity payable under Rule 45. The proviso to the rule is to the effect that the nomination shall not be in favour of any person or persons other than the members of his family and such nomination shall be in the order laid down in sub-sec.(5) of Rule 45. Hence the nomination made by deceased Narasinghan with regard to his family pension and death-cum-retirement gratuity are not valid as they are not in accordance with Rules 45 and 48 of the Tamil Nadu Pension Rules.

9. In so far as pension is concerned, the only nominee is the first defendant. She not being a

member of the family as defined under Rule 45(5) of the Tamil Nadu Pension Rules, the nomination is invalid.

10. With regard to the death-cum-retirement gratuity, the nomination is invalid because it is not in the order specified in Rule 45(5). It takes in the first defendant who is not the legally wedded wife of the second defendant. The first entry relates to the wife; the second to the husband and the third entry relates to the sons. In this case, the first plaintiff is the legally wedded wife of the deceased Narasinghan. So long as she is alive, there cannot be any nomination in favour of the second defendant, who is a son. Hence the nominations made by the deceased in favour of the first and second defendants are not valid in law and they cannot be acted upon. Moreover, even before the nomination was finalised by sending the same to the appropriate authority Narasinghan died on account of the accident and the process was not complete. In the circumstances defendants 1 and 2 cannot make any claim on the footing of the nominations made by deceased Narasinghan.

11. It, therefore, follows that the first plaintiff is the legally wedded wife of deceased Narasinghan and the second plaintiff and 8th defendant are their legitimate children.

12. Though it could be contended that the second defendant is not a legitimate son of the deceased because of the interpretation placed on Sec.16 of the Hindu Marriage Act by a Division Bench of this Court in *Valliammal v. Kamalambal*, (1990)1 L.W. 461, the plaintiffs not having filed any memorandum of cross objections, have allowed the decree granted by the lower appellate Court to become final. Hence the second defendant's right to claim a share of the service benefits payable to the deceased has to be upheld.

13. Consequently, the judgment and decree passed by the District Court, Cuddalore, in A.S.No.18 of 1988 are confirmed. The second appeal fails and it is dismissed. There will be no order as to costs.

Civil Miscellaneous Appeal No.68 of 1991: This appeal arises out of an application for payment of the compensation amount awarded in M.A.C.T.O.P.No.796 of 1984 by the Motor Accidents Claims Tribunal, Cuddalore, in favour of the legal heirs of deceased Narasinghan, who died on account of the accident. The award was passed on 15.12.1986. The dispute is between the appellants on the one hand and respondents 3 and 4 on

the other. The Tribunal directed the amount to be deposited in court and held that the legal heirs of late Narasinghan were entitled to withdraw the same from the court by producing the judgment in the civil case after final adjudication of the suit. After the disposal of the civil case by the trial court in O.S.No.1258 of 1984 and the confirmation of the decree by the District Court in A.S.No.18 of 1988, the first appellant filed I.A.No.87 of 1990 for payment out of the amount. The tribunal dismissed the application holding that the matter was pending in second appeal. Aggrieved by the said order, the first appellant has preferred this appeal.

15. During the pendency of the appeal the first appellant died and her daughter is brought on record as her legal representative. She has claimed that the share due to the first appellant has been bequeathed to her by the Will executed by the first appellant. The Will is not disputed by the other daughter of the first appellant, viz., Poongothai who was the eighth defendant in the civil suit, O.S.No.1258 of 1984. Hence it has to be held that the second appellant, viz., Mangai, is entitled not only to her share but also to the share of her mother, deceased first appellant.

16. To-day, I have disposed of S.A.No.1324 of 1989 holding that the legal heirs of Narasinghan are, (1) Kiliambal, (2) Mangai, (3) Poongothai, and (4) Murugan. Kiliyambal is the first appellant in this civil miscellaneous appeal. Mangai is the second appellant. She is entitled to a one-half share. Poongothai is not a party to this appeal. She is entitled to one-fourth share. She was a party to the civil suit. The other one-fourth share belongs to the fourth respondent Murugan. The Tribunal shall pay half of the amount to the second appellant; one-fourth to the fourth respondent Murugan and another one-fourth to Poongothai, who is not a party to this appeal. It is open to Poongothai to apply to the Tribunal, if so advised, for payment of the said one-fourth share. This appeal is allowed accordingly with the above directions. No costs.

B.S. ----

Second appeal dismissed and civil miscellaneous appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra and Janarthanam, JJ.*

O.S.A.No.135 of 1991 *5th August, 1991.*

**Chief Engineer Constructions, Works Branch,
Southern Railway and another** ...*Appellants*
v.

M/s.Muthuswamy ...*Respondent.*

Judicial order - Must be a speaking order.

No judicial order can be justified unless it is a speaking order. It is not stated in the impugned order what was the dispute for arbitration and why the plaintiff wanted the appointment of arbitrator and reference and why the defendant objected to the appointment of the arbitrator or the reference of the dispute to arbitration. It is well settled that a judicial order must advert to the facts and issues and give a specific finding before the operative order is passed. For that reason alone, the impugned order has to be set aside and remitted to the trial court.

[Para 3]

V.R.Gopalan, for Appellants.

B.T.Seshadri, for Respondent.

The Judgment of the Court was delivered by *Mishra, J.*:- Mr.B.T.Seshadri appears on behalf of the plaintiff/respondent. It is agreed between the parties that the entire matter, that is to say, the appeal itself can be disposed of at the admission stage itself. Having heard learned counsel for the parties, we are of the opinion that it is in the interests of all concerned that the appeal itself is finally disposed of at this stage.

2. The impugned order reads as follows:

"I have heard Mr.B.T.Seshadri on behalf of the contractor and Mr.V.R.Gopalan on behalf of the Railways. I have also perused the affidavit filed in support of the suit and the counter statement filed on behalf of the Railways.

The General Manager, Southern Railway, will follow the procedure in accordance with Clause 63(3)(ii) and Clause 63(3)(b) of the General Conditions of Contract and appoint two Arbitrators to decide the dispute and differences that have arisen between the contractor and the Southern Railway. All the disputes that have already been raised by both parties in the affidavit filed in support of the suit and also in

the counter affidavit will be decided by the two arbitrators. The arbitrators so appointed shall dispose of the matter and pass the Award within four months from the date of entering upon the reference.

The procedure with regard to the appointment of two arbitrators shall be completed within six weeks from this date."

Followed by the formal decretal order in these words:

"(1) That the General Manager, Southern Railway the 2nd defendant herein to follow the procedure in accordance with Clause 63(3)(ii) and Clause 63(3)(b) of the General Conditions of the Contract and appoint two Arbitrators to decide the dispute and differences that had arisen between the contractor and the Railway and also to decide all the disputes that had already been raised by both parties in the affidavit, and also in the counter affidavit filed herein:

(2) that the said Arbitrators appointed herein shall dispose of the matter and pass the Award within four months from the date of entering upon the reference and

(3) That the procedure with regard to the appointment of the Arbitrators as mentioned in Clause (1) supra shall be completed within six weeks from this date, i.e., on or before 3.5.1991."

3. It is not known why the learned single Judge found that the General Manager, Southern Railway, was required to follow the procedure in accordance with Clause 63(3)(ii) and Clause 63(3)(b) of the General Conditions of Contract and appoint two Arbitrators to decide the dispute and differences that have arisen between the contractor and the Southern Railway, when it had been contested before him on behalf of the appellants/Railways that no such arbitration was possible with respect to the dispute and that the dispute falls beyond the agreement. No judicial order can be justified unless it is a speaking order. It is not stated anywhere in the impugned order what was the dispute for arbitration and why the plaintiff wanted the appointment of arbitrator and reference and why the appellants/Railways objected to the appointment of the arbitrator or reference of the dispute to arbitrator. It appears that correct position of law in this regard was not brought to the notice of the learned single Judge. It is well

settled that a judicial order must advert to the facts and issues and give a specific finding before the operative order is passed. For the said reason alone, the impugned order has to be set aside and remitted to the trial court.

4. Accordingly, we allow the appeal, set aside the impugned order and remit the whole matter to the trial Court for a rehearing and disposal in accordance with law. There will be no order as to costs.

V.K.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

A.A.O.Nos.52 and 53 of 1992 17th February, 1992.

Rukmani Devi Arundale Trust represented by its Secretary C.T.Nachiappan, Madras ...Appellant

S.Easwaran

...Respondent.

Principal and agent - Agent in management of property of principal effecting improvements to same - Termination of agency - If can be restrained from interfering with possession of principal before his dues are paid.

Whatever possession the agent had prior to the termination of agency, was only on behalf of the principal. Even assuming that the agent is entitled to be reimbursed for the amount spent by him for reclaiming or improving the suit property or for planting trees, the only course open to him is to make claims against the principal and pray for a decree with regard to the same. Even assuming that the agent is entitled to a huge sum from the principal, the principal cannot be prevented from appointing his own agency to take care of the property. In such a case the principal is entitled to an injunction restraining the agent from interfering with the possession of the principal as the agency has been terminated. [Paras 2 and 3]

Cases referred to:

Southern Roadways Ltd. Madurai v. S.M.Krishnan, (1989) 3 S.C.C. 603. [Para 3]

- MLJ 6

Narayani Amma v. Bhaskaran Pillai, A.I.R. 1969 Ker. 214. [Para 3]

Appeal against the Order of the Court of the Subordinate Judge of Thenkasi, dated 6.8.1991 and made in I.A.Nos.9 and 94 of 1991 in O.S.No.2 of 1991 respectively.

M.S.Subramanian, for Appellant.

P.Viswanathan, for Respondent.

The Court made the following

ORDER:- These two appeals arise out of interlocutory applications filed by the appellant for an injunction, and by the respondent for vacating the interim injunction. The appellant is indisputably the owner of the property in question. The appellant-trust appointed the respondent as an agent for taking care of its properties under a letter dated 18.10.1984 marked as Ex.P-1 in the case. The letter reads as follows:

"Be it known that I, hereby, authorise on behalf of the Rukmani Devi Arundale Trust, from this day, the 18th day of October, 1984, Mr.S.Easwaran, son of Sri E.Subramony, No.85, Amman Sannadhi Street, Shencottah to be incharge as representative of the Trust and take such action he deems necessary to furtherance of the Trust lands comprised in Survey Nos.511/1, 55/2 and 511/3 aggregating to 6.73 acres of Courtallam Revenue Village, Tenkasi Taluk of Tirunelveli District."

It is not necessary to refer to other documents. But suffice it to point out that the appellant terminated the agency by its letter dated 4.5.1990 and called upon the respondent to render accounts. The suit has been filed for rendition of accounts and for an injunction restraining the respondent from interfering with the management of the suit property by the plaintiff. The appellant filed I.A.No.9 of 1991 for an injunction pending suit and the court below granted an order of interim injunction. As against that, the respondent filed I.A.No.94 of 1991 to vacate the interim injunction. The contention of the respondent is that the agency is coupled with interest and it cannot be allowed to be cancelled before the petitioner reimburses the respondent for the heavy expenditure incurred by him. According to the respondent he reclaimed the property, improved it and planted several trees. The trial court has accepted the case of the respondent and vacated the interim injunction partially taking a view that the agency cannot be terminated at this stage. The trial court has also

observed that if the respondent is prevented from entering into possession, the trees planted already will wither out as there would be none to take care of the same. The trial Court granted only an injunction restraining the respondent from cutting or removing the trees from the suit property. Aggrieved thereby, the plaintiff has preferred these two appeals.

2. Even the facts stated above are sufficient to show that the trial court is in error in vacating the interim injunction restraining the respondent from interfering with the possession of the appellant.

Whatever possession, the respondent had, prior to the termination of agency, was only on behalf of the appellant, and it cannot be contended by the respondent that he was in exclusive possession, so as to exclude even the owner thereof, who is the principal. Even assuming that the respondent is entitled to be reimbursed for the amount spent by him, for reclaiming or improving the suit property or for planting the trees, the only course open to him is, to make claims against the appellant and pray for a decree with regard to the same. So far the respondent has not filed any counter claim or written statement in the suit. Even assuming that the respondent is entitled to huge amount from the plaintiff, by way of compensation, the plaintiff cannot be prevented from appointing its own agency to take care of the property. It is not the case of the respondent that the plaintiff will not be in a position to pay the amount which may be claimed by the respondent, and therefore, the plaintiff should not be allowed to reimburse himself from and out of the income from the suit property.

3. It has been held in *Southern Roadways Ltd. Madurai v. S.M. Krishnan*, (1989) 3 S.C.C. 603, that a principal has every right to carry on business as usual after the removal of the agent and that the possession of the agent of the premises in question is only that on behalf of the principal. It has been pointed out that principal was never out of possession. In that case, the defendant was carrying on business as an agent of the principal who was entitled to the business premises. The plaintiff had been granted an injunction restraining the defendant from interfering with the possession of the principal as the agency had been terminated. The relevant observation of the Supreme Court is as follows:

"The crux of the matter is that an agent holds the principal's property only on behalf of the

principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor can he convert it into any other kind or use. His possession is the possession of the principal for all purposes. As the Kerala High Court in *Narayani Amma v. Bhaskaran Pillai*, A.I.R. 1969 Ker. 214, said

"The agent has no possession of his own. What is called a caretaker's possession is the possession of the principal."

Again in paragraph 22, it is observed as follows:

"In this case, the respondent's possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file a suit for recovery of possession. The respondent has no right to remain in possession of the suit premises after termination of his agency. He has also no right to interfere with the company's business. The case, therefore, deserves the grant of temporary injunction. The learned single Judge of the High Court in our judgment was justified in issuing the injunction. The Division Bench of the High Court was clearly in error in vacating it."

4. In view of the clear ruling of the Supreme Court, the order of the court below deserves to be set aside in so far as it is against the appellant. Both the appeals are allowed. There will be an order of injunction restraining the respondent from interfering with the possession of the appellant of the suit property till the disposal of the suit. There will be no order as to costs.

V.K.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

A.S.No.442 of 1980

15th March, 1991.

The Church of Christ King, Aranthangi, represented by Father Paul Pinto, Parish and Power of Attorney Agent

...Appellant

v.

Mohammed Muthaliff Rowther ...Respondent.

Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), Sec.15(4) and (5) - Scope - Lessee of inam land putting up structure thereon before notified date - Becomes owner of both building and site from notified date.

It is clear from a reading of sub-sec.(4) of Sec.15 of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963, that a building owned by a person immediately before the notified date shall vest in that person. Then as per sub-sec.(5) building includes the site on which the superstructure stands and any adjacent premises occupied as an appurtenance thereto. Therefore, the owner of the building in whom the building vests under Sec.15(4) will also be the owner of the site as well as the land appurtenant thereto. It is therefore manifest that the tenant who owned the building before the notified date becomes the owner of both the building as well as the site with the appurtenant land. [Para 5]

Cases referred to:

Somasundaram Pillai v. Dorairajan, (1979)1 M.L.J. 443. [Para 6]

KVellappa Gounder and Sons by partner KVellappa Gounder v. K.S. Thirugnanasambandam Chettiar, 93 L.W. 707. [Para 6]

G.Subramaniam, Senior Counsel, for Appellant.

G.Nagarajan, for Respondent.

The Court delivered the following

JUDGMENT:- The plaintiff church is the appellant. The suit for declaration of title, consequential injunction and for mandatory injunction for removal of superstructure in the suit property has been dismissed.

2. As the learned trial Judge has pointed out most of the facts in the case are admitted ones. The suit property is 29 cents of land in Survey No.15/1 in Aranthangi Thottam village. Originally it belonged

to an independent landholder of the village, Sulochanambalpuram Chathiram. This land and other lands of the land-holder was in the management of the District Board. On 7.9.1929 the District Board has given a lease of the said lands in favour of the plaintiff church. The plaintiff church has been periodically leasing out the lands to various tenants. Thus on 9.2.1946 the plaintiff church leased out a portion of the suit property to Krishnaswami Thevar under Ex.A-5 and then on 1.1.1962 it executed a lease deed in respect of another portion in favour of one Sathan under Ex.A-7. Then on 8.8.1962 the remaining portion of the property was leased out in favour of Meiyappa Konar under Ex.A-8. It appears Krishnaswami Thevar and Sathan have assigned their rights in favour of Velusamy and Natarajan. Then Meiyappa Konar, Veluswamy and Natarajan have subsequently under Exs.A-27, dated 12.3.1966, A-28, dated 25.4.1966, A-29, dated 26.4.1966, sold the superstructure put up by them to the defendant. In the meanwhile the village was notified on 9.4.1965 under Act 26 of 1963. Settlement proceedings were taken and the Assistant Settlement Officer granted patta in favour of the plaintiff in respect of both the superstructure and the site. On appeal by the defendant the Settlement Officer dismissed the appeal. But in the further appeal to the Director of Settlements, he holding that the superstructure belongs to the defendant, and the site viz., 29 cents belongs to the plaintiff church, issued joint patta. The revision preferred before the Commissioner of Land Revenue was dismissed as time barred, but however the Commissioner observed that it is open to the parties to establish their rights in the civil court. Therefore the suit.

3. The Church pleaded that both the site and the superstructure belong to the Church, and on the other hand the defendant contended *inter alia* that he or his predecessors-in-title having put up the superstructure, under the provisions of the Act 26 of 1963, he is entitled to both the superstructure and the site.

4. The trial court framed as many as 9 issues and answering all the issues, ultimately dismissed the suit. The main finding of the trial court is that the defendant or his predecessor-in-title having put up the superstructure, under Secs.15(4) and 15(5) of Act 26 of 1963, he will be entitled to both the superstructure and the site on which it stands and therefore the suit property belongs to the defen-

dant. It is this finding alone which is now challenged in this appeal and therefore it is not necessary to go into the other points that were decided by the learned trial Judge.

5. Now, admittedly the superstructure has been put up either by the defendant or his predecessor-in-title before Act 26 of 1963 was notified. Now, Sec.15 of the Act viz., Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act 26 of 1963, reads as follows:-

"15. Vesting of buildings situated in Inam estates:- (1) Every building situated within the limit is of an inam estate, which immediately before the notified date, belonged to any land-holder thereof and was then being used by him as an office in connection with its administration and for no other purpose, shall vest in the Government, free of all encumbrances, with effect on and from the notified date.

(2) Every building so situated which, immediately before the notified date belonged to any such landholder and the whole or principal part thereof was then in the occupation of any religious, educational or charitable institution shall also vest in the Government, free of all encumbrances, with effect on and from the notified date:

Provided that when such institution ceases to exist, the building shall revert to such landholder or if he is dead, to his heirs or legal representatives.

(3) where any building so situated--

(a) which belonged to any such land-holder on the 1st day of July, 1960; and

(b)(i) which on that date was being used by him as an office in connection with the administration of the inam estate, and for no other purpose, or

(ii) the whole or principal part whereof was on that date in the occupation of any religious, educational or charitable institution, has, after the 1st day of July, 1960 and before the notified date, been sold or made a gift of by the landholder or ceased to be used by him as an office as aforesaid, or ceased to be in the occupation of such institution, the value of the building shall be assessed by the Tribunal in such manner as may be prescribed; and the Tribunal shall pay to the Government such value cited in its office under sub-sec.(1) of Sec.36.

(4) Every building other than a building referred

to in sub-secs.(1), (2) and (3) shall with effect on and from the notified date, vest in the person who owned it immediately before that date; but the Government shall be entitled, for each fasli year commencing with the fasli year in which the inam estate is notified.

(i) in every case to levy the appropriate assessment thereon; and

(ii) in the case of a building which vests in a person other than a land-holder, also to the payments which such person was liable immediately before the notified date to make any land-holder in respect thereof, whether periodically or not and whether by way of rent or otherwise, in so far as such payments may accrue due on or after the notified date.

(5) In this section, "building" includes the site on which it stands and any adjacent premises occupied as an appurtenance thereto.

(6)"

It is clear from a reading of sub-sec.(4) of Sec.15 that a building owned by a person immediately before the notified date shall vest in that person. Then as per sub-sec.(5) building includes the site on which the superstructure stands and any adjacent premises occupied as an appurtenance thereto. Therefore, the owner of the building in whom the building vests under Sec.15(4) will also be the owner of the site as well as the land appurtenant thereto. It is therefore manifest that the tenant who owned the building before the notified date becomes the owner of both the building as well as the site with the appurtenant land.

6. From this it can be easily concluded that the suit land of 29 cents belongs to the defendant as per the provisions of the Act. The learned trial Judge has also relied on *Somasundaram Pillai v. Dorairaj*, (1979) 1 M.L.J. 443, in which case the facts are similar to the present case, and it has been held clearly therein that as per sub-sec.(4) of Sec.15 the person who is owning the building before the notified date will get that building vested in him, and in view of the definition of the building given in sub-sec.(5) he will also be entitled to the site of that building and also the appurtenant land thereto. That decision has been followed in a subsequent decision in *K.Vellappa Gounder and Sons by partner K.Vellappa Gounder v. K.S.Thirugnanasambandam Chettiar and others*, 93 L.W. 707. Thus I find no merit in the appeal. Accordingly the judgment and decree of the trial court are confirmed

and the appeal is dismissed. There will be no order as to costs.

V.K. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Janarthanam, J.*

C.R.P.No.285 of 1992 19th February, 1992.

N.Chellammal and others ...*Petitioners*
v.
R.Gangammal ...*Respondent.*

Civil Procedure Code (V of 1908). Sec.10 - Stay of suits - Matter in issue in two suits not similar - Parties in the suits different - Stay of further proceedings in the earlier suit, if can be ordered.

Held on facts: The provisions of Sec.10, C.P.C. can by no stretch of imagination, be stated to be attracted for stay of all further proceedings in the earlier suit. The scanning of the nature of the reliefs prayed for in both the suits would point out that the matter in issue is not similar. This apart, the parties in both the suits are different. In such state of affairs, there is no plausibility of any conflicting decisions being arrived at by both the courts regarding the amount due to the plaintiff in the earlier suit from out of the estate available in the hands of the legal representatives of the deceased. The grant or otherwise of the decree in the earlier suit will be taken due note of in the latter suit in the administration of the estate of the deceased. There is no necessity at all for stay of all further proceedings in the earlier suit and therefore the impugned order of the court below refusing to grant stay cannot at all be stated to be not sustainable in law. [Para 9]

Petition under Sec.115 of Act V of 1908 praying the High Court, to revise the order of the court of the Subordinate Judge, Srivilliputhur, dated 13.12.1992 and made in I.A.No.787 of 1989 in O.S.No.201 of 1988.

P.Peppin Fernando, for Petitioners.

The Court made the following

ORDER:- One Nalliah was the sole proprietor of

Balasubramanian Oil and Ginning Factory, Dindigul. He had been purchasing cotton seeds for his business from various traders through M/s.Murugesan and Company (in short 'the firm') a registered partnership firm. One S.Murugesan, V.R.Nagarathina, S.M.Mathiaselvam and R.N.Balu are stated to be the partners of the said firm.

2. There was one proprietrix concern going by name-Prakash Cotton traders, Rajapalayam, and one R.Gangammal is its sole proprietrix. She had been effecting sales of cottonseeds on credit to the said Nalliah. Certain amounts due to her by the said Nalliah had been paid in time on demand emerging therefor.

3. In the meantime, the said Nalliah died on 25.2.1988, leaving behind him his wife N.Chellammal, son N.Balasubramanian, and four daughters, namely, N.Vijayalakshmi, minor Vijayarani, minor Kalaiselvi and minor Karpagavalli. Subsequent to the death of the said Nalliah, his wife son and four daughters succeeded to his estate.

4. As repeated demands evoked no responses, the said R.Gangammal, for the amount due to her by the said Nalliah instituted the suit in O.S.No.201 of 1988 on the file of Sub Court, Srivilliputhur impleading the legal representatives of the said deceased Nalliah, as defendants 1 to 6, besides impleading the firm and its partners as defendants 7 to 11, for the amount due, namely, Rs.1,26,576.97.

5. One other creditor of the said Nalliah namely, N.Ramu Gounder, for himself and on behalf of other creditors, filed the suit in O.S.No.429 of 1989 on the file of Sub Court, Dindigul, impleading the legal representatives of the said Nalliah and his certain other creditors including Gangammal, the plaintiff in the earlier suit, praying for the relief of administration of the estate of the deceased Nalliah, in the hands of the legal representatives of the deceased, by appointment of an Administrator and for taking of accounts.

6. The legal representatives of the deceased Nalliah filed I.A.No.787 of 1989 in the earlier suit, under Secs.10 and 151, C.P.C., praying for stay of the said suit till the disposal of the latter suit.

7. Strong and stout opposition emerged from the other side to such an application.

8. Learned Subordinate Judge on consideration of the materials placed before him and after hearing the arguments of the respective learned counsel for the parties, dismissed the said application,

giving rise to the present revision petition, by the aggrieved legal representatives of the deceased Nalliah.

9. Even, at the outset, I may point out that there are no merits for the entertainment of the civil revision petition, inasmuch as the provisions of Sec.10, C.P.C. can by no stretch of imagination, be stated to be attracted for stay of all further proceedings in the earlier suit. The scanning of the nature of the reliefs prayed for, in both the suits, would point out that the matter in issue is not similar. This apart the parties in both the suits are different. In such state of affairs, there is no plausibility of any conflicting decisions being arrived at by both the courts regarding the amount due to the plaintiff in the earlier suit from out of the estate available, in the hands of the legal representatives of the deceased Nalliah. The grant or otherwise of the decree of the earlier suit will be taken due note of in the earlier suit will be taken due note of in the latter suit in the administration of the estate of the deceased. In the absence of the applicability of the provisions of Sec.151, C.P.C., in this view of the matter, there is no necessity at all for stay of all further proceedings in the earlier suit and therefore, it is that the impugned order of the court below refusing to grant stay cannot at all be stated to be not sustainable in law.

10. As such, the civil revision petition deserves to be dismissed even at the admission stage and is accordingly dismissed.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Janarthanam, JJ.

L.P.A.No.79 of 1991 22nd July, 1991.

Dhanalakshmi Ammal ...Appellant
v.
Perle D. Gonzaga and others ...Respondents.

(A) Civil Procedure Code (V of 1908), Sec.11 - Preliminary decree for partition passed and decree given to plaintiff alone as co-owner - Such decree

does not determine number of items of properties - Items of properties left out can be subject of partition in the course of final decree or in separate suit - Purchaser from one co-owner cannot be non suited on ground that in previous suit, preliminary decree has been granted in favour of another purchaser from another co-owner.

(B) Adverse possession - Purchaser from one co-owner entitled only to equity and not to possession - He cannot claim title by adverse possession - His remedy is to ask for partition.

One Joseph D. Gonzaga, was the owner of the properties set out in Schedule A in the plaint. In 1914 he married one V and had five children through her. Defendants 1 and 2 alone of those children are alive. In 1927, he married another woman and begot the third defendant through her. He died on 15.10.1956. Defendants 1 to 3 succeeded to his properties as tenants in common with equal rights. The first defendant sold items 1 to 4 in Schedule A on 7.2.1959 to the plaintiff. On 6.6.1962, the third defendant executed a sale deed in respect of the same property in favour of on G, 'G' filed a suit O.S.No.229 of 1969 on the file of the District Munsif, Cuddalore for declaration of the title to the said properties. It was dismissed. His appeal A.S.No.138 of 1965 on the file of the Subordinate Judge Cuddalore was also dismissed. He filed S.A.No.1431 of 1973 in the High Court. It was held that G would be entitled to 1/3 share in the properties and therefore a decree for partition and separate possession was granted to him. He died on 6.7.1976. Defendants 4 and 5 to 11 are his wife and children. The twelfth defendant purchased items 5 and 6 in Schedule A given the third defendant. The thirteenth defendant purchased items 7 and 8 in Schedule A from the third defendant. The plaintiff filed a suit in O.S.No.347 of 1977 on the file of the Sub Court, Cuddalore. The trial court held that by virtue of the decision in S.A.No.1431 of 1973, the suit was barred by *res judicata*. It also held that the 12th defendant had perfected his title by adverse possession. In appeal, a learned single Judge held that the plaintiff could not be allotted items 1 to 4 in Schedule A and that the 13th defendant had acquired title by adverse possession. In Letters Patent Appeal, **Held:-** When a preliminary decree has been passed for partition and the decree has been given not to the defendants but to the plaintiff (in the said suit) alone, the court in that case would not adjudicate

as to the validity of the sale deed of the plaintiff in the instant suit. The only issue involved was whether the plaintiff in the said suit was entitled to the properties conveyed by the third son of Joseph to him or not. He was given a preliminary decree for partition and separate possession of his one-third share in the suit properties. It is well settled that a preliminary decree only declares the shares of the parties and determines the extent of the right of the persons who are co-owners of property. It does not finally determine the number of items of properties. Such items of the properties may be found subsequently which were not included in the hotch-pot of the family and thus were subjected to actual partition. Such properties which were left out can always be a subject of partition either in course of the final decree if at all the partition is between the parties or in a separate suit if a decree for partition is granted to the plaintiff only and other members are left out as co-owners of the property. In the instant case the plaintiff has been able to show that the properties belonged to Joseph and thus belonged to the sons of Joseph. She has asked for the right which has been created in her favour by virtue of the sale deed if there is no dispute, as to the validity of the sale deed or there is a dispute the sale deed is found to be valid. It will be improper in such a situation to defeat the suit of the plaintiff on the ground that in the previous suit instituted by Govindarajulu, a preliminary decree has been granted in his favour. [Paras 9 and 10]

Unless it is shown that someone exercised possession openly and hostile to the interests of those who are entitled to the possession of the property, a purchaser from a co-owner will be entitled to only the equity and not to possession. He shall have to ask for partition and only when such partition decree is granted that he would be entitled to separate possession. [Para 11]

Cases referred to:

Morusu Lakshmamamma v. Bella Maocera, A.I.R. 1982 NOC. 259. [Para 9]

Visalakshi Ammal v. Narayanaswami Naidu, (1977) 2 M.L.J. 88. [Para 7]

V.Raghavachari, for Appellant.

V.Chandrakanth, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.*:- This appeal is being disposed of after notice of motion.

2. Plaintiff in O.S.No.347 of 1977, Subordinate Judge's Court, Cuddalore, has preferred this appeal

under Clause 15 of the Letters Patent of this Court against the judgment and decree in A.S.No.93 of 1980 of a learned single Judge of this Court.

3. The case in the plaint in short is as follows: The properties set out in 'A' schedule in the plaint were the absolute properties of one Joseph D.Gonzaga. He married one Viyakula Mary *alias* Arumal Kannu in or about the year 1914. Through her Joseph had five children of whom defendants 1 and 2 alone are alive. He, however, married another woman by name Roger in or about the year 1927. Through her he begot the third defendant. He died on 15.10.1956. The three defendants succeeded to the 'A' schedule properties left by him as tenants in common with equal rights. The first defendant, however, sold under a registered sale deed items 1 to 4 in 'A' Schedule (separately described as 'B' schedule to the plaint) on 7.2.1959 for a consideration of Rs.1,000 to the plaintiff. On 6.6.1962, however, third defendant executed a sale deed in respect of the same property in favour of one Govindarayulu for an apparent consideration of Rs.2,000. Govindarayulu filed a suit being O.S.No.229 of 1963 on the file of the District Munsif's Court, Cuddalore, for declaration of his title to the said properties and also for possession against the plaintiff and the second defendant in the present suit. That suit was dismissed in the trial court on the finding that the third defendant had no title to convey to Govindarayulu. Govindarayulu filed an appeal in A.S.No.138 of 1965 on the file of the Subordinate Judge's Court, Cuddalore. That appeal was also dismissed. Govindarayulu filed a second appeal being S.A.No.1431 of 1973. It was held in that appeal, however that the plaintiff therein will be entitled to a one-third share in the properties and therefore, a decree for partition and separate possession was granted on 6.7.1976. Govindarayulu died. Fourth defendant and defendants 5 to 11 are his wife and children. Twelfth defendant, who had purchased items 5 and 6 in 'A' Schedule from the third defendant under a sale deed dated 5.11.1958 for a sum of Rs.900 and 13th defendant, who had purchased items 7 and 8 in 'A' Schedule from the third defendant under Registered sale deed dated 17.2.1960 for a sum of Rs.700 have also been impleaded as party-defendants in the suit for, according to the plaintiff, they by virtue of their sale deeds are entitled to the extent of the share of their vendor. Praying in the suit that sale in excess

of the shares of the individual members of the family who were entitled to the extent of one-third, is invalid and that under the law in equity, the plaintiff having purchased items 1 to 4 in 'A' schedule properties is entitled in a general partition of all the co-sharers, to ask for allotment of 'B' schedule properties, the plaintiff filed the suit for partition.

4. Defendants 1, 3, 5 and 12 remained *ex parte*. The second defendant in the written statement contended *inter alia* that the suit is barred by *res judicata* in view of the decision in S.A.No.1431 of 1973. Defendants 4 and 6 to 11, however, contended that in respect of 'B' schedule properties already a preliminary decree has been passed in the second appeal and the final decree proceedings have been initiated and therefore, the present suit for partition of the properties by the plaintiff is not maintainable. The thirteenth defendant filed a separate written statement, however, claiming exclusive right to suit item No.7 by virtue of purchase from the third defendant for valid consideration and that he had acquired title by adverse possession.

5. The learned trial Judge held that by virtue of the decision in S.A.No.1431 of 1973, the suit is barred by the principles of *res judicata* and that the plaintiff, when she purchased the 'B' schedule properties under Ex.A-2 sale deed knew that there was other co-owner to the property but in spite of it she purchased and therefore, she has to bear the consequences arising therefrom and hence she cannot claim any larger share than one held by her vendor which alone had passed under the sale deed, by asking for a general partition of the properties including the suit properties and other properties owned by the sons and daughter of Joseph. The trial Court also held that the 12th defendant, who had purchased items 5 and 6 of 'A' schedule properties on 5.11.1958 had perfected title by adverse possession and therefore, there cannot be allotment of shares in these items to the plaintiff by virtue of Ex.A-2 sale deed and that the plaintiff not being a purchaser from a member of a coparcenary Hindu joint family, she cannot ask for general partition of all the properties of the three co-owners, namely, the sons and daughter of Joseph.

6. Learned single Judge has held in agreement with the decree of the trial Court that in view of the decree in S.A.No.1431 of 1973 under which

defendants 4 to 11 and 2nd defendant are entitled to 2/3rd share against which the plaintiff cannot have any say, it is not possible to allot the B schedule properties to her and that the 13th defendant, the alienee purchaser, having been in uninterrupted possession for more than 17 years, had acquired title by adverse possession.

7. There cannot be any question to the case pleaded by the defendants that the three sons of Joseph were co-parceners and that the law applied to a Hindu Co-parcenary is not applicable to the properties in dispute. It also cannot be disputed that as co-owners the three sons of Joseph were entitled to equal share and that in the capacity of co-owners they were entitled to transfer their respective shares. The question here, however, is how as a purchaser from one of the co-owners, the plaintiff, would be entitled to get possession of the properties transferred to her. The decision in *Visalakshi Ammal v. Narayanaswami Naidu*, (1977)2 M.L.J. 88, provides an answer to this question. That is the judgment in the Second Appeal 1431 of 1973. It says,

"....The succession in this case opened on the death of Joseph on 15th October, 1956. On that date, John, the vendor of the plaintiff, Biera, the vendor of the second defendant and the third defendant alone were alive. They would each be entitled to one-third share. Arumaikannu, the widow of Joseph who was alive was only entitled to maintenance out of the income from the property. But since she is dead now, that question also does not arise. Thus John, the vendor of the plaintiff had one-third share in the suit properties which he could have legally conveyed under Ex.A-11, dated 6th June, 1962 to the plaintiff. Thus, though the plaintiff claimed the entirety of the suit properties, he had established his title to one-third of the suit properties. It is well-settled that when the plaintiff claims a larger interest but was able to establish a lesser interest, to the extent he was able to establish his interest, a decree could be granted. The plaintiff is accordingly, given a preliminary decree for partition and separate possession of his one-third share in the suit properties. I may add that in the view that he will be a co-owner of the suit property, the defendants will not be entitled to any improvements even if they had made any such improvements."

The above gives us an idea of the law that has to be applied to a transfer by a co-owner of his share in tenancy in common. The sale deed which Govindarayulu had obtained from the third defendant with respect to items 1 to 4 in 'A' schedule (schedule 'B' properties) was ordered to be confined to the extent of the share of his vendor, that is to say, third defendant in so far as the suit properties in O.S.No.229 of 1963 are concerned. The plaintiff herein, however, who also is a purchaser from one of the co-owners, i.e., first defendant, has sued for a share in the properties held in common by the sons of Joseph or their transferees, alleging that not items 1 to 4 in A schedule but other properties also fell in the common pool of the tenancy in common. According to her, if the sale deed has to be limited to the extent of the share of the vendor, such share has to be determined not only in items 1 to 4 in 'A' schedule but in all the properties held in common with equal rights of the three sons of Joseph.

8. Both the plaintiff in the instant suit, who is a purchaser from the first son of Joseph and Govindarayulu were parties to the suit, O.S.No.229 of 1963. The adjudication as to the shares of the three sons of Joseph and the rights which the purchasers from them may have, has taken place in their presence. Both of them are bound by the adjudication in the said suit and the appeals. But still it has to be decided, whether any principle of *res judicata* is attracted on the facts of the case to defeat the suit of the plaintiff on the ground that adjudication has already been made in respect of the properties involved in the said suit and shares of the sons of Joseph have already been determined. *Res judicata* is a rule which is applied to any suit or issue in which the matter directly and substantially in issue has been directly and substantially determined in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a competent Court.

9. On somewhat similar facts, however, in *Morusu Lakshamma v. Bella Maocra*, A.I.R. 1982 NOC. 259, a learned Judge of the Andhra Pradesh High Court has said,

"The preliminary decree in the earlier partition suit against the defendant would not be a bar to the maintainability of the subsequent action by him for partition, where the relief was given only to the plaintiff and where the

rights of the defendants were only declared and no executable decree was passed in their favour."

We have quoted the finding in the second appeal. It is clear, therefore, that when a preliminary decree has been passed for partition and the decree has been given not to the defendants but to the plaintiff (in the said suit) alone, the court in that case would not adjudicate as to the validity of the sale deed of the plaintiff in the instant suit. The only issue involved was whether the plaintiff in the said suit was entitled to the properties conveyed by the third son of Joseph to him or not. He was given a preliminary decree for partition and separate possession of his one-third share in the suit properties.

10. As a purchaser from the first son of Joseph, who admittedly had one-third share in the properties of Joseph like the vendor of Govindarayulu, the plaintiff in the instant suit is also entitled to pray for a decree. That she has asked for in the instant suit. The question, however, is whether while asking for such a decree the plaintiff has to confine to the properties which were mentioned in the earlier suit or not? It is well-settled that a preliminary decree only declares the shares of the parties and determines the extent of the right of the persons who are co-owners of a property. It does not finally determine the number of items of properties. Such items of the properties may be found subsequently which were not included in the hotchpot of the family and thus, were subjected to actual partition. Such properties which were left out can always be a subject of partition either in course of the final decree, if at all the partition is between the parties or in a separate suit if a decree for partition is granted to the plaintiff only and other members are left out as co-owners of the property. In the instant case the plaintiff has been able to show that the properties belonged to Joseph and thus belonged to the sons of Joseph. She has asked for the right which has been created in her favour by virtue of the sale deed, if there is no dispute as to the validity of the sale deed or if there is a dispute, the sale deed is found to be valid. It will be improper in such a situation to defeat the suit of the plaintiff on the ground that in the previous suit instituted by Govindarayalu, a preliminary decree has been granted in his favour.

11. It is not understandable how the case of the

13th defendant has been accepted by the court below and it has been held that he has perfected title by adverse possession. Such a finding will stand in conflict with the law stated in S.A.No.1431 of 1973. Moreover, unless it is shown that someone exercised possession openly and hostile to the interests of those who are entitled to the possession of the property, a purchaser from one co-owner will be entitled to only the equity and not to possession. He shall have to ask for partition and only when such partition decree is granted that he would be entitled to separate possession. 12. So that as it may, since we do not propose in the instant case to decide any issue finally as in our view it would be incorrect to say that the suit will be barred by *res judicata*, we intend to remit the case to the Court below for a re-hearing and disposal in accordance with law.

13. In the result, the appeal is allowed; the judgments and decrees of the court below are set aside; the suit is remitted to the trial court for re-hearing and disposal in accordance with law. No costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, A.C.J. and
Thanikkachalam, J.*

W.A.Nos.326 and 327 of 1992 26th March, 1992.

P.Radhakrishnan ...*Appellant*
v.

The District Collector, Dindigul ...*Respondent.*

Tamil Nadu Mineral Concession Rules (1959) - Notification preceding holding of auction, proceedings relating to confirmation of auction and lease deeds entered into and registered stipulating that lessee should produce only rough stones, jallies etc., but not block stones dressed and undressed for polishing and for export etc., - No express inhibition in the Rules - Lessee if can produce block stones.

Held:- The Notification which preceded the holding of the auction, the proceedings relating to confirmation of auction and the ultimate lease

deeds entered into and registered all stipulated that the lessee shall produce only rough stones, jellies, stone pillars and plank stones which could be used for building and roadworks and the lessee shall not produce block stones dressed and undressed for any other purpose such as polishing and for export etc. Merely because there is no express inhibition in the Rules, it does not mean that anything the appellant desires is permitted. What is not permitted expressly must be deemed to have been inhibited. Even if the Court goes by the Rules, they are generously couched so as to be pliable to enter into lease deeds to meet situations according to facts and circumstances. The Rules and the forms thereunder are not rigid and inflexible in this regard and they do permit scope for settling terms according to the needs of the case. Further, the parties settled all their rights and obligations in the lease deeds and they must ultimately speak. The appellant never demurred earlier and on the other hand accepted the terms. It is not possible to enlarge the rights secured to the appellant under the lease deeds. The claim of the appellant to have more rights than what have been secured under the lease deeds cannot be sustained.

[Paras 1 and 2]

Appeal under Clause 15 of the Letters Patent against the Order of Govindasamy, J., dated 11.3.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.Nos.13275 and 13276 of 1991 presented under Art.226 of the Constitution of India to issue a writ of *mandamus* forbearing the respondent and their subordinates from interfering with the petitioner's right to quarry, remove the rough stones in blocks any size in S.F.No.536/1, 1005 in R.Kambai village, Veda sandur Taluk and transport the same to the place of choice (W.P.No.13275 of 1991) and to issue a writ of *mandamus* forbearing the respondents and their subordinates from interfering with petitioner's right to quarry remove the rough stones in blocks any size in S.F.No.222/1, Karungal Village, Veda sandur Taluk and transport the same to the place of his choice. (W.P.No.13276 of 1991). *R.Krishnamoorthy*, Senior Counsel, for *M/s.K.Govindarajan* and *S.Kadarkarai*, for Appellant.

M.A.Sadanand, Government Pleader, for Respondent

The Judgment of the Court was delivered by *Nainar Sundaram, A.C.J.:-* These two writ appeals

are directed against the common order of the learned single Judge in two writ petitions preferred by the appellant. The appellant wanted writs of mandamus forbearing the respondents and their subordinates from interfering with the petitioner's right to quarry, remove the rough stones in blocks from the lands in question and to transport them to the place of his choice. The matter is governed by the Tamil Nadu Mineral Concession Rules, 1959, hereinafter referred to as the Rules. The notification, which preceded the holding of the auction, the proceedings relating to confirmation of auction and the ultimate lease deeds entered into and registered; all stipulated that the lessee shall produce only rough stones, jellies, stone pillars and plank stones which could be used for building and road works and the lessee shall not produce block stones dressed and undressed for any other purpose such as polishing and for export etc. The learned single Judge, after a considerable discussion of the points urged, did not countenance the claim of the appellant and dismissed the writ petitions.

2. Mr. R. Krishnamoorthy, learned senior counsel appearing for the appellant, would submit that the Rules as such do not inhibit producing of block stones; and the lease deeds are not in conformity with the form prescribed under the Rules and the prescribed form does not contemplate a condition relating to inhibition for producing block stones. Learned senior counsel appearing for the appellant would contend that the Rules and the form thereunder are statutory in character and there cannot be a stipulation of terms besides those contemplated in the form. Merely because there is no express inhibition in the Rules, it does not mean that anything the appellant desires is permitted. What is not permitted expressly must be deemed to have been inhibited. Even if we go by the Rules, they are generously couched so as to be pliable to enter into lease deeds to meet situations according to facts and circumstances. The Rules and the forms thereunder are not rigid and inflexible in this regard and they do permit scope for settling terms according to the needs of the case. Further, the parties settled all their rights and obligations in the lease deeds and they must ultimately speak. The appellant never demurred earlier and on the other hand accepted the terms. It is not possible to enlarge the rights secured to the appellant under the lease deeds. We are not able

to sustain the claim of the appellant to have more rights than what have been secured under the lease deeds. Accordingly, these two writ appeals are dismissed as lacking in merits. No costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, A.C.J. and
Thanikkachalam, J.*

W.A.No.61 of 1992

31st January, 1992.

**Moorco (India) Ltd. represented by its General
Manager (Personnel)** *...Appellant*
v.

**The Government of Tamil Nadu, represented by
Secretary, Labour and Employment and others** *...Respondents.*

Industrial Disputes Act (XIV of 1947), Secs.10-A(3), (4) and 17 - Non-compliance with Sec.10-A(3) - Decision rendered by Deputy Commissioner of Labour in such cases - If can be said to fall within purview of the Act - Such decision if can be directed to be published under Sec.17.

The petitioner-appellant filed a writ petition for the issue of a writ of mandamus directing the second respondent, the Deputy Commissioner of Labour to forward his award dated 20.6.1988 to the Government of Tamil Nadu for the purpose of publication as contemplated by Sec.17. It was dismissed on the ground that the terms of the settlement between the petitioner and its workmen would constitute only an agreement to make voluntary reference of the dispute over bonus to arbitration. In appeal,

Held:- The well-settled proposition is that the Act, as such, does not countenance and make available its machinery for arbitration outside its purview. When there had been a non-compliance with sub-sec.(3) of Sec.10-A of the Act, it is not possible to characterise the decision rendered by the second respondent as one coming within the purview of the Act. sub-sec.(4) of Sec.10-A of the Act is

interlinked with sub-sec.(3) and only on satisfaction of the mandates of sub-sec.(3) of Sec.10-A, there could be an investigation into the dispute and making of the award by the arbitrator and then forwarding it to the appropriate Government as per sub-sec.(4) thereof. Otherwise, the whole process will remain only in the realm of private arbitration falling outside the Act. Sec.17 could have reference only to publication of awards coming within the purview of the Act. Viewed from this angle, the learned single judge was correct in discountenancing the prayer for issuance of a Writ of *mandamus* as asked for.

[Para 3]

Appeal under Clause 15 of the Letter Patent against the Order of Bakthavatsalam, J., dated 3.12.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.5497 of 1990 presented under Art.226 of the Constitution of India to issue a writ of *mandamus* directing the second respondent, the Deputy Commissioner of Labour, Trichy (Arbitrator), to forward his decision/award dated 30.6.1988 to the 1st respondent, Government of Tamil Nadu, Labour and Employment Department, for the purpose of publication as contemplated by Sec.17 of the Industrial Disputes Act.

Sanjay Mohan for *S.Ramasubramaniam & Associates*, for Appellant.

M.A.Sadanand, Government Pleader, for Respondent Nos:1 to 4.

The Judgment of the Court was delivered by *Nainar Sundaram, A.C.J.*:- The petitioner in W.P.No.5497 of 1990 is the appellant in this writ appeal. The respondents in the writ petition are the respondents in this writ appeal. For the sake of convenience we are referring to the parties as per their nomenclature in the writ petition.

2. The petitioner came to this Court by way of the writ petition seeking for a writ of *mandamus* directing the second respondent to forward his award dated 30.6.1988 to the first respondent for the purpose of publication as contemplated by Sec.17 of the Industrial Disputes Act, 1947, hereinafter referred to as the Act. Certain broad preceding factual features must stand delineated for the purpose of appreciating the scope of the prayer projected in the writ petition. There was a settlement on 27.1.1988 under Sec.12(3) of the Act between the petitioners and its workmen. Term No.3 of the settlement read as follows:

"The Deputy Commissioner of Labour shall

examine the eligibility for Bonus under the Payment of Bonus Act, 1965 for the workmen for the financial year 1986-87, and offer his decision at the earliest and the parties hereto agree to abide by the same."

There is no controversy that the above term would constitute only an agreement to make voluntary reference of the dispute over Bonus to arbitration. Sec.10-A of the Act speaks about voluntary reference of disputes to arbitration. Sub-sec.(3) thereof reads as follows:

"A copy of the arbitration agreement shall be forwarded to the appropriate Government and the Conciliation Officer and the appropriate Government shall, within one month from the date of the receipt of such copy, publish the same in the Official Gazette."

The admitted position is that the mandates of sub-sec.(3) of Sec.10-A of the Act were not complied with. The second respondent rendered his decision on 30.6.1988 and the portion of his decision, which is relevant from the point of view of the petitioner, reads as follows:

"I hold that Sec.16 of the Payment of Bonus Act, 1965 is applicable to the present case; and that the workers of the establishment (*viz.*) Moorco (India) Ltd., are not entitled to bonus for the year 1986-87 under the above said Act. I give my decision accordingly."

3. The question which arose before the learned single Judge for his consideration was as to whether a writ of *mandamus*, as asked for, could issue. The well-settled proposition is that the Act, as such, does not countenance and make available its machinery for arbitration outside its purview. When there had been a non-compliance with sub-sec.(3) of Sec.10-A of the Act, it is not possible to characterise the decision rendered by the second respondent as one coming within the purview of the Act. In this context, it is relevant to take note of sub-sec.(4) of Sec.10-A of the Act also, and it reads as follows:

"The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be."

Sub-sec.(4) of Sec.10-A of the Act is interlinked with sub-sec.(3) and only on satisfaction of the mandates of sub-sec.(3) of Sec.10-A, there could be an investigation into the dispute and making of

the award by the arbitrator and then forwarding it to the appropriate Government, as per sub-sec.(4) thereof. Otherwise, the whole process will remain only in the realm of private arbitration, falling outside the Act. Sec.17 could have reference only to publication of awards coming within the purview of the Act. Viewed from this angle, the learned single Judge was correct in discountenancing the prayer for issuance of a writ of *mandamus* as asked for. This writ appeal directed against the order of the learned single Judge deserves dismissals and accordingly we dismiss it. No costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.1138 of 1981 *15th November, 1990.*

The Commissioner of the Regional Provident Fund, Tamil Nadu and Pondicherry States, Madras *...Appellant*
v.

P.G.Srinivasan and another *...Respondents.*

Employees Provident Funds and Miscellaneous Provisions Act (XIX of 1952), Sec.14-B and Proviso (introduced by Act XL of 1973) - Levy of damages under Section - Affected party, if to be given notice. Before the introduction of the proviso, this court held in *Madras-Bangalore Transport Company v. Regional Provident Fund Commissioner, Madras*, (1969) 2 L.L.J. 136, that Sec.7-A of the Act would apply even though levy of damages is under Sec.14-B of the Act and that an enquiry should be held before levying damages. It was observed therein that damages under Sec.14-B of the Act being a penal levy, though imposed by an administrative authority, it will be necessary that the affected party is given an opportunity to show cause before, it is levied on him. The view taken by the court has not, in any way been altered by the introduction of the proviso to Sec.14-B of the Act. In fact, the proviso has only confirmed the position in law as

enunciated by this Court. Therefore, the view taken by the courts below that the appellant should have issued a notice to the respondents before deciding to levy damages is correct. [*Paras 3 and 5*]

Cases referred to:

Madras-Bangalore Transport Company v. Regional Provident Fund Commissioner, Madras, (1969) 2 L.L.J. 136. [Para 3]

Regional Provident Fund Commissioner, Madras v. K.R.Subbaier Tape Factory Woraiyur, (1966) 2 L.L.J. 676. [Para 3]

Ouchterlony Valley Estates (1938) Ltd. v. Regional Provident Fund Commissioner, Madras, 37 F.J.R. 404. [Para 4]

Atlantic Engineering Services (P) Ltd. v. Union of India, (1979) 2 L.L.J. 136. [Para 6]

P.Narasimhan, Senior Central Government Standing Counsel, for Appellant.

M.Subramania Rao, for Respondent No.1.

N.Muthusamy, Government Advocate, for Respondent No.2.

The Court delivered the following

JUDGMENT:- The Commissioner of Regional Provident Fund, Tamil Nadu and Pondicherry, who is the first defendant in the suit is the appellant. A show cause notice was issued under Ex. B-3 to the plaintiff as to why a sum of Rs.918.70 should not be levied as penal damages for delayed payments of contributions to the Employees' Provident Fund. The Plaintiff challenged the validity of the notice and filed the suit for a declaration that the notice is illegal and for a consequential injunction restraining the defendants from taking any coercive steps to collect the penal damages. Both the courts below have concurrently upheld the claim of the plaintiff and granted a decree as prayed for. The Lower appellate court has found that the notice Ex.B-3 is not in consonance with the provisions of Sec.14-B of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952, and that a reasonable opportunity should be given to the Plaintiff before the levy of damages is determined by the defendants.

2. Learned counsel for the appellant contends that there is a distinction between the amounts due and recoverable under Sec.7-A of the Act and the damages due and recoverable under Sec.14-B of the Act. According to learned counsel the elaborate procedure prescribed in Sec.7-A would apply only to cases of contributions and not to cases of

levy of damages Sec.14-B of the Act reads thus:

"Where an employer makes default in payment of any contribution to the Fund, the Family Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-sec.(2) of Sec.15 or sub-sec.(5) of Sec.17, or in the payment of any charges payable under any other provisions of this act or of any scheme or Insurance Scheme or under any of the conditions specified under Sec.17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the official Gazette in this behalf, may recover from the employer such damages, not exceeding the amount of arrears, as it may think fit to impose."

A proviso was introduced by Act 40 of 1973 and it is in the following terms:

"Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard."

3. Before the introduction of the proviso, this court held in *Madras-Bangalore Transport Company v. Regional Provident Fund Commissioner, Madras*, (1969)2 L.L.J. 136, that Sec.7-A of the Act would apply even though levy of damages is under Sec.14-B of the Act and that an enquiry should be held before levying damages. Ramakrishnan, J., who decided the case observed that damages under Sec.14-B of the Act being a penal levy, though imposed by an administrative authority, it will be necessary that the affected party is given an opportunity to show cause before it is levied on him. The relevant portion of the judgment reads as follows:

"Once it is held, as laid down in the above decision which I respectfully follow, that the damages under Sec.14-B is a penal-levy, though imposed by an administrative authority, it will be necessary that the affected party is given an opportunity to show cause, before it is levied on him. He may have several defences which may be valid, and which he may urge, for mitigating the penalty. Learned counsel for the respondent has referred to a Government order which has prescribed slab rates for the computation of the amount of damages, giving it almost an automatic character with no margin for the exercise of discretion by the

authority who imposes the damages in the first instance. Though Sec.14-B states that the damages have to be recovered by the appropriate Government, it is urged by counsel for the respondent that what happens in practice is that the Provident Fund Commissioner, by virtue of a delegation, automatically imposes damages according to the slab rates in the Government order leaving it to the party to move the Government subsequently for relief by way of reduction of the amount. It appears to me that such a method of imposing a levy, which is definitely penal in character, cannot be upheld. To begin with, the section uses the word 'may', thereby importing an element of discretion which can be invoked by the affected party, if he has adequate reasons to explain the delay in making the remittance in any given month. Under the scheme of the slab-system introduced by the Government order, it would appear as if the authority, who imposes the damages initially, had no discretion to deviate from the slab-system which he has got to follow automatically. But it is that authority who has to deal first with the contributor, and consequently the same authority has to consider any explanation that the contributor has got to offer. Therefore, the provision under the slab-system by which one authority automatically levies certain amounts by way of penalty without reference to any mitigating circumstances, and then the affected party thereafter has to move the higher authority, namely, the Government, for relief against such levy, cannot in my opinion, be viewed as a substitute for the normal rule of natural justice which has to be followed in the case of penal levies, viz., that the party affected should be given a chance of making representations contra even before the original levy itself."

The learned Judge has also referred to the judgment of a Division Bench in *Regional Provident Fund Commissioner, Madras v. K.R. Subbaier Tape Factory, Woraiyur*, (1966)2 L.L.J. 676, wherein it was held that, Sec.7-A of the Act had provided for an examination of the question of liability to pay damages under Sec.14-B of the Act in disputed cases.

4. In *Ouchterlony Valley Estates (1938) Ltd. v. Regional Provident Fund Commissioner, Madras*, 37 F.J.R. 404, Ismail, J., took a similar view and

observed that Sec.7-A(1) and 7-A(3) would apply to a case of levy of damages.

5. The view taken by this Court in the cases has not in any way been altered by the introduction of the proviso to Sec.14-B of the Act. In fact, the proviso has only confirmed the position in law as enunciated by this Court. Therefore, the view taken by the courts below that the impugned notice Ex.B-3 is not valid and the appellant should have issued a notice to the respondents before deciding to levy damages is correct.

6. Learned counsel for the appellant places reliance on the judgment of a Division Bench of the Delhi High Court in *Atlantic Engineering Services (P) Ltd. v. Union of India and another*, (1979) 2 L.L.J. 136. Reliance is placed on the following observations made by the Bench;

"The learned counsel then questioned the determination of damages by the Government as arbitrary. He said that the very fact that a table has been prepared by the Government and it was sent to the petitioner with the show cause shows that the Government did not apply its mind and was mechanical in making the demand for damages. On the contrary, we are of the view that framing of the table of damages by the Government is a salutary measure for the guidance of the officers of the Government who act under Sec.14-B. Under the table the amount of damages is related to be delay in payment of the contribution. This method of determining damages is entirely reasonable and it shows that no officer acting under Sec. 14-B can act arbitrarily, but must follow this reasonable guideline made by the Government. Further this is only a guideline. It is not a determination. The actual decision as to what damages would be in a particular case is made only after hearing the employer and assessing the particular facts of his case. This was done in the present case."

7. The question which has arisen before me did not arise before the Division Bench of the Delhi High Court. The Bench had no occasion to express their opinion on this question. Hence, the judgment of the Division Bench will not apply to the present case. No inference can be drawn from the above observations of the Division Bench that they took the view which is now put forward by learned counsel for the appellant.

8. In the result, the second appeal has to fail and it

is dismissed. There will be no order as to costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram* and
Somasundaram, JJ.

W.A.Nos.618 and 619 of 1987 13th August, 1991.

S.Balasubramanian

...Appellant

v.

Special Tahsildar (LA) III, Maraimalai Nagar Scheme, Kattangulathur, Chingleput District and another

...Respondents.

Land Acquisition Act (I of 1894), Sec.11-A as introduced by Amendment Act (LXII of 1984) - Validity. It is found that sub-sec.(1-A) of Sec.23 contemplates the award of an amount calculated at the rate of 12 per cent per annum on the market value for the period commencing on and from the date of the publication of the notification under Sec.4(1) in respect of such land to the date of the award or the date of taking possession of the land whichever is earlier. Prior to the Amendment Act, case law was replete even at the level of the highest court in the land striking down acquisition proceedings on the ground of prejudice caused by delay. The Amendment Act has brought in redeeming provisions and they, to a very great extent, ameliorate grievances with regard to delay. They provide adequate answers to this ground. The grievance expressed by the learned counsel for the petitioner to strike at Sec.11-A of the Act cannot be appreciated and sustained. [Para 3] Appeal under Clause 15 of the Letters Patent against the order of S.Mohan, J., dated 9.4.1987 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.Nos.3701 and 3702 of 1987 presented under Art.226 of the Constitution of India to issue a writ of W.P.No.3701 of 1981: writ of *certiorari* and *mandamus* calling for the records in Notice in Form 10 dated 12.3.1987 on the file of the 1st respondent herein and quash the same and direct the respondents herein to

drop the acquisition proceedings in respect of the petitioner's lands situate in S.No.336/471, 5 A1, 5 A2, 5 B7, 5 C3 comprising of a total extent of 7.87 acres in No.56 Kattangulathur, Chengleput District etc.

Ram Mohan and C.R.Suresh Kumar, for Appellant.

P.Rajamanickam, Government Advocate, for Respondents.

The Judgment of the Court was delivered by *Nainar Sundaram, J.*:- These writ appeals, which were dismissed earlier, for want of prosecution, have been restored today by orders passed by us in C.M.P.Nos.9757 and 9758 of 1990.

2. These writ appeals are directed against the common order of the learned single judge in and by which he disposed of W.P.Nos.3701 and 3702 of 1987. The challenge in the writ petitions was of the proceedings for acquisition under the Land Acquisition Act 1 of 1984, hereinafter referred to as the Act, and in doing that, there is a prayer to strike down Sec.11-A of the Act as void. Two grounds were urged before the learned single Judge coveting interference in writ powers. The same grounds are being urged before us also. The first ground was that the award was not made within the time prescribed therefor by Sec.11-A introduced into the Act by the Land Acquisition (Amendment) Act, 1984, hereinafter referred to as the Amendment Act. Sec.11-A reads as follows:

"11-A. Period within which an award shall be made: The Collector shall make an award under Sec.11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse:

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencement.

Explanation: In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a court shall be excluded."

The declaration under Sec.6 of the Act, in the instant case was made in 22.10.1977. The main part of Sec.11-A enjoins the making of an award within the period of two years from the date of the

publication of the declaration and further says, if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse. However, the proviso says that in a case where the said declaration has been published before the commencement the Amendment Act, the award shall be made within a period of two years from such commencement. The commencement of the Amendment Act was on 24.9.1984. The declaration here having come to be made before such commencement, the award could be made within a period of two years from the date of the commencement of the Amendment Act. That did happen here. Rightly, the learned single Judge discountenanced this ground of attack put forth on behalf of the petitioners, and we also repel it.

3. The second ground urged is that Sec.11-A introduced into the Act by the Amendment Act has encouraged and maintained procrastination in the completion of acquisition proceedings, and as a result, the owner of the land acquired suffers on the question of compensation, which has got to be determined only as on the date of the notification under Sec.4(1). The learned single Judge found that this contention has been repelled by him in an earlier pronouncement of his and on this ground chose to discountenance it. However, at the request of Mr.R.Ram Mohan, learned counsel for the petitioner we proceeded to examine this contention on merits also, not concluding it on the earlier pronouncement of the learned single Judge. Learned counsel for the petitioner would say that even though the declaration under Sec.6 of the Act would have been made long back and the award comes to be made at a much later stage, compensation will be paid only as on the date of the publication of the notification under Sec.4(1) of the Act and this will work undue hardship to the petitioner and that would amount to arbitrary deprivation of property. When we look into the statement of objects and reasons behind the Amendment Act, we could envisage and appreciate the scheme and framework of the provisions introduced by the Amendment Act and in our view, there are sufficient provisions balancing and ameliorating any complaint of hardship on account of delay. The statement of objects and reasons for the Amendment Act runs as follows:

"Statement of objects and reasons:- With the enormous expansion of the State's role in promoting public welfare and economic develop-

ment since independence, acquisition of land for public purposes, industrialisation, building of institutions, etc., has become far more numerous, than ever before. While this is inevitable, promotion of public purpose has to be balanced with the rights of the individual whose land is acquired, thereby often depriving him of his means of livelihood. Again, acquisition of land for private enterprises ought not to be placed on the same footing as acquisition for the State or for an enterprise under it. The individual and institutions who are unavoidably to be deprived of their property rights in land need to be adequately compensated for the loss keeping in view the sacrifice they have to make for the larger interests of the community. The pendency of acquisition proceedings for long periods often causes hardship to the affected parties and renders unrealistic the scale of compensation offered to them. It is necessary, therefore, to restructure the legislative framework for acquisition of land so that it is more adequately informed by this objective of serving the interests of the community in harmony with the rights of the individual. Keeping the above objects in view and considering the recommendations of the Law Commission, the Land Acquisition Review Committee, as well as the State Governments, institutions and individuals, proposals for amendment to the Land Acquisition Act, 1984, were formulated and a Bill for this purpose was introduced in the Lok Sabha on the 30th April, 1982. The same has not been passed by either House of Parliament. Since the introduction of the Bill, various other proposals for amendment of the Act have been received and they have also been considered in consultation with the State Governments and other agencies. It is now proposed to include all these proposals in a fresh Bill after withdrawing the pending Bill."

We have already extracted Sec. 11-A introduced by the Amendment Act and we have discussed its implications. By the Amendment Act, sub-sec. (1-A) was also introduced into Sec. 23 relating to matters to be considered in determining compensation and Sub-sec. (1-A) reads as follows:

"(1-A). In addition to the market value of the land as above provided, the court shall in every case award an amount calculated at the rate of

twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under Sec. 4, sub-sec. (1) in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier."

Thus we find that sub-sec. (1-A) contemplates the award of an amount calculated at the rate of 12 per cent per annum on the market value for the period commencing on and from the date of the publication of the notification under Sec. 4(1) in respect of such land to the date of the award or the date of taking possession of the land whichever is earlier. Prior to the Amendment Act, case law was replete even at the level of the highest court in the land, striking down acquisition proceedings on the ground of prejudice caused by delay. The Amendment Act has brought in redeeming provisions and they, to a very great extent, ameliorate grievances with regard to delay. In our view, they provide adequate answers to this ground. Hence, we are not able to appreciate and sustain this grievance expressed by the learned counsel for the petitioner to strike at Sec. 11-A of the Act. Thus, we uphold that decision of the learned single Judge and dismiss these two writ Appeals. No costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- Govindasamy, J.

W.P.No.3501 of 1990

22nd June, 1992.

P. Andree

...Petitioner

v.

The Tamil Nadu Medical Council and another

...Respondents.

Tamil Nadu Medical Registration Act (IV of 1914), Sec. 9-A(3) and By-law 70 - Resolution passed by Executive Committee for suspension of Registrar of Medical Council - Sustainability - President of Council, if can order suspension of Registrar.

By communication dated 19.3.1990, the petitioner, Registrar of the Tamil Nadu Medical Council was placed under suspension by the President of the Council. He questioned the right of the President to pass such an order of suspension. He also questioned the resolution passed by the Executive Committee of the council to place him under suspension.

Held:- Sub-sec.(3) of Sec.9-A provides that the council may, with the previous sanction of the State Government delegate, any of its powers and duties to the Executive Committee. There is no dispute that the council has not delegated any of the powers and duties to the Executive Committee. If that be so, the Executive Committee has no power to pass any order unless and until power is delegated as provided under sub-sec.(3) of Sec.9-A. It may be that the President may be empowered by virtue of Bye-law 70 to impose any punishment on the members of establishment but it does not mean that the President is empowered to place any member of the establishment, under suspension pending enquiry or pending contemplation of enquiry. Suspension can be imposed by payment of penalty after following the procedure for holding an enquiry against any definite charge and after arriving at a specific finding with reference to the guilt of the delinquent employee. In the absence of any specific power vested either with the President or the Executive Committee to place any member of establishment, the impugned order is not sustainable and consequently is liable to be quashed. [Paras 2, 5 and 6]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records, on the file of the second respondent relating to communication dated 19.3.1990 of 2nd respondent and quash the order, dated 19.3.1990 and made therein.

Vijayanarayan, for Petitioner.

K.Palanisamy, for Respondents.

The Court made the following

ORDER:- The petitioner was appointed as Registrar of the Tamil Nadu Medical Council with effect from 1.7.1988. It is stated that since the Medical Council of India did not recognise Sri Ramachandra Medical College, Porur, Tamil Nadu, the petitioner intimated the Dean of Ramachandra Medical College and Research Institute on

7.3.1990 that the Medical Council of India did not recognise the said Medical College. The 2nd respondent then informed the petitioner to ignore the letter dated 16.2.1990 of the Medical Council of India and wanted the petitioner to issue temporary medical registration Certificate to the students who had undergone the course in Sri Ramachandra Medical College. The petitioner in reply informed the 2nd respondent that it would not be in order to issue temporary medical registration certificate. However, the 2nd respondent insisted upon the petitioner to issue such a certificate to the students, presumably for the reason that the students of the said College resorted to strike because of non-issuance of temporary registration certificate to the students. However the petitioner informed the president of the second respondent about the factum of issuance of temporary registration certificate. At the instance of the second respondent, the petitioner issued the certificate on 13.3.1990. However, the petitioner was called upon to explain in writing as to why he has exhibited the communication from the Medical Council of India to the students of Sri Ramachandra Medical College which created serious reaction from the students of the said college. While so, the President of the second respondent by the impugned communication dated 19.3.1990 placed the petitioner under suspension. The impugned communication is as follows:-

From:

THE PRESIDENT.

To:

Mr.P.ANDREE,
REGISTRAR,
THE TAMIL NADU MEDICAL COUNCIL,
MADRAS.

Reg: Suspension - Executive Committee Meeting Resolution - Dated 19.3.1990.

The Tamil Nadu Medical Council has placed you under suspension temporarily with immediate effect pending enquiries of serious nature. You are directed to hand over the keys and the records to Mr.S.Kandasamy.

Sd/-

PRESIDENT

Tamil Nadu Medical Council,
Madras.

2. It is in these circumstances that the petitioner has filed the present writ petition to issue a writ of certiorari to quash the aforesaid communication. Mr. Vijayanarayanan, learned counsel appearing on behalf of the petitioner represents that in the instant case the executive committee by its resolution dated 19.3.1990 resolved to place the petitioner under suspension with immediate effect and that order was communicated by the President by the impugned communication. Learned counsel would say that the executive committee had no jurisdiction at all, or in other words, it has not been vested with any power to pass such an order of suspension and consequently the impugned order is liable to be quashed. In support of his contention learned counsel refers to Sec.10(1) of the Madras Medical Registration Act, hereinafter referred to as the Act. Sec.10(1) of the Act provides that the council shall appoint a Registrar who shall act as Secretary of the council and who shall also act as Treasurer, unless the council shall appoint another person as Treasurer. It is also provided that every person appointed shall be removable at the pleasure of the Council. Sub-sec.(2) of Sec.10 provides that the Council may also employ such other persons as it may deem necessary for the purposes of this Act. According to the learned counsel Sec.10 of the Act confers power on the council for appointment as well as removal of a Registrar at the pleasure of the Council. Learned counsel refers to Sec.9-A of the Act which provides that there shall be an Executive Committee of the Council, consisting of its President and Vice-President *ex-officio* and three other members of the Council who shall be elected every year in the prescribed manner by the Council at its first meeting held in that year. Clause (a) of sub-sec.(2) of Sec.9-A provides that every member of the Executive Committee so elected shall hold office as such until the next annual election; and if any casual vacancy occurs before such election, the Executive Committee shall fill that vacancy by electing a member of the Council. Sub-sec.(3) of Sec.9-A provides that the council may, with the previous sanction of the State Government delegate any of its powers and duties to the Executive Committee. It is in these circumstances the learned counsel for the petitioner represented that there

is no dispute that the council has not delegated any of its powers and duties to the Executive Committee. Learned counsel for the respondents is not in a position to dispute the same. If that be so, the Executive Committee has no power to pass any order unless and until power is delegated as provided under sub-sec.(3) of Sec.9-A.

3. Learned counsel also refers to By-law No.69 which provides penalties that could be imposed on the members of the establishment of the employment under Sec.10 of the Act. By-law No.69 provides the following penalties.

- (i) Censure;
- (ii) Withholding of increments or promotion;
- (iii) Reduction to a lower post or time-scale or to a lower stage in a time-scale;
- (iv) Recovery from pay of the whole or part of the pecuniary loss caused to the Council by negligence or breach of orders;
- (v) Suspension;
- (vi) Removal from service which does not disqualify from future employment;
- (vii) Dismissal from service, which disqualifies from future employment.

Learned counsel for the Petitioner at this juncture represents that even though 'suspension' is one of the penalties specified under By-law 69, such penalty could be imposed only after following the procedure of holding an enquiry against a definite charge framed against the delinquent employee and that by-law does not provide for any interim suspension pending enquiry or pending contemplation of enquiry.

4. Learned counsel then referred to By-law No.50, which was also referred to by the Learned counsel for the respondents in the counter affidavit. It provides as follows: "During Suspension, an employee shall be given subsistence allowance amounting to one-half of the monthly salary for a period of three months. When an employee is under suspension, he shall leave his address with the President. He shall obey all orders to attend any enquiry into his conduct at his own cost. If he fails to do so, the enquiry shall be held in his absence." By-law 50 is in respect of an employee placed under suspension which may be by way of penalty and the employee is entitled to subsistence allowance. By-law 50 does not provide any power vested on any of the officers to place any of the employees of the establishment under suspension, pending enquiry or pending contemplation

of enquiry. There is no provision at all either in the statute or in the By-law empowering the authorities to place any of the members of the establishment under suspension pending enquiry or pending contemplation of enquiry. In the instant case the petitioner was placed under suspension by the decision taken by the Executive Committee. Nowhere in the Act or in the By-law the Executive Committee is vested with any such power to place an employee under suspension. Hence, the impugned order is not sustainable.

5. However, the learned counsel appearing on behalf of the respondents represented that Sec.10(1) of the Act provides that the Council is entitled to remove any member of the establishment at the pleasure of the Council and that By-law 70 provides that subject to the provisions of Sec.10(1) of the Act, the President or Vice-President when he acts as President, may impose any of the penalties specified in By-law 69 on any member of the establishment. Learned counsel for the respondents from the above representation wants to infer that the President is empowered to pass an order of Penalty as provided under By-law 69 of the By-Laws. It may be that the President may be empowered by virtue of Bye-law 70 to impose any punishment on the members of establishment, but it does not mean that the President is empowered to place any member of the establishment under suspension pending enquiry or pending contemplation of enquiry. Suspension can be imposed by way of penalty, after following the procedure for holding an enquiry against any definite charge and after arriving at a specific finding with reference to the guilt of the delinquent employee.

6. Learned counsel for the respondents referred to By-law 72 which provided for an appeal from clerks and menial staff to the Executive Committee aggrieved by the order of Penalty. But that is not relevant to the present writ petition. Learned counsel for the respondents is not in a position to bring the notice of this Court that either the President or the Executive Committee is empowered to place any member of the establishment under suspension pending disciplinary proceedings or contemplation of disciplinary proceedings. In the absence of any specific power vested either with the President or the Executive Committee to place any member of establishment, the petitioner in the instant case, the impugned order

is not sustainable and consequently is liable to be quashed.

7. In the result, the writ petition is allowed and the impugned order is quashed. There will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.Nos.2261 and 2262 of 1981 *10th January, 1992*

Baliah Nadar and another ...*Appellants*
v.

Rayappan and others ...*Respondents.*

Civil Procedure Code (V of 1908), Sec.11 - Prior partition suit dismissed for default - No decision on merits - Second partition suit if barred by res judicata - Right of co-sharers to maintain suit for partition - Suit for partial partition, if barred.

The earlier suit O.S.No.233 of 1971 was suit for partition which was dismissed for default. There was no decision on merits. Hence, the principles of *res judicata* will not apply. If the parties are co-sharers, then they are entitled to maintain a suit for partition so long as there is no division. Just because an earlier suit for partition is dismissed for default without a decision of the Court that the plaintiff is not entitled to a share in the properties, the plaintiffs will not cease to be a co-sharer. Hence a second suit is maintainable as the cause of action is a continuing one. The other contention that the suit is bad for partial partition is also unsustainable in view of the judgment of the Court in *Pakhiri Mohammed v. Kaji Mohammed Manjool Sahib*, 45 M.L.J. 321. It is only a Hindu joint family, a suit for partial partition is generally not accepted. The parties in the instant case are Indian Christian and that principle cannot apply and the ruling referred to above will govern.

[*Paras 4 and 5*]

Cases referred to:

Pakkiri Mohammed v. Kaji Mohammed Manjool

Sahib, 45 M.L.J. 321. [Para 5]

N.S.Sivam, for Appellants.

K.Venkataraman for V.Nicholas, for Respondents.

The Court delivered the following

JUDGMENT:- Defendants 3 and 4 are the appellants in both the appeals. One suit is for declaration that plaintiff and second defendant are absolute owners of the suit property. The other suit is for partition and separate possession of one third share of the plaintiff. The first defendant in the suit who is the brother of the plaintiff claimed one-third share in all the properties. Defendants 3 and 4 contested the claim of the plaintiff as well as defendants 1 and 2. The trial court has found that the plaintiff is entitled to one-fourth share in Door No.7, which is the property in O.S.No.82 of 1976 out of which S.A.No.2262 of 1981 arises. In the other suit, the trial court granted a decree as prayed for by the plaintiff.

2. On appeal, the Principal subordinate Judge, Tiruchirapalli, modified the decree in O.S.No.82 of 1976 and granted one third share to the plaintiff in the suit property. In the other appeal, the learned subordinate Judge has granted a decree, declaring that the plaintiff and second defendant are entitled to two thirds share and on that basis granted an injunction.

3. In these second appeals, it is argued that both the suits are not maintainable. In S.A.No.2262 of 1981, it is contended that it is a suit for partial partition and it is barred by the principles of *res judicata* in view of the dismissal of an earlier suit O.S.No.233 of 1971 filed by the plaintiff. In S.A.No.2261 of 1981, similar contentions are raised.

4. There is no substance in the argument that the suits are barred by the principles of *res judicata*. O.S.No.233 of 1971 was a suit for partition which was dismissed for default. There was no decision on merits. Hence, the principles of *res judicata* will not apply. If the parties are co-sharers, then they are entitled to maintain a suit for partition so long as there is no division. Just because an earlier suit for partition is dismissed for default without a decision of the Court that the plaintiff is not entitled to a share in the properties, the plaintiff will not cease to be a co-sharer. Hence, a second suit is maintainable as the cause of action is a continuing one.

5. The other contention that the suit is bad for partial partition is also unsustainable in view of the judgment of this Court in *Pakkiri Mohammed*

v. Kaji Mohammed Manjool Sahib, 45 M.L.J. 321.

It is only a Hindu joint family, a suit for partial partition is generally not accepted. The parties in the instant case are Indian Christians and that principle cannot apply and the ruling referred to above will govern.

6. Significantly, in the written statement of defendants 3 and 4, the title of the plaintiff's father to the property has not been disputed. On the death of the plaintiff's father, plaintiff and defendants 1 and 2 will be equally entitled to the properties.

7. Hence, the conclusion of the lower appellate court is unassailable. The second appeals fail and are dismissed. There will be no order as to costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present:- K.S.Bakthavatsalam, J.

W.P.No.17808 of 1991 18th December, 1991.

H.Belli

...Petitioner

v.

Union of India, represented by the Secretary, Ministry of Defence, New Delhi and others

...Respondents.

Constitution of India (1950), Art.226 - Public interest litigation - Petitioner raising question of public importance making allegation - Allegations denied by concerned department by communications to petitioner - Writ, if can issue.

From the records produced before the court, the petitioner seems to be raising a question of public interest according to him which has been denied by the Department by communications. In spite of it, if the petitioner wants to agitate the matter once over, the court cannot extend its arms under Art.226 of the Constitution of India aiding him.

[Para 4]

Case referred to:

Shri Sachidanand Pandey v. State of West Bengal, A.I.R. 1987 S.C. 1109; (1987) 2 S.C.C. 295; (1987) 2 S.C.J. 70. [Para 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 2nd and 3rd respondents to forbear from letting out the property belonging to the first respondent and classified a class 'A' in the G.L.A.Rules 1937 or dealing with it in any manner contrary to the rules and quash the said order.

V.Raghavachari for Petitioner.

The Court made the following

ORDER:- The prayer in the writ petition is as follows:

"To issue a writ of *mandamus* or any other appropriate writ or direction to the 2nd and 3rd respondents from letting out the property belonging to the first respondent and classified as Class 'A' in the G.L.A. Rules 1937 or dealing with it in any manner contrary to the Rules aforesaid."

2. The petitioner claims to be a social worker and interested in the welfare of the society and also is attempting to enforce the laws through legal machinery. Certain lands in the cantonment area are controlled and managed by the 4th respondent. In 1986 the respondents 2 and 3 sought the land for their use after the lease period in their favour is over. It seems initially the lands were classified as agricultural lands and class 'C' when it was leased out to persons who belonged to lower strata of the society. In 1986 the 4th respondent handed over the lands to the respondents 2 and 3. It is alleged in the affidavit that subsequent to the surrender of the lands by the lessees the fifth respondent has been illegally permitted to raise crops and he is making merry out of the State executor and is cultivating the lands and taking the income from the lands. It is stated that the 5th respondent is owning about 80 acres and they are under cultivation and he is raising crops like carrot, cabbage, potato and garlic etc. It seems the petitioner lodged his protest to the respondents 2 and 3 and issued a number of notices to the parties concerned and no action has been taken according to the allegations made in the affidavit. It is alleged in the affidavit that the Government lands are not available to be misused and it is not prerogative of the respondents 2 and 3 to confer a privilege not available in them to the 5th respondent, that poor farmers have been removed from

the lands on the ground that it is required for the exclusive use of the respondents 2 and 3. However, it is seen that the fifth respondent is cultivating the lands and it is stated that the property of the State cannot and should not be used for benefiting a few. It is also alleged that when the lease was cancelled it was due to the security reasons and by leasing out in favour of the 5th respondent the cancellation of lease itself is under cloud of doubt, according to the petitioner. The petitioner has been making representation since 1987 since the lands have been used by the 5th respondent and it should not be done. The petitioner has been given a reply by the Lt.Col. Officiating Training, Madras, Regimental Centre, Wellington on 8.7.1971 saying that no defence land has been given on lease to anyone. The defence Estate lands under the case of this Centre is being managed, according to Rules 2 and 4. When another person by name Nanjappa made a complaint he has been replied that the case has been examined and it is found that private party has been given any lease and thereafter the amount was realised by way of sale proceeds from the garden fund etc., has been deposited in the Government Treasury by the M.R.C. Wellington. This letter Nanjappa has received from the Under Secretary to the Government of India, Ministry of Defence. Not satisfied with that the petitioner made a representation to Thiru Shri Sharad Pawar through the Member of Parliament, Rajya Sabha on 17.10.1991 to the Ministry of Defence, Government of India and also has written the letter to the officer Commanding Station, Madras House, Wellington.

3. I heard Mr.Raghavachari, learned counsel for the petitioner *in extenso*.

4. I am not convinced with the arguments of the learned counsel and the contentions raised in the affidavits from the records, the records produced before me, the petitioner seems to be raising a question of public interest according to him, which has been denied by the Department by Communications. In spite of it, if the petitioner wants to agitate the matter once over as it is the guardian of the public property, I do not think that this Court can extend its arms under Art.226 of the Constitution of India aiding him. As has been rightly pointed out by Khalid, J. in *Shri Sachidanand Pandey v. State of West Bengal*, A.I.R. 1987 S.C. 1109: (1987)2 S.C.C. 295: (1987)2 S.C.J. 70:

"Today public spirited litigants rush to courts

to file cases in profusion under this attractive name. They must inspire confidence in courts and among the public. They must be above suspicions. See the facts of this case and the result."

The learned Judge further observed thus:

"My purpose in admitting these few lines of my own is to highlight the need for restraint on the part of the public interest litigants when they move courts. Public interest litigation has now come to stay. But one is led to think that it poses a threat to courts and public alike. Such cases are now filed without any rhyme or reasons. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions.

I should not be understood to say that traditional litigation should stay put. They have to be tackled by other effective methods, like decentralising the judicial system and entrusting majority of traditional litigation to village courts and Lok Adalats without the usual populist stance and by a complete restructuring of the procedural law which is the villain in delaying disposal of cases.

It is only when courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the under dog and the neglected, I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self imposed restraint on public interest litigants."

In my view, this is a typical case where the observations of Khalid, squarely applies. It is not as if the petitioner has not been replied by the concerned authorities. I have already stated that the

Department as well as the Defence Ministry have denied the allegations of the petitioner by replying to him. In such circumstances, I do not think that this Court can interfere in this matter. The writ petition is dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Swamidurai, JJ.

O.S.A.No.174 of 1991 12th March, 1992.

K.Rama Naidu

v.

S.K.Parthasarathy Naidu and another.

...Appellant
..Respondents.

(A) *Partnership Act (IX of 1932), Sec.6 - Partnership - Existence of - Determination - Sharing of profits or of gross returns arising from property by persons holding a joint or common interest in the property by itself if makes such persons partners.*

(B) *Partnership Act (IX of 1932), Sec.14 - Property of Partnership firm - What constitutes - Nothing on record to show that suit property was either originally brought by the partners into stock of the partnership or subsequently acquired by purchase or otherwise in the course of business of firm - Suit property, if can be said to be property of the firm.*

(C) *Specific Relief Act (1963) - Sec.41(c) - Injunction - Grant of - Considerations - Balance of convenience should be taken into account.*

Held:- The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in the property does not of itself make such persons partners. The receipt by a person of a share of the property of a business or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business, more so, if such a person is the lender of money to persons engaged or about to engage in any business. There is no material on record to show

anything beyond a certain stipulation that the first defendant/appellant has agreed to share profits or gross returns arising from the sale of the suit land. There is nothing also to show that the plaintiff and the second defendant have been holding a joint or common interest in the suit land with the first defendant/appellant. [Paras 9 and 12]

To constitute a property of the firm, it must be shown that the rights and interests in property have been brought into the stock of the firm by the partners originally when the firm was formed or subsequently acquired by purchase or otherwise in the course of the business of the firm. The first document dated 8.8.1988 showing that the plaintiff paid a sum of Rs.1,00,000 to the first defendant for the purchase of the suit property shows that the first defendant had agreed that he would give one-fifth share in the profit derived out of the sale of the land by any third party after converting into plots. There is nothing on record to show, assuming that some sort of partnership was created that the suit property was either originally brought by the partners into the stock of the partnership or subsequently acquired by purchase or otherwise in the course of the business of the firm or out of any fund of the partnership. If there has been a partnership between the plaintiff and the first defendant, that had nothing to do with the partnership which the first defendant had with the second defendant. The common link in the two partnerships (if at all there has been a partnership) is missing. The first defendant no doubt is the purchaser/owner of the suit property but he neither gave the property to the partnership which he created with the plaintiff nor he gave that property to the partnership which he created with the second defendant. There is also nothing on record to know as to when and how a partnership between and three was created, the so-called partnership which is sought to be dissolved in the suit.

[Paras 9 and 13]

The court cannot fail to take notice of the attempt of the plaintiff to seek enforcement of a so-called contract of partnership after it is dissolved by the plaintiff himself by his act of moving the court for its dissolution and in the course of this attempt to enforce the contract to keep the property which belongs to the first defendant/appellant in a *status quo* so that the relief of profit that he would have received as a consequence of the contract executed by the first defendant should not be denied

to him. This is a prayer opposed to the rule in Sec.41(e) of the Specific Relief Act. If at all there is a breach of the contract of partnership by the first defendant, the question that would arise is, can the contract be specifically enforced by a decree of the court? If it could be specifically enforced, then only injunction could be asked for to prevent the breach. [Para 14]

It is difficult to understand how the learned trial Judge has come to the conclusion that the plaintiff and the defendants are partners of the suit property particularly when the facts in this behalf are clear and unambiguous that the first defendant/appellant approached the plaintiff promising to give one-fifth share in the profits derived out of the sale of the suit land and getting a sum of Rs.1,00,000 from him. Similarly, under a separate agreement, he received a sum of Rs.1,00,000 from the second defendant and promised to give him one-fifth share in the profits derived out of the sale of the land. Having so obtained Rs.1,00,000 each from the plaintiff and the second defendant, he finalised the purchase of the suit land and obtained a sale deed dated 12.3.1990 in respect of the suit property in his name from the trustees of the temple (vendors). There has been thus no partnership in purchase. If at all there has been anything, that was borrowing Rs.1,00,000 from the plaintiff and another sum of Rs.1,00,000 from the second defendant on a promise that he shall share one-fifth of the profit when the land would be sold after laying out the land as house plots. Once it is found that there has been no partnership in purchasing the land, even if it is found that there has been some sort of partnership between plaintiff and the first defendant on the one hand and between the first defendant and the second defendant on the other hand and by guess between the three that is to say, the plaintiff, the first defendant and the second defendant, that was confined to sharing the profits to the extent of one-fifth, three-fifth and one-fifth respectively. This partnership also is sought to be dissolved. The result is, if there has been any business of a sale of any portion of the suit property before the suit there shall be profit to the plaintiff as well as to the second defendant to share with the first defendant/appellant and if there shall be any business during the pendency of the suit and there is a profit, there shall be such sharing by way of accounting. Injunction will bring the business to a

standstill. If there shall be no business, there shall be no profit. There shall be nothing to share. That there has been nothing to share before the suit is admitted in the plaint. Since there has been no business before the suit, there is nothing to share between the so-called partners. Something to share will arise only if there is a sale. There is some material brought before the court to show that some agreement of sale has been executed by the first defendant in favour of some persons who are described by the second defendant/respondent as kins of the first defendant. Nonetheless they are third parties. It is not known whether they have acquired a right under the contract of sale to get the same specifically enforced. Any grant of injunction in the absence of such intending purchasers who entered into an agreement with the first defendant will affect their right as well. This leads one to the irresistible conclusion that the inconvenience which the first defendant/appellant will suffer if injunction is granted will be far greater than that which the plaintiff will suffer and this alone is enough to refuse the prayer of injunction.

[*Paras 15, 16 and 17*]

Cases referred to:

Narayanappa v. Bhaskara Krishnappa, (1966)2 M.L.J. (S.C.) 80: (1966)2 An.W.R.(S.C.) 80: (1966)2 S.C.J. 490: A.I.R. 1966 S.C. 1300. [Para 20]

C.R.R. Gowder v. C.P. Nanjappa, (1973)1 M.L.J. 189: A.I.R. 1973 Mad. 179. [Para 22]

I.J.J. Rebello v. C.C. Rev. Authority, A.I.R. 1971 Mysore 318. [Para 24]

Pren Raj Brahmin v. Bhanu Ram Brahmin, I.L.R. (1846)1 Cal. 191. [Para 24]

Appeal under Clause 15 of the Letters against the order of Arumugam, J., dated 2.8.1991, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.403 of 1991 presented to this Court (Original Side), to order an interim injunction restraining the 1st respondent, 1st defendant, from selling or encumbering or in any way alienating the suit property fully described in the Schedule to Judge's Summons, pending C.S.No.597 of 1991, on the file of the High Court, (Original Side), Madras.

R. Gandhi, Senior Counsel, for *Mr. A.A. Lawrence*, for Appellant.

N.S. Nandakumar, K. Singaravelu, for Respondent No.1.

T. Arulraj, for Respondent No.2.

The Judgment of the Court was delivered by

MLJ 9

Mishra, J.:- The first defendant in a suit on the Original Side of the court has appealed against an order of injunction issued in terms as follows:

"That the interim order of the court herein dated 13.6.1991 directing the respondents herein not to encumber or alienate the property more fully set out in the schedule hereto, in any manner to third parties and extended till 27.6.1991 by order dated 20.6.1991 be and is hereby made absolute till the disposal of the above suit C.S.No.597 of 1991."

2. The plaintiff/first respondent and the second defendant/second respondent have a common cause in the injunction petition. For the purpose of appreciating the nature of the dispute between the parties, we may refer to the contents of the plaint and if necessary to the affidavits filed in the course of the hearing of the injunction petition. We do not, however, have the advantage of the written statement of the first defendant/appellant. We shall, however, for the purpose of deciding the question of injunction, accept the allegations in the supporting affidavit as uncontroverted.

3. According to the plaintiff, he and defendants 1 and 2 have been dealing in real estate within and outside the jurisdiction of this Court independently and/or in partnership with one another in respect of any particular transaction. They purchased land, developed it as an approved lay-out and sell the lay-out plots to third parties and share not profits arising out of those transactions, depending upon the agreed share of investment and the share of profit fixed therefor. It is said, in the course of such business activity, the first defendant/appellant approached the plaintiff and the second defendant to do business in partnership of developing and selling the land of an extent of 4 acres of approved lay-out. This land is fully described in the schedule to the plaint. It is alleged,

"The first defendant agreed to give to the plaintiff and the 2nd defendant 1/5 share each in the profits of the sale proceeds of the suit property as lay-out plots. The 1st defendant is entitled to 3/5 share in the said profits. The abovesaid business of partnership between the plaintiff and the 1st defendant on the one hand and the 1st defendant and second defendant on the other hand, is confirmed by the 1st defendant in separate agreements dated 16.4.1988 and 8.8.1988. The partnership business of the

plaintiff and defendants came into existence in the following way:

The plaintiff states that the 1st defendant represented that the suit property was originally the trust property of Sithi Puthi Vinayakar Temple of Navanerikuppam Village and the 1st defendant along with one Radhakrishnan entered into an agreement of sale dated 17.10.1983 with the Trustees of the said temple fixing the sale price of the suit property at Rs.4,93,500 and that the Trustees filed O.P.No.14 of 1985 on the file of the District Court, Chingleput for getting permission to sell the suit property and that the court has also granted permission on 30.7.1985 and that subsequently dispute arose between them and that therefore the 1st defendant and the said Radhakrishnan were not able to purchase the suit property.

The plaintiff states that by making such representation during the pendency of the aforesaid O.P.No.14 of 1985 the 1st defendant approached the plaintiff to do business in partnership for developing the suit property as a lay-out and to share the profit by selling the same. The 1st defendant requested the plaintiff for contribution of part of sale consideration to purchase the suit property from the trustees of the temple agreeing to pay 1/5 of the profits of sale of lay-out plots. Believing the said representation of the 1st defendant, the plaintiff paid a sum of Rs.1,00,000 (one lakh only) on 28.9.1987 for purchase of the suit property and the 1st defendant also issued a stamped receipt therefor. In the said receipt itself the 1st defendant admitted to give 1/5 share of profits to the plaintiff. Subsequently the 1st defendant executed an agreement dated 8.8.1988 incorporating the business of partnership and the share of profits as stated above between the plaintiff and the 1st defendant.

The plaintiff states that the 1st defendant subsequently represented to the plaintiff that the 1st defendant has entered into similar partnership with the 2nd defendant agreeing to pay to him 1/5 share in the business of selling the suit property for which the 2nd defendant has also paid a sum of Rs.1,00,000 (one lakh only) and the 1st defendant had also entered into an agreement dated 16.4.1988 for sharing the profits as stated above with the 2nd defendant.

Thus the 1st defendant entered into a partner-

ship with the plaintiff and 2nd defendant by separate agreements agreeing to pay 1/5 share each from selling the suit property as lay out plots. Originally before the suit property was purchased for the partnership, the first defendant has mentioned estimated value of the suit property as Rs.10,00,075 and the share of the plaintiff and defendant is mentioned as Rs.1,00,001 each. It is agreed that after defraying the aforesaid sums, the profit will be shared in the ratio. However, now the property was purchased only for a sum of Rs.4,46,800. Therefore, the estimated value of Rs.10,00,075 has no bearing for taking away the share capital of partners. The plaintiff states that after the receipt of the aforesaid sums from plaintiff and second defendant towards the partnership business the plaintiff prosecuted O.P.No.14 of 1985 for getting permission to purchase the property from the Trustees of the temple. As represented by the first defendant after entering into the compromise on 15.2.1990 with his co-agreement vendee namely Radhakrishnan and the Trustees of the temple, the 1st defendant was able to complete the formalities of getting permission from the court and to obtain the sale deed dated 12.3.1990 *in respect of the suit partnership property*. The 1st defendant gave the agreement dated 16.4.1988 between 1st defendant and second defendant and the xerox copy of the sale deed to the plaintiff." (*underlining is ours*).

4. Alleging that the first defendant, all of a sudden made a publication in the English daily "The Hindu" dated 15.7.1990 notifying the suit property for sale giving a phone number 652763 for contact by intending purchaser of the suit property and that hitherto the first defendant used to give the phone No.610359 of the 2nd defendant alone for contact in person of business of partnership property by the intending developers, purchasers etc., which conduct of the first defendant is against the principles of Partnership and destructive of the partnership business itself, and for the reason that the plaintiff came to know that the representations made by the 1st defendant from 1987 onwards was with a fraudulent intention of cheating the plaintiff and the second defendant, the plaintiff has moved this Court for a decree *inter alia* that the partnership of the plaintiff and defendants to carry on the business of

laying out and selling the suit property may be dissolved as and from the date of suit and that the suit property being the asset of the partnership, may be divided into one fifth, three-fifth and one-fifth between the plaintiff, the first defendant and the second defendant by appointing a Commissioner therefor. The plaintiff/respondent also moved the court for an order of injunction. A learned single Judge of this Court granted injunction as above.

5. Before we advert to consider whether on the facts as above in the plaint, any case for the grant of injunction in terms as ordered by the trial court has been made out, we shall prefer to recapitulate the ambit and scope of a suit for dissolution of partnership and find out from a glance to the relevant provisions of law as to what constitutes an asset of the partnership and how far a partner can go claiming interest in the properties that belong to the partnership and how far a court can enjoin a partner with respect to the properties of the partnership and with respect to the properties which do not belong to the partnership.

6. The Indian Partnership Act has defined partnership, partner, firm and firm name to identify the relationship between persons, who have agreed to share the profits of a business carried on by all or any of them acting for all. Sec.5 of this Act says, "The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business."

7. Sec.6 of this Act indicates the mode of determining existence of partnership in these words:

"In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1: The sharing of profits of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2: The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the

persons carrying on the business; and, in particular, the receipt of such share of payment: (a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow of child of a deceased, partner, as annuity or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business."

8. Sec.14 of this Act describes the property of the firm in these words:

"Subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purpose and in the course of the business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

9. These provisions thus give us a definite idea to know whether a partnership is in existence and as to what is the property of the partnership. The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in the property does not of itself make such persons as partners. The receipt by a person of a share of the profits of a business or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business, more so, if such a person is the lender of money to persons engaged or about to engage in any business and other instances indicated in Explanation 2. To constitute a property of the firm, it must be shown that the rights and interests in property have been brought into the stock of the firm by the partners originally when the firm was formed or subsequently acquired by purchase or otherwise in the course of the business of the firm.

10. Sec.37 of the Specific Relief Act says that temporary injunctions are such as to continue until a specified time, or until further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil

Procedure, 1908, Sec.41(e) of this Act says,

"An injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced."

11. In the course of the hearing of the injunction petition in the trial court, some documents were produced in support of the plaint allegations. Such documents have been dealt with by the learned single Judge and for our purpose, it will be enough that we extract from the judgment of the trial court the contents thereof and the findings thereon.

"The typed set filed on behalf of the first defendant/respondent contains the copies of various letters and agreements and among one was the sale agreement dated 28.9.1987, executed between the first defendant, herein as No.1 and the plaintiff herein as No.2 and that this document has been titled as land sale agreement. Referring the suit property in this agreement, as having been purchased by the first defendant, it was specifically pointed out that for the purpose of paying the money to get the sale deed in the District Court at Chengalpattu to purchase the suit property it appears that the first defendant had obtained a sum of Rs.1,00,001 by cash. It appears from the said document that the suit property was valued on the said date for Rs.1,00,075 and further it was agreed that the said property is to be converted into plots and sold away to third parties and the first defendant has agreed to give 1/5 share in the property derived out of the said sale of the suit property. Then this document was followed by the execution of another receipt by the first defendant on 16.4.1988 in favour of the second defendant herein for the receipt of Rs.1,00,001 in token and consideration of an agreement executed by themselves in the stamp papers on 16.9.1988. Then a similar agreement was entered into between the first and second defendant to share the 1/5 profit to the second defendant from the profit derived out of the sale of the suit property and that this agreement was executed on 16.4.1988 with the value given for the suit property at Rs.10,75,000.

One another document which was relied upon by the first defendant as well as the plaintiff is a document executed by the first defendant herein to the plaintiff on 8.8.1988 and that in which the first document and the receipt of Rs.1,00,001 from the plaintiff has been

referred to which was paid to him for the purchase of the suit property, Further, in the said document, it was recited as follows as agreed by the first plaintiff:

திரு ராமாநாயுடு பெற்றுக் கொண்ட ரூ.1,00,001/-க்காக மேற்கண்ட சர்வே நெம்பர் 11ல் இருக்கும் 4 ஏக்கர் நிலத்தை திரு பார்த்தசாரதி அவர்களுடன் கூட்டு வியாபாரம் செய்து பிளாட்டுக்களாக போட்டு வியாபாரம் செய்ய ஒப்புக் கொண்டார். அதன் விபரம் வருமாறு:

"1987ம் செப்டம்பர் மாதம் 28ஆம் தேதி மேற்கண்ட நிலத்தின் மதிப்பு ரூ.10,75,000/- (ரூபாய் பத்து லட்சத்து எழுபத்தைந்தாயிரம்) இதை விற்கும் சமயத்தில் எந்த விலைக்குப் போகிறதோ அந்த விலையில் இருந்து ரூ.10,75,000/- ரூபாய்யைக் கழித்துக் கொண்டு கிடைக்கும் நிகர லாபத்தில் 1/5 பாகத்தை (ஐந்தில் ஒரு பாகத்தையும்) அசலாகிய ரூ.1,00,001/- (ரூபாய் ஒரு லட்சத்து ஒன்று) உடன் சேர்த்து இரண்டாம் பார்ட்டியாகிய திரு பார்த்தசாரதி அவர்களுக்கு கொடுக்க முழு மனதோடு சம்மதித்து முதல் பார்ட்டியாகிய நான் (ராமாநாயுடு) எழுதிக் கொடுத்த பத்திரம்."

This document clearly speaks for the truth that, upon which the plaintiff and the first defendant had agreed upon already with regard to the suit property. It was made clinchingly clear that for the purpose of purchasing the suit property in the name of the first defendant, the sum of Rs.1,00,001 was contributed by the plaintiff and that for which the first defendant has agreed to give 1/5 share in the profit derived out of the sale of the said land by any 3rd party after converting into plots and that even so the specific words stipulated therein.

"திரு ராமாநாயுடு அவர்கள் பெற்றுக் கொண்ட ரூ.1,00,001/- மேற்கண்ட சர்வே நெம்பர் 11ல் இருக்கும் 4 ஏக்கர் நிலத்தை திரு பார்த்தசாரதி அவர்களுடன் கூட்டு வியாபாரம் செய்து பிளாட்டுக்களாக போட்டு வியாபாரம் செய்ய ஒப்புக் கொண்டுள்ளார்."

The above words clearly manifest the intention of the parties, when it was reduced into writing. There was no denial on the part of the first defendant that he has not received the amount of Rs.1,00,001 from the plaintiff and the first defendant respectively. Thus, a careful perusal and consideration of the documents relied on by the first defendant clearly demonstrate the fact that what was agreed upon between the defendants and the plaintiff was

only a partnership business in purchasing the suit property in the name of the first defendant and for that purpose, he got the contribution from the plaintiff and purchased the same at the value prevailing on that date and agreed to sell away at Rs.10,75,000 subsequently and that thereupon to share the profit also in accordance with the ratio of the contribution. Through this document, the truth has come out and the pleadings as well as the case of the plaintiff brought so far has been substantiated *prima facie* by the plaintiff herein.

It is true that there was no written partnership deed among the plaintiff and the defendants herein with regard to the business of purchasing the lands and converting the same into plots and sell it away to third parties for profits. But, this fact has not been suppressed by the plaintiff. But even so, the documents, relied upon by the first defendant, clinches the fact of the agreement of partnership, business among the parties herein relating to the suit property by converting into plots followed by the approval by the authorities and selling it away to third parties for profit and share them in proportion to their respective contribution made among themselves."

To begin thus to consider whether there has been a partnership, it has to be seen that there is no written partnership deed among the plaintiff and the defendants with regard to the business of purchasing the land, converting the same into plots and selling it away to third parties for profits (see the finding quoted above of the trial court). 12. There is no material on record to show anything beyond a certain stipulation that the first defendant/appellant has agreed to share profits or gross returns arising from the sale of the suit land. There is nothing also to show that the plaintiff and the second defendant have been holding a joint or common interest in the suit land with the first defendant/appellant.

13. The first document dated 8.8.1988 showing that the plaintiff paid a sum of Rs.1,00,001 to the first defendant for the purchase of the suit property shows that the first defendant had agreed that he would give one-fifth share in the profit derived out of the sale of the land by any third party after converting into plots. The plaint recital is also clear that the first defendant purchased the suit land from the trustees of the Siddhi Puddhi

Vinayagar Temple of Navaverikuppam (*vide*: sale deed dated 12.3.1990) after permission in O.P.No.14 of 1985 granted by Court and after compromise on 15.2.1990 with the co-agreement vendee Radhakrishnan and the trustees of the temple. There is nothing on record to show, assuming that some sort of partnership was created, that the suit property was either originally brought by the partners into the stock of the partnership or subsequently acquired by purchase or otherwise in the course of the business of the firm. In fact, it is nobody's case that the suit land was purchased in the course of the business of the firm or out of any fund of the partnership. If there has been a partnership between the plaintiff and the first defendant, that had nothing to do with the partnership which the first defendant had with the second defendant. The common link in the two partnerships (if at all there has been a partnership) is missing. The first defendant no doubt is the purchaser/owner of the suit property, but he neither gave the property to the partnership which he created with the plaintiff nor he gave that property to the partnership which he created with the second defendant. There is also nothing on record to know as to when and how a partnership between and there was created, the so-called partnership which is sought to be dissolved in the suit.

14. Viewed, however, independent of the merit of the claim of the plaintiff that the suit property is a partnership property and confining our consideration only to the prayer of injunction we cannot fail to take notice of the attempt of the plaintiff to seek enforcement of a so-called contract of partnership after it is dissolved by the plaintiff himself by his act of moving in the court for its dissolution and in the course of this attempt to enforce the contract, to keep the property which belongs to the first defendant/appellant in a *status quo* so that the relief of profit that he would have received as a consequence of the contract executed by the first defendant should not be denied to him. This is a prayer opposed to the rule in Sec.41(e) of the Specific Relief Act. If at all there is a breach of the contract of partnership by the first defendant, the question that would arise is, can the contract specifically be enforced by a decree of the court? If it could be specifically enforced, then only injunction could be asked for to prevent the breach.

15. Learned trial Judge, however, held that the plaintiff has *prima facie* established that the suit

transaction is a partnership business and that the plaintiff and the defendant herein are the partners of the suit property in purchasing, converting and developing into plots and selling the same to third parties for profit and that they have agreed to share the profits derived out of the said sale in accordance with the ratio of their respective contributions. We fail to understand how the learned trial Judge has come to the conclusion that the plaintiff and the defendants are partners of the suit property particularly when the facts in this behalf are clear and unambiguous that the first defendant/appellant approached the plaintiff promising to give one-fifth share in the profits derived out of the sale of the suit land and getting a sum of Rs.1,00,000 from him. Similarly, under a separate agreement, he received a sum of Rs.1,00,000 from the second defendant and promised to give him one-fifth share in the profits derived out of the sale of the land. Having so obtained Rs.1,00,000 each from the plaintiff and the second defendant, he finalised the purchase of the suit land and obtained a sale deed dated 12.3.1990 in respect of the suit property in his name from the trustees of the temple (Vendors). There has been thus no partnership in purchase. If at all there has been anything, that was borrowing of Rs.1,00,000 from the plaintiff and another sum of Rs.1,00,000 from the second defendant on a promise that he shall share one-fifth of the profit when the land would be sold after laying out the land as house plots.

16. Once it is found that there has been no partnership in purchasing the land, even if it is found that there has been some sort of partnership between plaintiff and the first defendant on the one hand and between the first defendant and the second defendant on the other hand and by guess between the three that is to say, the plaintiff, the first defendant and the second defendant, that was confined to sharing the profits to the extent of one-fifth, three-fifth and one-fifth respectively. This partnership also is sought to be dissolved. The result is, if there has been any business of a sale of any portion of the suit property before the suit, there shall be profit to the plaintiff as well as to the second defendant to share with the first defendant/appellant and if there shall be any business during the pendency of the suit and there is a profit, there shall be such sharing by way of accounting. Injunction will bring the business to a standstill. If there shall be no business, there shall

be no profit. There shall be nothing to share. That there has been nothing to share before the suit is admitted in the plaint. Since there has been no business before the suit, there is nothing to share between the so-called partners. Something to share will arise, as we have noticed earlier, only if there is a sale. There is some material brought before us to show that some agreement of sale has been executed by the first defendant in favour of some persons who are described by the second defendant/respondent as kins of the first defendant. Nonetheless they are third parties. It is not known whether they have acquired a right under the contract of sale to get the same specifically enforced. Any grant of Injunction in the absence of such intending purchasers, who entered into an agreement with the first defendant, will affect their right as well.

17. It is not necessary, in our opinion, to go beyond what we have already found, to refuse the prayer of injunction on behalf of the plaintiff. But we cannot resist making some observations that besides the question whether there is a *prima facie* case, it is always necessary in a case of temporary injunction to bear in mind the cardinal principles of balance of convenience and irreparable injury. Parties, it appears, failed to address the trial court on the question of balance of convenience. There has, however, been some attempt before us on behalf of the respondents (plaintiff and the second defendant) to raise the issue of equity, a rule which is the foremost part of the rule of balance of convenience. This Court has in a number of cases indicated how the rule of balance of convenience is applied. We shall only be repeating but we must quote a passage from the Halsbury's Laws of England, 3rd Edn., Volume 21, p.765 at page 365.

"Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right, the burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the

injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

18. There has been no attempt by the learned trial Judge to find out how this balance tilted in favour of the plaintiff and the second defendant if injunction was refused and how, if injunction was granted, inconvenience caused to the first defendant/appellant was lesser than the inconvenience caused to the plaintiff and the second defendant. The view that we have taken leads us to one irresistible conclusion that the inconvenience which the first defendant/appellant will suffer if injunction is granted will be far greater than that which the plaintiff will suffer and this alone in our view, is enough to refuse the prayer of injunction.

19. Before we part with this judgment, we must in appreciation of the efforts of the learned counsel for the plaintiff/respondent, deal with the case law brought to our notice.

20. In *Narayanappa v. Bhaskara Krishnappa*, (1966) 2 M.L.J. (S.C.) 80: (1966) 2 An.W.R. (S.C.) 80: (1966) 2 S.C.J. 490: A.I.R. 1966 S.C. 1300, it is pointed out with reference to some of the provisions of the Partnership Act that all property originally brought into the stock of the firm or acquired by the firm in the course of the business of the firm constitutes the assets of the partnership. On the facts of the case before the Court, the Supreme Court has observed,

"From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall

to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Clause (a) and sub-Clauses (i), (ii) and (iii) of Clause (b) of Sec.48."

21. There can be no exception to the statement of law by the Supreme Court but before such restraint as indicated by the Supreme Court is applied to the partners, it has to be found that the property belongs to the partnership. The case in hand, in our opinion, is one in which it is still in doubt whether the property in dispute is a partnership property.

22. In *C.R.R. Gowder v. C.P. Nanjappa*, (1973) 1 M.L.J. 189: A.I.R. 1973 Mad. 179, also, the same view has been expressed in these words:

"In the present case the property in question was purchased in 1909 and Desai Gownder was living in the property. Ramiah was also associated with Desai Gownder even during his lifetime and he was living in the same property. After the reconstruction of the house by utilisation of partnership funds, Ramiah, one of the partners of the firm, was living in the same property. The mere fact that it was not shown in the balance-sheets of the firm as partnership property, will not alter the character of the property and the further circumstances that the Arbitrator who decided the disputes between the plaintiff and his brothers made an award on basis that the suit property is the separate property belonging to Ponniah and divisible among the plaintiff and others also will (not) alter the character of the property. The fact that the suit property was the subject of division will not alter the character of the property, as there is no decision on that question. The mere fact that the muchalika by the three brothers requesting Sr.C.S.Rathnasabapathy Mudaliar to effect a division was attested by Ramiah will not to an admission that the suit property belonged to Ponniah alone. On the other hand, Ramiah's occupation of the suit house even prior to the death of Desai Gownder is a circumstance to be taken into account in ascertaining whether the plaintiff is the owner."

23. The above observations were made after taking notice of the various authorities and the provisions of the Partnership Act and the principle that unless a contrary intention appears by an

express agreement or by the nature of the transaction, property bought with money belonging to the firm is deemed to have been bought for the firm.

24. A Judgment, however, of the Special Bench of the Mysore High Court in the case of *I.J.J. Rebello v. C.C. Rev. Authority*, A.I.R. 1971 Mysore 318, has expressed this aspect of the law in these words:

"The concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital, money or property including immovable property. When it is shown that property, whatever its character is brought into the common stock of the partnership firm. It would cease to be the exclusive property of the person who brought it in and it would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of the partnership. Since the firm has no legal existence, the partnership property will vest in all the partners. The provisions of the Indian Partnership Act, 1932 do not prescribe any particular mode by which properties whether movable or immovable have to be brought into common stock. For the purpose of bringing the separate property of a partner into the common stock of the firm. It is not necessary to have recourse to any written document at all.

As soon as the partners intend that their separate properties should become the partnership properties and they are treated as such, then by virtue of the provisions of the Partnership Act the properties become the properties of the firm. This result follows by operation of law. This sort of contribution or transfer is not prohibited by the Transfer of Property Act or the Registration Act (*vide: Pren Raj Brahmin v. Bhani Ram Brahmin*, I.L.R. (1846) 1 Cal. 191 at pp.193-194.

Though under law a written document is not necessary to bring in the separate property of a partner into the partnership stock and such property becomes the property of the firm when the partner intends to bring it and treat the same as such, where a document is executed by a partner as a formal conveyance, the question is not whether the contribution or transfer could not be effected otherwise than by execution of a document but whether the document is a conveyance, as defined under

Sec.2(1)(d) of the Act. The Act subjects to duty the instruments falling within the description of documents specified in the schedule and for fixing the duty payable, the substance of the document should be looked into.

A partner can sell his property to a partnership firm which includes himself as a member. Whether the partner sold his property or he contributed the property to the common stock is a question which would depend upon his intention and on the language of the document. Where the document contains no words whatever of a dispositive character which expressly or by necessary implication, amount to a transfer of interest as between one partner and the others, there is irresistible conclusion that the properties were brought into the common stock."

25. We are in complete agreement with the view of the Special Bench and we have not deviated from the principles stated therein.

26. Our conclusions on facts, however, are such that we are constrained to hold that any right of the plaintiff in the suit is in serious dispute and it will be difficult to say that there is a *prima facie* case. In any case, in our view, the balance of convenience is in favour of the first defendant/appellant. The impugned judgment, in our opinion, is not in accordance with law. The same is accordingly set aside. We, however, make it clear that any observations on the merits of the case of the plaintiff in our judgment, shall not be taken into account in the course of the trial of the suit. The appeal is, therefore, allowed. No costs.

B.S.

Appeal allowed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

Present:- Srinivasan, J.

S.A.No.753 of 1981 10th December, 1991.

G.S.Ramachar ...Appellant
v.
The Block Development Officer, Kaveripatnam
and others ...Respondents.

*Civil Procedure Code (V of 1908), O.39, Rule 7 -
Mandatory injunction - Grant of - Plaintiff guilty of
laches, not entitled to mandatory injunction.*

Held:- Even before the suit, a notice was issued under Ex.A-1 dated 12.12.1972. In that notice it was stated that the respondents 1 to 3 were trying to trespass on the property and form a road. The respondents 1 to 3 were threatened with a suit if they failed to comply with the demand made in the said notice within two months therefrom. Yet the suit was filed only on 30.1.1975. In paragraph 16 of the plaint, it is stated that the road was completed by the respondents 1 to 3 from the point 'X' to 'Y'. It is further stated that the plaintiffs are entitled to damages at least at Rs.100 per year from the defendants from December, 1972 to December, 1974. Thus, there is an admission that the road was completed in December, 1972. Therefore, it is clear that the plaintiffs were guilty of laches. They should have taken steps even when there was an attempt on the part of the defendants to form a road and obtained an injunction restraining them from forming the road. Having allowed the Authorities to spend lot of public money for forming the road, it is not open to the plaintiffs to ask for mandatory injunction. The relief of mandatory injunction is discretionary and the lower appellate court applied the correct principles of law in refusing to grant the mandatory injunction. [Para 2] *Mrs.Prabha Sridevan*, for Appellant.
M.Venugopal, Government Advocate, for Respondent Nos.1 to 3.

The Court made the following

ORDER:- When the appeal was called, *Mrs.Prabha Sridevan*, learned counsel for the appellant, reported that the 8th defendant, who is the 6th respondent in the appeal, died and that she has filed an application to bring his legal representatives on record. I find that the 6th respondent

herein who was the 8th defendant in the suit remained *ex parte* in both the courts below. In this second appeal, no notice was issued to him and the counsel got it dispensed with under O.41, Rule 14 of the Code of Civil Procedure. It is also seen that the prayer in the plaint is not only on behalf of the plaintiffs but also on behalf of defendants 8 and 9. Thus, the deceased defendant was sailing with the plaintiffs and there was no contest as among them. In these circumstances, there is no necessity to bring the legal representatives of the 6th respondent (8th defendant) on record in this second appeal. Under O.22, Rule 4(4), C.P.C., the court can exempt, whenever it thinks fit, the plaintiffs from the necessity of substituting the legal representatives of any such defendant who had remained *ex parte*. Hence, there is no necessity for the plaintiff to bring the legal representatives of the 6th respondent (8th defendant) on record in this second appeal.

2. The second appeal is taken up for hearing. There is no merit in this appeal. The courts below have declared the title of the plaintiffs to the property in question. But the lower appellate court has found that the plaintiffs are not entitled to mandatory injunction in view of their conduct in keeping quiet when the respondents 1 to 3 formed the road. Even before the suit, a notice was issued under Ex.A-1, dated 12.12.1972. In that notice, it was stated that the respondents 1 to 3 were trying to trespass on the property and form a road. The respondents 1 to 3 were threatened with a suit if they failed to comply with the demand made in the said notice within two months therefrom. Yet the suit was filed only on 30.1.1975. In paragraph 16 of the plaint, it is stated that the road was completed by the respondents 1 to 3 from the point 'X' to 'Y'. It is further stated that the plaintiffs are entitled to damages at least at Rs.100 per year from the defendants from December, 1972 to December, 1974. Thus, there is an admission that the road was completed in December, 1972. Therefore, it is clear that the plaintiffs were guilty of laches. They should have taken steps even when there was an attempt on the part of the defendants to form a road and obtained an injunction restraining them from forming the road. Having allowed the authorities to spend a lot of public money for forming the road, it is not open to the plaintiffs to ask for mandatory injunction. The relief of mandatory injunction is discretionary and the lower

appellate court has applied the correct principles of law in refusing to grant the mandatory injunction.

3. It is next contended that the plaintiffs are entitled to claim more damages than what is granted by the lower appellate court. I find that the plaintiffs have claimed only Rs.200 in the prayer portion though in the body of the plaint they had mentioned that they were entitled to damages at the rate of Rs.100 per year. The learned judge has granted more than the amount claimed. But there is no cross-objections or cross-appeal at the instance of the respondents. I am not inclined to interfere with the grant of compensation in favour of the plaintiffs by enhancing the same.

4. The second appeal fails and the same is dismissed. No costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Swamidurai, JJ.

O.S.A.No.113 of 1985 11th March, 1992.

M.Chettyappan and others ...*Appellants*
v.

State Bank of India, Nungambakkam Branch,
Madras-34 ...*Respondent.*

Contract Act (IX of 1872), Secs.140 and 141 - Principal debtor obtaining loan from Bank - Goods, produce and merchandise offered as security - Security bond executed - Executing shipping agreement in respect of stock of Canned srimpsere letter of undertaking to hold in trust all the goods pledged to the bank - Persons in management of company - Playing fraud and depriving bank of the securities - Bank if can claim full debt from sureties - Sureties whether discharged to extent of security lost to Bank - Rights of sureties.

The plaintiff bank entered into a contract of cash credit loan to an extent of Rs.3,00,000 and medium term loan to an extent of Rs.75,000 on the hypothecation of the schedule of properties with the principal debtor, first defendant, a company,

carrying on business in processing and exporting sea goods Defendants 2 and 3 who were then directors of the company stood surety for the cash credit loan to the company and defendants 3 and 4 stood surety for the medium term loan. Subsequently defendants 2 and 3 resigned from the directorship. One 'A' and 'P' entered as new directors. They passed a letter to defendants 2 and 3 with regard to the discharge of the loan due to the plaintiff. As the loans were outstanding, the Bank filed a suit against defendants 1 to 3 for the cash credit loan and against defendants 1, 3 and 4 for the short term loan. Suit decreed. On appeal, **Held:-** It is not in the language of Sec.140 or Sec.141 of the Indian Contract Act that the court will always endeavour to find out whether the creditor was in actual custody of the security or not and that it was only on account of the negligence of the creditor that the security was lost. The provision in Sec.140 invests the surety with the same rights which the creditor had against the principal debtor and thus puts him in the same position as the creditor realises his debt from the principal debtor including in all such rights which the creditor had in the properties that were offered as securities. Unless such transfer of security is also read in Sec.140 of the Contract Act, there shall be always a chance of a creditor suing the surety and in the meanwhile the principal debtor appropriating or removing every security so that in the event of the surety paying or performing all that he is liable for, he is denied the benefits of the right of the creditor that is conferred upon him by virtue of a statute. Sec.141 read in the context as the Supreme Court has read in *State of Madhya Pradesh v. Kaluram*, (1967)2 S.C.J. 823: (1967)1 S.C.R. 226: 1967 Lab.L.J. 55: A.I.R. 1967 S.C. 1105, thus entitles the surety to the benefit of every security which the creditor has against the principal debtor at the time when the contract for suretyship is entered into. The qualifying words 'whether the surety known of the existence of such security or not' keep the surety in inevitable position in relation to the creditor as all rights of the creditor as per Sec.140 would vest in him upon payment or performance of all that he is liable for. The other co-ordinating part of Sec.141 reads 'and if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the value of the security. The loss that can be discharged by the

surety to the extent of the value of the security has also been illustrated. The illustration has some similarity with the case in hand. It is found in Exs.P-2, P-3, P-4 and P-5 that the cash-credit loan was sanctioned on the security of the goods, produce and merchandise and the stock of canned shrimps was required to be stored in such place and in such manner as the Bank may from time to time approve. The first defendant company held in trust solely for the plaintiff Bank the goods pledged and the documents of title thereto in their absolute control, possession and disposition free of any charge, lies or other encumbrance and to keep the goods fully insured against loss or damage by fire, riot, civil commotion therefor, pilferage, etc., This shows that the security against loss even on account of theft, pilferage etc., must be found in the hands of the creditor. The creditor cannot escape liability by saying that he has not ensured that the first defendant company had kept all the goods insured against loss or damage by fire, riot, civil commotion theft, pilferage etc., It will be for the creditor, thus, to say how the security was lost and in case of loss the amount of insurance that must be found to accrue to the surety and the surety must accordingly be found to have been discharged to the extent of the insurance. If there is no insurance, it is obvious, it is on account of the negligence of the creditor-Bank. If there is insurance, there is security and the surety must be deemed to have been discharged to that extent. Negligence need not always be inferred from a positive act. It can be inferred also from omission. If the creditor has omitted to do something which he had to do, to keep the security for the surety in the event of the creditor claiming the debt from the surety, the creditor has to account for the loss. The burden is obviously on the creditor to satisfy the court that it has no liability under sec.141 of the Act or under Sec.140 thereof to the extent of the security and that notwithstanding the loss of the security it can still claim the debt from the surety. [Paras 15 and 16]

Cases referred to:

State of Madhya Pradesh v. Kaluram, (1967) 2 S.C.J. 823: (1967) 1 S.C.R. 266: 1967 Lab.L.J. 55: A.I.R. 1967 S.C. 1105. [Paras 8, 12]

Billing v. Jay, (1872) 7 Q.B. 756. [Paras 10, 12]

Amrit Lal v. State Bank of Travancore, (1968) 2 S.C.J. 741: A.I.R. 1968 S.C. 1432. [Para 12]

State Bank of Saurashtra v. Chitrangan Ranganath,

A.I.R. 1980 S.C. 1328. [Para 14]

Appeal under Clause 15 of the Letters Patent against the order of S.A.Kader, J., dated 19.10.1983 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.442 of 1978.

The Judgment of the Court was delivered by *Mishra, J.*:- Defendants 2 to 4 (third defendant has been substituted by his legal representatives) have appealed. It is not in dispute that the plaintiff-Bank entered into a contract of cash credit loan as well as medium term loan on the hypothecation of the schedule of properties with the principal debtor Messrs. Discon Foods (P) Ltd., (first defendant), a company incorporated under the Indian Companies Act and carrying on business in processing and exporting sea foods. The cash credit limit was Rs.3,00,000 and medium term loan limit was Rs.75,000. Defendants 2 and 3, who were at the relevant time, Directors of the first defendant-company, stood surety for the cash credit loan to the first defendant-company and defendants 3 and 4 stood surety for the medium term loan. This was, however, in April, 1974, and continued until, it is said, the second defendant resigned from the directorship of the first defendant Company on 19.7.1974 and the third defendant resigned from the directorship with effect from 27.10.1975. It appears that one M.C.Agarwal and Mrs.Pushpa Agarwal entered as new directors and passed a letter dated 22.11.1975 to defendants 2 and 3 with regard to the discharge of the loan due to the plaintiff.

2. According to the defendants, when the Agarwals took over, they entered into some sort of arrangement with the creditor Bank and thus they stood discharged as sureties. The creditor Bank found that the principal debtor had not cleared the cash credit loan amounting to Rs.2,14,379.22 and medium term loan amounting to Rs.48,701.61. Hence, it filed the suit claiming moneys, both principal and interest from defendants 1, 2 and 3 jointly and severally for the cash credit loan and defendants 1, 3 and 4 for the medium term loan.

3. On the main questions that were raised in the suit, whether the novation put forward by defendants 2 and 3 is true, valid and binding on the plaintiff and whether there has been any variation in the terms of the contract between the plaintiff and the first defendant and the sureties are discharged thereby, learned trial Judge has found

that the plea of novation set up by defendants 2 to 4 is illusory and that they are not absolved of their liability and there is no material to establish that there has been any variation in the terms of the contract so as to attract the operation of Sec.133 of the Contract Act and discharge the liability of the second defendant.

4. Learned counsel for the appellants has assailed the said finding and taken us through the evidence on record. He has however, not been able to dispute the proposition that in case the defendants/appellants pleaded a novation so as to give rise to a new contract leading to the discharge of the surety or such variation in the terms of the original contract attracting Sec.133 or Sec.135 of the Contract Act, the burden of proof for the same was upon them.

5. Learned trial Judge has looked into all such materials and found the evidence inadequate to hold in agreement with the case of the defendants. We find nothing particular drawn to our notice to take a different view. We shall be only re-writing the judgment of the trial court in this behalf if we record what is stated in Exs.P-2, P-3, P-4, P-5, P-6, P-7, P-9 and P-10 or refer to the evidence of P.W.1, who alone has been examined on this aspect of the matter on behalf of the plaintiff Bank and that of D.Ws.1 and 2, who have been examined on behalf of the defendants along with the documents that have been produced on their behalf particularly Ex.D-5, a letter allegedly written by one Mr.Agarwal (not examined) dated 22.11.1975 as the Managing Director of the first defendant-company to defendants 2 and 3, wherein he has referred to his discussions with the Bank and the proposal given by the company for the repayment of the amounts in instalments. We concur with the findings of the learned trial Judge in this behalf.

6. It is a case however, in our opinion, in which serious notice has to be taken of a plea of discharge of surety to the extent of the security lost to the creditor Bank. It is conceded in the evidence of P.W.1 that the cash credit loan to the extent of Rs.3,00,000 had been sanctioned by the plaintiff-Bank on the security of the goods, produce and merchandise of the first defendant-company for which Ex.P-2 the security bond, had been executed by the first defendant-company. Ex.P-3 is the shipping lien agreement in respect of stock of canned shrimps and other sea foods to be stored in such place and in such manner as the Bank may from

time to time approve. Ex.P-4 is the trust letter under which the first defendant-company has undertaken to hold in trust solely for the plaintiff-Bank to keep all the goods pledged to the Bank and the documents of title thereto in their absolute control, possession and disposition, free of any charge, lien or other encumbrance in favour of any other bank or any other person, firm or company and to keep the goods fully insured against loss or damage by fire, riot, civil commotion, theft, pilferage, etc. In respect of the medium term loan Ex.P-6 is the Articles of Agreement pledging the machineries of the first defendant-company set out in the schedule thereto. It was contended before the learned trial Judge, as has been contended before us by the learned counsel for the appellants that as provided under Sec.141 of the Indian Contract Act, a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract for suretyship was entered into and if the creditor lost or without the consent of the surety parted with the security, the surety is discharged to the extent of value of the security.

7. P.W.1 has admitted besides admitting the security, that during the last inspection, the Bank found that there was no machinery and found no name board of the company and that there was nothing of security found in the terms as Exs.P-2, P-3, P-4 and P-6 provided for. The learned trial Judge upon that posed the question whether the plaintiff has been so negligent as to lead to the total loss of the security and absolve the liability of the sureties and answered:

"In the case on hand, neither the goods and merchandise nor the machinery were in the actual custody of the plaintiff Bank. They were at Cochin and the persons in the management of the company have played fraud and deprived the plaintiff Bank of the securities. It cannot be said that there was any lack of supervision implying negligence on the part of the plaintiff-bank so as to attract the provisions of Secs.139 and 141 of the Contract Act."

8. In the case of *State of Madhya Pradesh v. Kaluram*, (1967)2 S.C.J. 823: (1967)1 S.C.R. 266: 1967 Lab.L.J. 55: A.I.R. 1967 S.C. 1105, the Supreme Court considered a case of forest contract under which the Government demanded security and it was in terms as extracted.

"Whereas the Governor in order to secure the

due performance of conditions of the above contract demanded security from the forest contractor.... undertake to discharge the liability of the forest contractor in case of any act, omission, negligence or default on the part of the forest contractor for any sum which may become payable by the forest contractor to the Governor by or under the conditions of the above contract."

The principal debtor, however, removed almost the entire quantity of trees sold to him, but since he did not pay the remaining three instalments of the price, the State of Madhya Pradesh took proceedings to recover from the agent the amount due by the principal debtor. The sureties started action on the plea that forest authorities gave time to the principal debtor and omitted to take steps which their duty to the surety required them to take and thus the loss so caused, must lead to discharge of the surety. The Supreme Court stated as follows:

".... the facts in the present case make it abundantly clear that it was on account of the conduct of the forest authorities that the security was lost. The goods sold were under the control of the Forest Officers when they were in the coupe and even when they were in the depot of the contractor. The goods could be removed on the production of a pass from the coupe, and even after the goods were removed, unless they were examined and checked they were not at the disposal of the contractor. It is not pleaded by the State that the trees sold were not checked and examined at the depot of the contractor. Knowing that the goods were removed without payment of the instalments, if the Forest authorities checked and examined the goods and took no action for recovery of the amount payable, and did not enforce the charge, it would be difficult to say that there was mere inaction on the part of the forest authorities "

9. The Supreme Court, however, opined about the legal proposition in these words:

"The expression "security" in Sec.141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefits of the rights of the creditors against the principal

debtor which arise out of the transaction which gives rise to the right or liability; he is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or has parted with the security without the consent of the surety, the latter is, by the express provision contained in Sec.141, discharged to the extent of the value of the security lost or parted with."

10. In this judgment the Supreme Court has quoted with approval the observations by Hannen, J. in *Wulff and Billing v. Jay*, (1872) 7 Q.B. 756, which run as follows:

"I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiff; and he was entitled, therefore to the benefit of that real and substantial security "in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Ress v. Barrington-2 Whites & Tudor's L.C. 4th Edn. at p.1002-*' As a surety on payment of the debt is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them, to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands."

11. The Supreme Court has then added, "subject to certain variations, which are not material for the matter under discussion, Sec.141 of the Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security

held by him."

12. In *Amrit Lal v. State Bank of Travancore*, (1968)2 S.C.J. 741: A.I.R. 1968 S.C. 1432, the Supreme Court has referred to the above judgment and pointed out,

"As pointed out by this Court in *State of Madhya Pradesh v. Kaluram*, (1967)2 S.C.J. 823: (1967)1 S.C.R. 226: 1967 Lab.L.J. 55: A.I.R. 1967 S.C. 1105, the expression "security" in this section is not used in any technical sense; it includes all rights which the creditor has against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability. The surety is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or parted with the security without the consent of the surety the latter is by the express provision contained in Sec.141 discharged to the extent of the value of the security lost or parted with. In *Wulff and Billing v. Jay*, (1872)7 Q.B. 756, Nannen, J. stated the law as follows:.....

11. After saying as above, the Supreme Court in this judgment, has added,

"It is true that Sec.141 of the Indian Contract Act has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of surety. But subject to this variation, Sec.141 of the Indian Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him."

13. The two judgments of the Supreme Court thus clearly state the law on the subject that a surety shall be entitled to securities held by the creditor at the date of his becoming surety and all such securities thus will accrue to him if he discharged the debt or performed all that he under the terms and conditions of the contract was required to perform.

14. In *State Bank of Saurashtra v. Chitranjan Ranganath*, A.I.R.1980 S.C. 1328, the Supreme Court considered a case of a Bank giving cash

credit facility to a businessman against securities, namely, (1) the pledge of goods to be kept under lock and key under the supervision of the Bank, and (2) personal guarantee of the surety. The Supreme Court noticed that the surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor had offered security by way of pledge of goods and the goods were to be in the custody of the creditor-Bank. It was found that the Bank was utterly negligent with regard to the safe keeping and handling of pledged goods and the security of pledged goods was lost on account of the negligence of the Bank. The Supreme Court relied upon its earlier judgments (supra) and made some further examination of the principles of law in this behalf to notice in Halsbury's Laws of England, 4th Edn., Vol.20, para 280, p.152 the statement of law bearing on this point as under,

"On paying the guaranteed debt the surety is entitled to have all securities held by the creditor for the debt handed over to him by the creditor in exactly the same state and conditions in which they were originally provided, whether they were in existence at the date of the contract of suretyship or came into existence subsequently, Consequently any act of the creditor interfering with or impairing that right will, to the extent at all events of any loss inflicted, relieve the surety from liability, and, if it has the effect of altering or purporting to alter the contract of suretyship, discharge him altogether. Thus, where there is a mortgage security given in respect of a debt which is subsequently guaranteed, the creditor must hold the security for the benefit of surety, so that, on paying the debt, the surety may obtain a transfer of the mortgage in its original unimpaired condition. If the creditor does not fulfil his duty in this respect the surety is discharged."

and added,

"This statement of law is reflected in Secs.140 and 141 of the Act."

15. We have chosen to refer to these salutary principles and statements of law on the subject only to assure ourselves that it is not in the language of Sec.140 or Sec.141 of the Indian Contract Act that the court will always endeavour to find out whether the creditor was in actual custody of the security or not and that it was only on account of the negligence of the creditor that the security

was lost. The provision in Sec.140 invests the surety with the same rights which the creditor had against the principal debtor and thus puts him in the same position as the creditor to realise his debt from the principal debtor including in it all such rights which the creditor had in the properties that were offered as securities. Unless such transfer of security is also read in Sec.140 of the Contract Act, there shall be always a chance of a creditor suing the surety and in the meanwhile the principal debtor appropriating or removing every security so that in the event of the surety paying or performing all that he is liable for, he is denied the benefits of the right of the creditor that is conferred upon him by virtue of a statute. Sec.141 read in the same context as the Supreme Court has read thus entitles the surety to the benefit of every security which the creditor has against the principal debtor at the time when the contract for suretyship is entered into. The qualifying words 'whether the surety known of the existence of such security or not' keep the surety in unenviable position in relation to the creditor as all rights of the creditor as per Sec.148 would vest in him upon payment or performance of all that he is liable for. The other co-ordinating part of Sec.141 reads,

'and, if the creditor loses or without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.'

The loss that can be discharged by the surety to the extent of value of the security has been illustrated as follows:

"C advances to B, his tenant, 2,000 rupees on the guarantee of A.C. has also further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture."

The illustration has some similarity with the case in hand. It is found in Exs.P-2, P-3, P-4 and P-5 that the cash-credit loan was sanctioned on the security of the goods, produce and merchandise and the stock of canned shrimps was required to be stored in such place and in such manner as the Bank may from time to time approve. The first defendant company held in trust solely for the plaintiff Bank the goods pledged and the documents of title thereto in their absolute control; possession and disposition free of any charge, lien

or other encumbrance and to keep the goods fully insured against loss or damage by fire, riot, civil commotion theft, pilferage, etc., This shows that the security against loss even on account of theft, pilferage etc., must be found in the hands of the creditor. The creditor cannot escape liability by saying that he has not ensured that the first defendant company had kept all the goods insured against loss or damage by fire, riot, civil commotion, theft, pilferage etc. It will be for the creditor, thus, the say to the security was lost and in case of loss the amount of insurance that must be found to accrue to the surety and the surety must accordingly be found to have been discharged to the extent of the insurance. If there is no insurance, it is obvious, it is on account of the negligence of the creditor-Bank. If there is insurance, there is security and the surety must be deemed to have been discharged to that extent.

16. It is thus a case, in our opinion, in which the learned trial Judge was not addressed by either party properly on the question of discharge of surety to the extent of security. It is not to be found anywhere in the records as to what was the extent of the security. It is not available anywhere on the record how the goods were kept and how all goods were insured as required under Exs.P-2, P-3, P-4 and P-5. The sudden conclusion that goods were at godown and the persons in management of the company played fraud and deprived the plaintiff-Bank of the security, will not absolve the creditor-Bank to make good the surety the loss of security. It is also not possible on such facts as above, in the absence of further evidence that may be available to the creditor-Bank that they had taken all care to ensure that conditions of the contract in Exs.P-2, P-3, P-4 and P-6 have been complied with and maintained therein with respect to the goods that were under security. Negligence need not always be inferred from a positive act. It can be inferred also from omission. If the creditor has omitted to do something which he had to do, to keep the security for the surety in the event of the creditor claiming the debt from the surety, the creditor has to account for the loss. The finding in this behalf is hopelessly insufficient. No party, it appears, cared to take notice of the specific provisions of law in Secs.140 and 141 of the Contract Act. The burden is obviously upon the creditor to satisfy the Court that it has no liability under Sec.141 of the Act or under Sec.140 thereof to the extent of the

security and that notwithstanding the loss of the security, it can still claim the debt from the surety.

17. We have no other way but to interfere with the impugned judgment and set it aside, but setting aside of the impugned judgment is not going to meet the ends of justice. It is a fit case, in our opinion, in which the matter should be remitted to the trial Court for a re-hearing and if necessary, by affording opportunity to the plaintiff Bank to lead proper evidence and also to afford opportunity to the defendants to enter into further evidence, if any, on the questions as above.

18. In the result, the appeal is allowed. The impugned Judgment and decree are set aside. The case is remitted to the trial Court for a re-hearing and disposal in accordance with law. There shall be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.M.S.A.No.87 of 1986 *16th December, 1991.*

Vedanayagi *...Appellant*
v. *...*
Porkilai *...Respondent.*

Civil Procedure Code (V of 1908), O.21, Rule 99 - Decree for mere declaration - Cannot be executed for recovery of possession. [Paras 5 and 6]

G.Masilamani, Senior Counsel, for T.P.Manoharan, for Appellant.

R.Subramanian, for Respondent.

The Court delivered the following

JUDGMENT: This appeal has to be disposed of on a very short ground. This appeal arises out of execution proceedings.

2. The respondent obtained a decree in O.S.F.No.5 of 1968 of the file of the Principal District Munsif, Pondicherry on 6.11.1976. The decree is one for declaration of the respondent's title to the property. The respondent filed execution proceedings and took possession of the property on 13.1.1981. The appellant filed a petition under O.21, Rules

99 and 101, C.P.C., for ordering redelivery of the property. The appellant's case is that the property belongs to her and she is not bound by the decree as she is not a party thereto. The appellant raised a contention that the decree is one for mere declaration and it cannot be executed for recovery of possession.

3. The executing court accepted the contention of the appellant and allowed the application filed by the appellant. On appeal the II Additional District Judge, Pondicherry held that the decree, though one for declaration, was executable as such and possession could be delivered thereunder as per the French Law which, according to him, was applicable to the proceedings. The appellate Judge also gave findings that the appellant herein had not proved her title to the property and that she was a party to the suit, when it was originally instituted in the French court.

4. Aggrieved by the appellate order the appellant has preferred this C.M.S.A. After hearing counsel on both sides I am of the view that it is wholly unnecessary to consider the question whether the appellant was a party to the suit O.S.F.No.5 of 1968 and whether the appellant has proved her title to the property or not. It should be mentioned that the cause title found in the judgment and decree in O.S.F.No.5 of 1968 do not contain the name of the appellant. It mentions Krishnan as the fourth defendant. It is stated that Krishnan is the father of the appellant. Similarly the judgment in the appeal against the decree in the suit *viz.*, A.S.No.212 of 1976 on the file of the II Additional District Judge, Pondicherry dated 30.6.1980 does not also show the appellant as one of the parties thereto.

5. I propose to dispose of this appeal on the short ground that the decree being one for declaration cannot be executed for recovery of possession. Learned counsel for the respondent submits that under the French Law a decree for mere declaration can be executed and possession can be obtained. According to him, the French Law would apply to the present case. I do not accept this contention for the following reason: In the judgment in O.S.F.No.5 of 1968 the trial court specifically directed the plaintiff to file a separate suit for recovery of possession. In the penultimate paragraphs of the judgment of the following passage is found:

"Further even to order delivery of possession

of the property under the enjoyment of D-1 that there is no relief as such and a separate suit for possession would only lie against him. Moreover, if the plaintiff is of opinion that the other defendants are in possession of the suit property claimed by her, she is at liberty to file a suit and recover possession."

6. If the said passage had not been in the judgment, it might have been open to the respondent to contend that the French Law would apply to the case and he is entitled to recover possession under the same decree. But, the judgment has clearly directed the respondent to file a separate suit for recovery of possession. That direction was not challenged by the respondent when the matter was taken up to the appellate court at the instance of the first defendant in the suit. There was no memorandum of cross-objections or cross-appeal. The decree of the trial court was confirmed as such. Hence it is not open to the respondent to get over that direction at the stage of execution by contending that the French Law will apply to the proceedings.

7. Hence it is clear that the decree for declaration could not have been executed by the respondent and she cannot recover possession from the appellant in the eviction proceedings. The order directing delivery of possession and delivery effected pursuant thereto are invalid and they deserve to be set aside.

8. Consequently, the order of the executing court in E.A.No.82 of 1981 allowing the said petition and directing redelivery as claimed by the appellant herein is restored. The order of the appellate court in A.S.No.2 of 1985 dated 24.4.1986 is set aside. The civil miscellaneous second appeal is allowed. The parties will bear their respective costs.

V.K

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- K.M.Natarajan, J.

W.P.No.1324 of 1982

19th June, 1992.

N.M.Balasubramaniam and another ...Petitioners

The Management of K.Singaram Pillai Bus Transport and others ...Respondents.

Industrial Disputes Act (XIV of 1947), Sec.11-A and Sch.III, Item 11 - Charges relating to misconduct not proved in one case - There was no fair enquiry in another case - Labour court awarding compensation instead of ordering reinstatement - Order if can be sustained.

Applying the ratio laid down in *Tulsidas Paul v. Second Labour Court* (1971) 1 L.L.J. 526, *Workmen of United Bleachers v. United Bleachers*, (1968) 1 L.L.J. 529, *Workmen of Assam Match Co., Ltd. v. Labour Court*, (1973) 2 L.L.J. 279, *Vinayak Bhagwan Shetty v. Kismat (P) Ltd.*, (1984) 1 L.L.J. 203, *Workmen, Ennore Foundries v. Manager*, (1978) 2 L.L.J. 222, *R.Sankaran v. Additional Labour Court, Madras*, 1977 Lab.I.C. 1338 and *The Management of L.T. Pvt. Ltd. v. N.Palaniswami and others*, (1987) 1 L.L.J. 450, to the facts of this case, it is seen that the Presiding Officer, Labour Court/second respondent came to the conclusion that none of the charges levelled against the petitioners relating to misconduct has been proved and in the case of the second petitioner there was no fair enquiry and the enquiry before the disciplinary authority is vitiated. However, the second respondent without ordering reinstatement with back wages awarded compensation of Rs.1,000 to the first petitioner and Rs.2,000 to the second petitioner on the ground of strained relationship between the workmen and the management. It is to be noted that it is nowhere pleaded by the management that there was any strained relationship and that the petitioners are not entitled to the relief of reinstatement in case the charges are not proved. No evidence was also adduced. There was absolutely no exceptional or special circumstances in the instant case which warrant departure from the natural rule of granting the reinstatement.

[Para 7]

Cases referred to:

M/s. Tulsidas Paul v. Second Labour Court, (1971) 1 L.L.J. 526. [Para 7]

Workmen of United Bleachers v. United Bleachers, (1968) 1 L.L.J. 529. [Para 7]

Workmen of Assam Match Co., Ltd. v. Labour Court, (1973) 2 L.L.J. 279. [Para 7]

Vinayak Bhagwan Shetye v. Kismat (P) Ltd. and another (1984) 1 L.L.J. 283. [Para 7]

Workmen, Ennore Foundries v. Manager, (1978) 2 L.L.J. 222. [Para 7]

R. Sankaran v. Additional Labour Court, Madras, (1977) Lab. I.C. 1338. [Para 7]

The Management of L.T. Pvt. Ltd. v. N. Palaniswami, (1987) 1 L.L.J. 450. [Para 7]

Petition under Art. 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to I.D.No. 112 of 1977 on the file of the 2nd respondent including the award passed therein dated 4.11.1978 and quash the said award in so far as it fails to grant the normal relief of reinstatement with full back wages and continuity of service to the petitioners and grants only the relief of payment of compensation to the petitioners.

Venkataraman for M/s. Aiyer and Dolia and A.R. Gokulnath, for Petitioners.

Kalyanasundaram, for Respondents.

The Court made the following

ORDER: This writ petition is filed by the employees of the first respondent/Management challenging the award passed by the second respondent and praying for the issuance of a writ of *certiorari* calling for the records relating to the award dated 4.11.1978 and quashing the same in so far as it fails to grant the normal relief of reinstatement with full back wages and continuity of service, but only grants the relief of payment of compensation to the petitioners..

2. The brief facts which are necessary for the disposal of the writ petition can be stated as follows:- Both the petitioners were employed as conductors in the respondent/transport business. The first petitioner has put in 5 years of service and the 2nd respondent has put in 10 years of service. A charge-memo dated 31.8.1976 was issued to the first petitioner by the management, namely, the first respondent herein, to the effect that he did not attend to his duties on the evening of 19.8.1976

and 20.8.1976, 21.8.1976, 22.8.1976 and 23.8.1976 and again on 29.8.1976, 30.8.1976 and 31.8.1976. The first petitioner submitted an explanation to the effect that he attended duty but he was not allotted any work. Another memo was issued to the effect that he did not attend duties on 1.9.1976, 2.9.1976 and from 5.9.1976 to 9.9.1976 to which also he sent a same reply. Yet another memo was issued alleging that he was absent from 10.9.1976 to 30.9.1976. Thereupon a domestic enquiry was ordered. Based on the finding of the Enquiry Officer, he was discharged from service. The dispute was referred for adjudication by the Government, along with the second petitioner's case of non-employment, in G.O.Rt.No.2188, dated 10.10.1977.

3. As far as the second petitioner is concerned, he filed a criminal complaint alleging that the proprietor of the first respondent beat him and took away Rs.9 kept by him in his pocket and on account of the injury sustained by him, he could not attend the duties since he was undergoing treatment in the hospital. On that ground, he applied for leave. The first respondent did not pay heed to his request. But he called upon him to return to duty within 48 hours by letter dated 27.5.1976. The second petitioner sent two letters dated 19.5.1976 and 23.6.1976 and the first respondent refused to receive the same. The second petitioner received a letter on 4.1.1977 to the effect that his services would stand terminated with effect from 5.1.1977. It is only thereupon, I.D.No.112 of 1977 was raised. It is contended that when the Labour Court found that the charge against the first petitioner that he was absent from 10.9.1976 to 13.9.1976 was not substantiated by any reliable evidence, it was not justified in granting only payment of compensation without the relief of reinstatement with continuity of service with full back wages and other attendant benefits on account of strained feelings. It is further submitted that as far as the second petitioner is concerned, the Labour Court on an appreciation of the evidence found that the observation of the Enquiry Officer that the second petitioner did not obtain leave or permission is not correct. The second respondent/Labour Court came to the conclusion that the domestic enquiry was not properly conducted and the management had not made out any case for dismissing the second petitioner from service. The second respondent is not

justified in denying the normal relief of reinstatement with continuity of service and back wages; but only awarded payment of compensation of Rs.2,000. As far as the first petitioner is concerned, the management never pleaded that the first petitioner was holding a post of trust and confidence; nor have they let in any evidence to prove and establish the strained feelings. In any event, the strained feeling cannot be a ground to put against the worker for denying him the normal relief of reinstatement with continuity of service etc. Similarly as regards the second petitioner, the management has not proved any special cause or circumstances for showing that he was unworthy of being taken back into service. In any event, the compensation awarded in both the cases is very paltry and meagre sum. Hence this writ petition.

4. In the counter-affidavit filed on behalf of the first respondent by one Raju, who is a close relative of the first respondent, under instructions, on 13.3.1992 while denying the facts submitted that the first respondent held 4 stage-carriage permits and transferred all of them along with the bus as detailed in the counter-affidavit, namely, Route No.91 to V.Lakshmanan Pillai in 1976, Route No.75 to the first respondent's son Harikrishnan in 1977, Route No.58 to M/s.Kumaran Bus Transports in March, 1979 and Route No.117 to the first respondent's son S.Kaliyamurthi (third respondent herein) in September, 1979. The first respondent is aged about 75 years and he has closed the transport business in 1979 and as such, no question of reinstatement arises. He has also contended that the discussion of the Tribunal order shows that the worker, namely, the first petitioner, has not been fully exonerated from the charges and hence the reasons of the Labour Court to hold that the charges have not been substantiated on reliable evidence, are untenable. As far as the second petitioner is concerned, it is stated that the Labour Court without properly considering the evidence held that the charges have not been established. It is further submitted that the second respondent taking into account the totality of the circumstances and taking into account the strained relationship between the workers and the management, awarded compensation of Rs.1,000 to the first petitioner and Rs.2,000 to the second petitioner as compensation. It is further stated that since the Labour Court (second respondent) awarded compensation of Rs.1,000 and Rs.2,000

to petitioners 1 and 2 respectively, the first respondent has not challenged the finding of the Labour Court by filing separate writ petition. Lastly it was stated that since this writ petition was heard and increases in the quantum of compensation was suggested, the first respondent has not filed his counter-affidavit earlier and he is filing the counter-affidavit only now *i.e.* 13.3.1992.

5. In the counter affidavit dated 13.3.1992 filed by the third respondent, while denying the averments stated in the affidavit filed by the petitioners, it is submitted that the petitioners were in employment under his father when he was running the bus service as conductors and as stated in paragraph 3 of the affidavit, the first petitioner was discharged from service on 18.12.1976 and the second petitioner was dismissed from service on 4.1.1977. When they filed I.D.No.112 of 1977 on the file of the second respondent, it was contested by his father, the first respondent. It is further submitted that out of the four buses, his father transferred three buses to other persons and lastly one bus in his (third respondent) favour in September, 1979 and his father ceased to be a bus operator. Along with the bus and the permit, he has taken two drivers and two conductors working in that bus. On that date, both the petitioners were dismissed from service in 1976 and 1977 and they were not in employment at the time when the last of the permits held by him was transferred in his favour. There is no legal or any other liability to pay any amounts to the petitioners herein and he is not a necessary party.

6. The point that arises for consideration in this writ petition is, whether the petitioners are entitled to be reinstated in service with full back wages and continuity of service.

7. The learned counsel for the petitioners, Mr.Venkataraman, mainly submitted that the second respondent having found that the management failed to prove the misconduct against the petitioners and their discharge and dismissal from service are unjustified, ought to have awarded them the normal relief of reinstatement with full back wages and continuity of service. He would submit that when the management did not challenge the award, it has become final so far as the management is concerned and it is not open to them now to put forth the contention at the late stage after the arguments were over by contending that the finding is not proper. Since the workers,

namely, the writ petitioners, have been denied the proper relief and the second respondent has not exercised its discretion judiciously, they have come forward with this writ petition. He would vehemently argue that the second respondent has committed a grave error of law and perversity in holding that the management has lost confidence in the first petitioner, when that was not even the case of the management either in the pleadings or anywhere. As regards the strained feelings, the management has not let in any evidence. Mere strain in the feelings created on account of proceedings initiated by the management against the first petitioner cannot be a ground for depriving the first petitioner of his entitlement to the relief of reinstatement with continuity of service and full back wages. As regards the second petitioner also, the strain in the feelings in a creation of the management and the same cannot be a ground for denying his entitlement to the normal relief of reinstatement with full back wages and continuity of service. When the management has not established any special cause or special circumstances, the second respondent is not justified in refusing to grant the relief of reinstatement. The learned counsel submitted that the second respondent failed to take into consideration while passing the award the security of service of employment and that led to the miscarriage of justice. In this connection, the learned counsel drew the attention of this Court to the relevant portion of the award. In para 9 of the award, the second respondent/Presiding Officer, Labour Court, discussed the evidence adduced by the first respondent before the enquiry officer in respect of the alleged absence without obtaining any prior permission or leave which is the charge levelled against the first petitioner. At the end of the paragraph it was held as follows:- The charges framed by the management against Balasubramanian had not been substantiated by any reliable evidence. The learned counsel also pointed out that the Labour Court observed: "The fact that Balasubramanian attended to his duties on the remaining dates in August, 76, as mentioned in Ex.M-24 will support his contention that he was willing to work and that the respondent did not allot him any work. The Labour Court accepted the contention of the first petitioner that though he was willing to work, he was not allotted any work. In respect of the second petitioner, he has applied for leave during the relevant period as

he was undergoing treatment for the injury in the hospital. Ex.M-25, money-order coupon regarding his salary, only supports the case of the second petitioner. In para 10 of the award, the second respondent has observed that the first petitioner was working on a permanent basis for the past 5 years on a salary of Rs.178 per month. The second respondent further observed that the first petitioner sent Ex.M-10 petition to the police alleging that the proprietor did not allot him duty and threatened him and sent him out of office. He has also observed that in his claim statement, the first petitioner alleged that the first respondent used to threaten him and will not allot him work even though he was willing to attend to his duty. After discussion, the second respondent came to the conclusion at the end of para 10 of the award; "It is clear that the worker and the management have developed strained feelings and have lost confidence on each other. Under such circumstances, in the interests of the worker, an order for payment of compensation will be the appropriate relief that can be granted to him." In the case of the second petitioner, after considering the evidence adduced on behalf of the parties, the second respondent came to the conclusion in para 14: "The observation of the enquiry officer that the second petitioner has not obtained prior permission is not quite correct." The allegation against the second petitioner is that he has absented himself from duty without permission from 16.4.1976. The second respondent found in his award: "Ex.M-18, dated 16.4.1976 shows that the worker has applied for leave as he was undergoing treatment in the hospital. In Ex.M-13, the explanation of the worker has not been called for on the ground that he was absenting himself from duty. It is stated in Ex.M-13 that the worker should report for duty within 48 hours failing which action will be taken against him. No further charge-memo has been issued to the worker Rathinam asking for his explanation. "Ultimately the second respondent came to the conclusion as follows: "If the case of the management is true, the entire salary for April, 1976 would not have been sent to the worker by money order. The enquiry against Rathinam was conducted *ex parte*. It is clear that the domestic enquiry had not been properly conducted against the worker Rathinam. "The reason given by the second respondent for not ordering his reinstatement but only awarding compensation was that as

per Ex.W-18 the worker, namely, the second petitioner, would allege that the proprietor beat him and took away cash of Rs.9 from his pocket. As per Ex.M-17 he wanted police protection even to attend the domestic enquiry. Ex.M-40 shows that the worker, namely, the second petitioner, has filed a criminal complaint against the proprietor/first respondent before the judicial First Class Magistrate, Tiruchirapalli, for an offence punishable under Sec.392, I.P.C. Under such circumstances, in the interest of the worker, the payment of compensation will be the proper relief and that can be granted to him and accordingly a sum of Rs.2,000 was awarded. The learned counsel for the petitioners submitted that the petitioners were granted only compensation, even though the Presiding Officer/second respondent held that the non-employment of the workers, namely, petitioners 1 and 2, is not justified. In this connection, it is worthwhile to consider the various case-laws cited on behalf of the petitioners. In *M/s. Tulsidas Paul v. Second Labour Court*, (1971) 1 L.L.J. 526, the apex court held that the normal rule was one of reinstatement where the dismissal or removal from service was found to be unjustified and wrongful. Compensation should be awarded by Labour Court only, in exceptional and unusual circumstances. Such discretion should be exercised by the Labour Court in a spirit of fairness and justice. In the above quoted case, it was ultimately held in para 10 as follows:

"It appears from the judgment of the learned single Judge that he was moved to interfere with the order of reinstatement, firstly, on the ground that it would be received by the other workmen with ill grace and might result in fresh hostilities between the two groups of workmen, and secondly, that employment of workmen in this case being seasonal the employers were not bound to engage the same workmen in the next season. We find it difficult to sustain this reasoning. As observed by the Division Bench, the employers did not at any stage before the tribunal place the question of reinstatement in issue. Nor did they establish that reinstatement would result in fresh industrial hostilities. In the absence of any proof that that would be the consequence of reinstatement, the conclusion of the learned single Judge that it would so result was only an assumption."

In that view, the Supreme Court dismissed the appeal upholding the decision of the Division Bench. In *Workmen of United Bleachers v. United Bleachers*, (1968) 1 L.L.J. 529, Kailasam, J. (as he then was) held that the reinstatement cannot be denied on the ground that the relationship between the management and the workman was strained. It was further held in the said decision:

"Further, in this case the management never pleaded that in the event of the labour court finding Krishnan is entitled to reinstatement he could be amply provided for by compensation."

That is a case where the workman Krishnan was suspended and subsequently dismissed. An industrial dispute was raised in the Labour Court and the Labour Court directed reinstatement with back wages. The management did not reinstate him. On the day he reported for duty, he was retrenched. A dispute was raised regarding the non-employment of such workman. The Labour Court ordered compensation instead of reinstatement. The award was challenged in Writ wherein it was mainly contended that the relationship between the management and the workman was strained and also on the ground of delay. That contention has been negated and the writ was allowed in favour of the workman. In *Workmen of Assam Match Co., Ltd. v. Labour Court*, (1973) 2 L.L.J. 279, the apex court has observed that the Tribunal has found that the domestic enquiry held by the management against the workman for his alleged misconduct was unfair and invalid. It also found that the charges against the workman were baseless and the findings of the enquiry officer were perverse. Even so the Tribunal took the view that there may not be cordial relationship between the parties of the workman is reinstated and on that ground alone the tribunal refused to order reinstatement. In the circumstances it was held:

"It is well-settled that where in an industrial dispute arising out of a dismissal of a workman it is established that the impugned dismissal was unjustified the normal rule is that the dismissed workman should be reinstated."

It is further held:

"If an employer is shown to have dismissed his employee/without justification and the decision of the dispute resulting from such dismissal takes time, it cannot be urged by the

employer that by passage of time, reinstatement should not be ordered. One of the objects which industrial adjudication has to keep in mind is to assure industrial employees security of tenure. The normal rule is that when the dismissal is unjustified the employees should be reinstated."

It was further held:

"The next contention is that the respondent has lost confidence in Dutt. This argument is misconceived. We do not think it would be possible to accept the contention that even if employer is shown to have dismissed the employee wrongfully and without justification the fact that he adopted such course should be taken into account while determining the question whether reinstatement should be ordered or not. If this contention is accepted the industrial employee illegally and unjustifiably dismissed would never get the relief of reinstatement."

Ultimately the appeal was allowed and the reinstatement of the industrial employee was ordered with back wages. In *Vinayak Bhagwan Shetty v. Kismat (P) Ltd. and another*, (1984) 1 L.L.J. 203, a Division Bench of the Bombay High Court held:

"It is difficult to sustain the view taken by the Labour Court that the employee was not entitled to reinstatement because the action in discharging the employee was not vindictive. Assuming for a moment that it is not established that the action taken was vindictive, that would be wholly irrelevant because the moment the misconduct is not proved and the penal action is found to be unjustified and unsustainable, the termination must cease to be a *bona fide* termination. But for the misconduct, which the employer had taken as proved, there could not have been any order of dismissal. If the foundation of this action for dismissal disappears, namely, the proof of misconduct the order of dismissal must also stand vacated."

In *Workmen, Ennore Foundries v. Manager*, (1978) 2 L.L.J. 222, Ismail, J. (as he then was) held:

"If the Labour Court finds that the orders of dismissal were unjustified, the normal relief that it should grant was one of reinstatement and payment of compensation in lieu of reinstatement should only be granted in special or exceptional circumstances. It was held that the

Labour Court had not recorded any exceptional or special circumstances in the instant case which warranted the departure from the normal rule of granting the relief of reinstatement. The Labour Court in the circumstances was directed to bear these principles in mind in deciding the case on remand."

In *R. Sankaran v. Additional Labour Court, Madras and another*, (1977) Lab.I.C. 1338, it was held that the strained relationship cannot constitute a valid ground for negating the claim for reinstatement. In *The Management of L.T. Pvt. Ltd. v. N. Palaniswami and others*, (1987) 1 L.L.J. 458, a Division Bench of this Court, after considering the various earlier decisions held:

"It is the duty of the Management to place material before the Labour Court or the writ court for refusal of back wages to workman. If the Management has failed to place such materials for refusal of back wages before the Labour Court or High Court a writ would be justified in granting the relief of reinstatement and consequential monetary benefits in the shape of back wages."

That was a case where it was found that on the merits of the case none of the charges was proved and therefore the dismissal was not justified. However, the Labour Court refused to grant the relief of reinstatement on the ground that the worker was absent from service for a long time and the management has made some alternative arrangement and on this ground it ordered the payment of Rs.10,000 in lieu of reinstatement. After the award the management sent a cheque covering the amount awarded by the Labour Court. Accepting the cheque under protest and without prejudice to file a writ petition, the writ petition was filed by the worker for quashing the award made by the Labour Court in so far as it declined to grant the relief of reinstatement and the writ petition was allowed holding that the worker should be reinstated in service with all consequential monetary benefits. That was challenged by way of writ appeal and it came before the Division Bench. As stated earlier, the Division Bench after considering the various earlier decisions, upheld the decision of the learned single Judge and held that a writ would be justified in granting the relief of reinstatement and consequential monetary benefits in the shape of back wages. Applying the ratio laid down in the above decisions to the facts of this

case, it is seen that the Presiding Officer, Labour Court/second respondent came to the conclusion that none of the charges levelled against the petitioners relating to misconduct has been proved and in the case of the second petitioner there was no fair enquiry and the enquiry before the disciplinary authority is vitiated. However, the second respondent without ordering reinstatement with back wages awarded compensation of Rs.1,000 to the first petitioner and Rs.2,000 to the second petitioner on the ground of strained relationship between the workmen and the management. It is to be noted that it is nowhere pleaded by the management that there was any strained relationship and that the petitioners are not entitled to the relief of reinstatement in case the charges are not proved. No evidence was also adduced. There was absolutely no exceptional or special circumstances in the instant case which warrant departure from the normal rule of granting the reinstatement. The first petitioner was employed for about 5 years as conductor and the second petitioner was employed for about ten years. The charge against the first petitioner was that he absented himself for some days. The charge against the second petitioner is that he did not report for duty as desired by the management and he was absent both the charges, as already stated, were not proved and hence the order of dismissal was held to be improper and illegal. Though in the belated counter-affidavits filed before this court after the arguments were over it was contended that after the award was passed, the first respondent has transferred the route buses to the third respondent and others, the above contention was not put forward at the earliest point of time and the petitioners have no opportunity to rebut the same. Even otherwise, as rightly contended by the learned counsel for the petitioners, the first respondent-management cannot circumvent the order by resorting to transfer the buses while the proceedings are pending before the court. The learned counsel for the petitioners submits that the petitioners will work out their remedy if reinstatement with back wages is ordered and that cannot be a bar for granting the relief prayed for in this writ petition. I find every force in the said contention. The learned counsel for respondents 1 and 3, Mr.M.Kalayanasundaram, did not dispute the proposition of law laid down in the various decisions cited above. But, what all he contended is

that there was a proposal for compromise by enhancing the compensation and in the circumstances of the case the petitioners can receive higher compensation instead of insisting for reinstatement and back wages etc. The mere fact that there was a talk of compromise at the suggestion of the Bench of this Court on an earlier occasion cannot be a ground for negating the relief prayed for in the writ petition. Thus, on a careful consideration of the entire materials, I am of the view that the petitioners are entitled to the relief of reinstatement and back wages as prayed for and the award of compensation in lieu of reinstatement is not valid and proper.

8. In the result, the writ petition is allowed, the award passed by the second respondent in so far as it relates to the refusal of grant of the relief of reinstatement with back wages, but ordering compensation only, is set aside and there will be an order in favour of the petitioners for reinstatement in service with back wages and continuity of service as prayed for. However, in the circumstances of the case there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- Mishra, J.

W.P.Nos.10116 of 1983 and 17376 of 1991

23rd April, 1992.

P.R.Rajagopalan

...Petitioner

v.

Southern Structural Ltd. and others

...Respondents.

(A) Constitution of India, (1950), Arts.226 and 12 - 'Authority' for the purposes of - Decision on - Criterion for.

An 'authority' for the purpose of Art.226 of the Constitution of India need not be an authority under Art.12 of the Constitution of India and 'any

other authority' for the purpose of Art.12 of the Constitution of India may, in a given case be an instrumentality or agency of the Government of the State. It is not the look of the body concerned. It is the character that will decide whether it is an authority for the purpose of Art.226 of the Constitution of India or an authority for the purpose of Art.12 of the Constitution of India and whether its name or look is different on account of the veil or cloth. The Court, in such cases, shall pierce the veil and notice the true character of the person concerned to determine whether it is 'an authority' for the purpose of Art.226 of the Constitution of India or/and authority for the purpose of Art.12 of the Constitution. An authority under Art.12 of the Constitution of India shall always be an authority for the purpose of Art.226 of the Constitution of India. [Para 11]

(B) *Constitution of India (1950), Arts.14 and 16(1) - Order of termination of services of a servant of an instrumentality of State-charges levelled but no enquiry held into them - Termination of services for reason that he disobeyed an order of transfer - Termination contrived to avoid enquiry into charges - Order, held to be stricken by arbitrariness and hit by malice.*

There are sufficient elements in the order of termination simpliciter to show that it had been contrived to avoid enquiry into the charges that had been levelled against the petitioner. The impugned order terminating the petitioner's service for the reason that it used the alleged disobedience of the transfer order as the ground is stricken by arbitrariness and for the reason that instead of proceeding with the charges levelled against the petitioner the respondent company decided to terminate the petitioner's service on a ground *non est*, it is hit by malice in law. For these reasons, there can be no hesitation in holding that the order of termination of the services of the petitioner issued by the first respondent is violative of Arts.14 and 16(1) of the Constitution of India.

[Para 14]

(C) *Constitution of India (1950), Art.226 - Delay and laches - Termination of services of servant of Government managed company - Petitioner questioning validity of termination order under the Tamil Nadu Shops and Establishments Act - Appeal rejected as not maintainable - Moving High Court by a writ in 1983 - Filing a second writ petition in 1991 to avoid a technical objection - Delay, held, cannot vitiate the proceedings.*

It is stated that this Court should decline to interfere with the order of termination of the services of the petitioner because that order had been challenged only in the second writ petition that has been filed in the year 1991 after a long and inordinate delay. Taking this technical view of the matter will mean ignoring the fact that the petitioner did question the validity of the order of termination of services under the Tamil Nadu Shops and Establishments Act and when his appeal was rejected as not maintainable, moved this Court in W.P.No.10116 of 1983. This Court's power to interfere with the arbitrary and (without jurisdiction) order of the kind impugned by the petitioner-herein in W.P.No.10116 of 1983 cannot be questioned. The court must always see as to how any unconstitutional act can be avoided and how far the facts of the case require moulding the relief. In the instant case, the delay in filing W.P.No.17376 of 1991 is excusable. [Para 15]

Cases referred to:

C.V.Raman v. The Management of Bank of India, Madras, (1985) 2 M.L.J. 439. [Para 8]

Sri Konaseema Co-operative Central Bank Ltd. v. N.Seetharama Raju, A.I.R. 1990 A.P. 171. [Para 9]

E.E. and C., Ltd. v. State of West Bengal, A.I.R. 1975 S.C. 266. [Para 9]

Ramana Dayaram Shetty, A.I.R. 1979 S.C. 1628. [Para 9]

Chander Mohan Khanna v. NCERT, A.I.R. 1992 S.C. 76. [Para 10]

Petitions under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* *mandamus*, (1) calling for the records in the order of termination dated 3.10.1980 of the 1st respondent and quash the same in so far as it relates to the petitioner and direct the 1st respondent to reinstate the petitioner to the original post as on 3.10.1980 together with all attendant benefits of service conditions as are applicable in law (in W.P.10166 of 1983 prayer amended as per order of court dated 23.4.1992 made in W.M.P.No.21051 of 1991 etc.

S.Sampath Kumar, for Petitioner.

Prabhakaran, for Respondent No.1.

N.Sampath, Government Advocate, for Respondent No.2.

The Court made the following

ORDER:- W.P.No.10116 of 1983 is directed against

the order of T.S.E. case No.44 of 1980 by the second respondent therein viz. the Assistant Commissioner of Labour II, Madras, under which order he has held that no appeal is maintainable under Sec.41(1) of the Tamil Nadu Shops and Establishments Act against the order of termination of service passed by the management of Southern Structurals Ltd. the first respondent therein W.P.No.17376 of 1991 is directed against the order of termination passed by the said respondent as well as to quash the service rules so far as clause 6(4) thereof is concerned.

2. Relevant facts as set out in the affidavit filed in support of the writ petitions are as follows: Petitioner was employed as a Stores Officer in the service of the respondent-Southern Structurals Ltd., when according to him his service was unlawfully terminated by order dated 1.9.1980. He had joined the service of the respondent in July, 1962 as cashier-cum-accounts Assistant and risen to the status of the Stores Officer by and by in July, 1974. In March, 1975 he was transferred to Structural Engineers and Technicians Industrial Co-operative Society Ltd. In July, 1977 he was recalled to the stores at Pattabiram. In September, 1979 he was transferred to the Data Collection and Statistics section of the Industrial Engineering Department, where he remained for a brief period of 13 days only after which he was recalled to the Accounts Department. According to the petitioner he discovered during 1975 that the personal assistant to the then Managing Director of the company had in collusion with a typist at the Head office been misappropriating the share capital of members. This led to the disciplinary action against some of the guilty persons. The Managing Director did not take this kindly and subjected the petitioner to a space of transfers, following by a charge memo in March, 1978, alleging that the petitioner was responsible for the missing of two plates from the stores. On petitioner's explanation this charge was not followed up. In December, 1979 a further memo emanated as if one forged round was missing from the stores. The said charge was also not followed up on petitioner's explanation about the round having been consumed. In May, 1980 another charge memo came up that colour coding of stock had not been carried out by the petitioner. The petitioner answered this charge also. However, the petitioner was transferred to Ramagundam project in

Andhra Pradesh on 22.8.1980 and asked to join duty on or before 27.8.1980. The petitioner represented to the General Manager and sought time to report for duty and also represented on 28.8.1980 requesting for a month's time as his wife had undergone a major surgery from which she was yet to recover and to meet her medical expenses he was required to dispose of certain properties with respect to which certain execution proceedings was pending in court. The petitioner was served with another office memo to join at Ramagundam before 10.9.1980. This order the petitioner received on 4.9.1980. However, before the petitioner could proceed he received another memo dated 1.9.1980 purported to be one month's notice of termination of service on the ground that he had disobeyed the transfer order dated 22.8.1980. The petitioner represented against the said termination. This termination order was withdrawn on 8.9.1980. The petitioner was also informed that the second transfer order also stood cancelled.

3. While so according to the petitioner he was informed by letter dated 8.9.1980 that his representation against the transfer to Ramagundam was rejected and this was followed by a letter dated 17.9.1980 containing a charge sheet for certain alleged omissions. Under this letter the petitioner was called upon to explain the charge within 48 hours. The petitioner has stated;

"While so by letter dated 17.9.1980 the respondent issued a charge sheet for alleged omission on my part and gave me 48 hours to explain why disciplinary action should not be taken against me. The charges were vague and various office orders which I was unaware of were referred to. The charges also related to acts in 1977, 1978 and 1979. I sought substantiation of the same and requested for production of records. But by order dated 3.10.1980 vide the month's notice dated 1.9.1980 my services were terminated."

Petitioner filed an appeal under Sec.41 of the Tamil Nadu Shops and Establishments Act, T.S.E. Case No.44 of 1980. The said case was dismissed by order dated 27.7.1983 on the sole ground that the respondent company was exempted under G.O.Ms No.545 being an establishment under the Government of Tamil Nadu.

4. W.P.No.10116 of 1983 was admitted to hearing. To avoid any technical objection that the order impugned in the said petition was one passed in appeal under Sec 41(1) of the Tamil Nadu Shops

and Establishments Act and thus the termination order passed by the first respondent had not been questioned in the said writ petition the petitioner as advised filed W.P.No.17376 of 1991. Both petitions have been heard together and are being disposed of by a common order.

5. Learned counsel for the petitioner conceded that in view of the order in G.O.Ms.No.545, dated 10.2.1950 of the Government of Tamil Nadusince the respondent company is a Government company the provisions of the Tamil Nadu Shops and Establishments Act are not applicable and accordingly the appeal under Sec.41(1) of the said Act was not competent. He has thus given up any challenge to the validity or correctness of the order in T.S.E. case No.44 of 1980. He has however, contended that on the facts as aforementioned the order terminating the petitioner's services afflicted by malice in law is arbitrary and violative of Art.14 of the Constitution of India.

6. In the counter affidavit filed in W.M.P.No.21051 of 1991 in W.P.No 10116 of 1983 on behalf of the first respondent it is stated that the petitioner's services with the first respondent company was governed by the service rules of the first respondent company which were/are in the nature of contract of service. It is further stated as follows:

"6. The first respondent company transferred the petitioner *vide* its letter dated 22.8.1980 from its factory at Pattabiram to Ramagundam project where the first respondent company was doing certain contract work. But the petitioner by his letter dated 28.8.1980 refused to obey the said transfer order of the first respondent company and stated that he would not be in a position to go to Ramagundam site immediately due to certain domestic problems and that he was willing to visit not only Ramagundam site but other sites also once in a while to organise the accounting billing work, collections etc."

7. Since the first respondent company wanted to reorganise and restructure its accounts department by efficient persons and to weed out the inefficient ones and since no other suitable work was available for the petitioner the first respondent company terminated the services of the petitioner by giving one month's notice *vide* its letter dated 1st September, 1980.

8. Though the first respondent company directed *vide* its letter dated 4.9.1980 to proceed to

Ramagundam Super Thermal Power Project Ramagundam site before 10th September, 1980 to organise and take care of the complete accounting side in view of the notice of termination issued on 1.9.1980 the first respondent company cancelled the abovesaid order dated 4.9.1980 *vide* its office order dated 8.9.1980. The charge sheet dated 17.9.1980 issued by the first respondent company to the petitioner was only to find out the truth in the alleged charges against the petitioner. The fact that the termination notice preceded the said charge sheet clearly shows that the petitioner's service were not terminated for any misconduct.

9. As said above the petitioner's service were terminated by the first respondent company only for reasonable cause. Against the said termination order the petitioner preferred an appeal bearing No.44 of 1980 before the Deputy Commissioner of Labour Madras under Sec.41 of the Tamil Nadu Shops and Establishments Act. The said appeal was dismissed by the second respondent as not maintainable in view of G.O.Ms.No.545, dated 10.2.1950 which exempted all persons employed in any kind of work in factories and governed by the Factories Act, 1948 from all the provisions of the said Act. Against the impugned order the petitioner preferred the above writ petition in the year 1983."

7. In another return filed in W.P.No.17376 of 1991 it is stated that "the respondent company refute the allegation that the petitioner's service was terminated in an arbitrary and whimsical manner. It is only for the reason of refusal by the petitioner to join duty at Ramagundam site his service was terminated after giving one month notice for the same." In this affidavit the first respondent has taken the stand that the Government of Tamil Nadu was holding 92.4% of share holding in the equity capital of the respondent but holding share capital by the Government of Tamil Nadu does not amount to having deep and pervasive control over the affairs of day to day management/administration of the respondent and only in the capacity as shareholder the Government of Tamil Nadu is appointing Directors to the extent of its shareholding. It is further stated;

"Further the Article of Association of the respondent company does not require any prior permission from the Government of Tamil

Nadu for running affairs of the company. In fact neither the memorandum of Association nor the Articles of Association of the respondent company provide for any power or control or right in favour of the Government of Tamil Nadu to issue any direction or to regulate or interfere with the business or affairs of the respondent company. Even the Directors nominated by the Government of Tamil Nadu are completely free from Governmental control in discharge of their functions. The respondent company is doing business/manufacturing activity in relation to cranes and structural works like any ordinary person would do and as such is not enjoying any monopoly status conferred by the Government or corporations like Air India or Indian Airlines. While the Government of Tamil Nadu has control over the respondent company to the extent mentioned above it cannot constitute deep and pervasive state control which is a prerequisite for the respondent company to be construed as a State agency or instrumentality. The functions of respondent company are not of any public importance nor are they related to Government functions. Facts clearly indicate that the respondent company is not an instrumentality or agency of the Government." After taking the above stand in this counter affidavit it is further stated:

"Even though the respondent company might fall under the definition of establishment under State Government as per Sec.4(1)(c) of the Tamil Nadu Shops and Establishments Act for reasons mentioned above the respondent company does not fall under the category of 'other authority' under Art.12 of the Constitution of India. The respondent is advised to submit that all establishments which may fall under the category of ('Establishment under State Government' under Sec.4(1)(c) of T.N.S.E. Act do not necessarily fall under the category of 'other authority' under Art.12 of the Constitution of India. Either for the reason that the respondent company might fall under the category of establishment under State Government or by reason of the averments made by the respondent in the counter statement before the authority under the T.N.S.E. Act, it is not possible to state that respondent company is falling under the heading 'other

authority' under Art.12 of the Constitution of India."

8. The stand thus that the first respondent is neither an instrumentality nor an agency of the Government nor an authority under Art.12 of the Constitution of India would appear to be in conflict with the previous statements that the respondents has been making in the sense that to oust the jurisdiction of the appellate authority under the Tamil Nadu Shops and Establishments Act, it was maintained that the respondent company was a Government company and to oust the jurisdiction of this Court it was suggested that even though there has been an overwhelming shareholding in the hands of the State Government, the State Government has been appointing Directors and though only its nominees were managing the affairs of the company the Government never had that deep and pervasive control upon the affairs of the company which would convert it into an agency or instrumentality of the State Government. Keeping this controversy in mind the court on 13.2.1992 ordered as follows:

"My attention has been drawn to a counter statement filed on behalf of the respondent company before the Deputy Commissioner of Labour in which it is stated *inter alia*:

"The respondent-company is a factory managed by the Government of Tamil Nadu and it is covered by the Factories Act, 1948 the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946 and not by the Tamil Nadu Shops and Establishments Act, 1947."

"The authorised capital of the respondent company is Rs.350 lakhs and the paid up capital of the respondent company is Rs.148.85 lakhs divided into 62.60 lakhs equity shares of Rs.2.25 each amounting to Rs.140.85 lakhs and 2 lakhs 9.33% preference shares of Rs.4 each amounting to Rs.8,00,000 and out of the 62.60 lakhs of equity shares the Government of Tamil Nadu owns 57.80 lakhs equity shares which amounts to 92.4% of the total equity capital of the respondent company."

The Board of Directors of the respondent-company consists of eight directors out of which six directors are the nominees of the Government of Tamil Nadu.

The appointment of any director on the Board of Directors of the respondent company has to

be approved by the Government of Tamil Nadu. The Government of Tamil Nadu has given counter guarantee to the extent of Rs.535 lakhs in favour of the bankers of the respondent company in respect of the guarantees and various other credit facilities provided by the bankers to the respondent company.

All the facts stated above will go to prove that the entire control and management of the respondent company is with the Government of Tamil Nadu and hence even assuming without admitting that the respondent company is an establishment as defined under the Tamil Nadu Shops and Establishments Act, 1947 it is an establishment under the Government of Tamil Nadu and so the respondent company is exempted from the provisions of the said act according to Sec.4(1)(c) of the said Act."

In an affidavit filed before this Court however in W.P.No.17376 of 1991 an attempt is made to suggest that the entire control of the company is not that the State Government and for the reasons of its shares and other factors as stated it cannot be said that it is under the control of the State Government and it is a State under Art.12 of the Constitution of India.

2. The counter-affidavit in the writ petition has a definite talent of facts to accept writ jurisdiction of this Court for the reason that fundamental rights of any person may not be enforced by a writ unless it is against a State under Art.12 of the Constitution of India. Before I make any order as to whether there is an attempt to mislead the court by a statement in the counter affidavit before this Court and thus any action is warranted it is necessary that all the records pertaining to the establishment and the control upon the affairs of the company by the State Government/any other person are called for and examined by the court. It is also necessary to know who besides the State Government held the shares of this company and whether those besides the Government holding the shares of the company are themselves a State under Art.12 of the Constitution or not. There are many informations of this kind which are not disclosed in the counter affidavit filed before this Court. Thus it is hereby ordered that the respondents shall produce before this Court all the relevant records showing how the company was created who

controlled it and how it cannot be stated to be a Government Company who besides the State Government are members of the company (share holders) and who besides the Government of the State excised any control with respect to the affairs of the company. All the relevant records pertaining to the above must be produced before this Court at the next hearing, put up next week."

No records however as directed under the above order have been produced. A further affidavit has been filed on behalf of the first respondent stating *inter alia* that the aforementioned stand was taken due to the fact that in *C.V.Raman v. The Management of Bank of India, Madras and another*, (1985)2 M.L.J. 439, it was observed that there was a distinction between "an establishment under the Government" under Sec.4(1)(c) of Tamil Nadu Shops and Establishments Act and an "authority" under Art.12 of Constitution of India "it was also observed that it cannot be gainsaid that the principle applicable to the determination of an 'authority' under Art.12 of Constitution of India can bodily be imported in deciding the meaning of 'establishment' under the Government' under Sec.4(1)(c) of Tamil Nadu Shops and Establishments Act."

It is thereafter said,

"Because of this I presumed that inspite of the averments made by the respondent before the authority 41(1) of the T.N.S.E. Act about the extent of the control by the Government of Tamil Nadu over the respondent I may be able to convince this Hon'ble court that the respondent does not fall within the definition of 'State' under Art.12 of the Constitution of India by reason of the abovesaid distinction."

After saying so it is said:

"I hereby unconditionally apologise without any reservation whatsoever for having made out the above submission that the respondent is not "state" under Art.12 of the Constitution of India."

It is not understandable why if there were/are materials that could justify the stand of the respondent company that it was not a State under Art.12 of the Constitution of India it should abstain from producing relevant records and materials and instead decide to file the affidavit aforementioned. The court at this stage can proceed with the presumption that the first

respondent is an instrumentality/agency of the State of Tamil Nadu.

9. In a Full Bench judgment of the Andhra Pradesh High Court in *Sri Konaseema Co operative Central Bank Ltd. v. N.Seetharama Raju*, A.I.R. 1990 A.P. 171, a detailed study had been made with reference to various pronouncements of the Supreme Court as to how a court should approach to determine whether a writ should issue to a certain authority or not. The Full Bench summarised the rule as follows:

"From the above discussion the following propositions emerge:

(i) If a particular co-operative society can be characterised as a 'State' within the meaning of Art.12 of the Constitution (applying the tests evolved by the Supreme Court in that behalf) it would also be an 'authority' within the meaning and for the purpose of Art.226 of the Constitution. In such a situation an order passed by a Society against its Employee in violation of the bye-laws can be corrected by way of a writ petition. This is not because the bye-laws have the force of law but on the ground that having framed the bye-laws prescribing the service conditions of its employees the society must follow them in the interest of fairness. If it is left to the sweet will and pleasure of the society either to follow or not to follow the bye-laws it would be inherently arbitrary and may very likely give rise to discriminatory treatment. A society which is 'state' has to act in conformity with Art.14 and for that reason it will be made to follow the bye-laws.

(ii) Even if a society cannot be characterised as a 'state' within a meaning of Art.12 even so a writ would lie against it to enforce a statutory public duty which an employee is entitled to enforce against the society. In such a case it is unnecessary to go into the question whether the society is being treated as a ('person' or 'an authority') within the meaning of Art.226 of the Constitution. What is material is the nature of the statutory duty placed upon it and the court will enforce such statutory public duty.

(iii) The bye-laws made by a co-operative society registered under the A.P. Co-operative Societies Act do not have the force of law. They are in the nature of contract terms of contract between the society and its employees or

between the society and its members as the case may be. Hence where a society cannot be characterised as a 'state' the service conditions of its employees governed by bye-laws cannot be enforced through a writ petition. However in the matter of termination of service of the employees of a co-operative society Sec.47 of the A.P. Shops and Establishments Act provides a certain protection and since the said protection is based upon public policy it will be enforced in an appropriate case by this Court under Art.226 of the Constitution. Ordinarily of course an employee has to follow the remedies provided by the A.P.Shops and Establishments Act, but in appropriate case, this Court will interfere under Art.226 if the violation of a statutory public duty is established. It is immaterial which act or rule casts such a statutory public duty.

(iv) *Mandamus certiorari* and *prohibition* are public law remedies. They are not available to enforce private law rights. Every act of a society which may be a 'state' within the meaning of Art.12 does not necessarily belong to public law field. A society which is a 'state' may have its private law rights just like a Government. A contractual obligation which is not statutory cannot be enforced by way of a writ petition under Art.226 of the Constitution. Prior to entering into contract however Art.14 operates as explained by the Supreme Court in *E.E. & C. Ltd., v. State of West Bengal*, A.I.R. 1975 S.C. 266 and *Ramana Dayaram Shetty*, A.I.R. 1979 S.C. 1628."

10. In a series of judgments the Supreme Court has pointed out how the word 'authority' in Art.226 of the Constitution of India is not restricted to the same meaning as the words 'other authorities' should receive in the definition of the 'State' in Art.12 of the Constitution of India. The former must receive a liberal meaning. The latter is relevant only for the purpose of enforcement of fundamental rights. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water tight compartment. It should remain flexible to meet the requirements of various circumstances. This analysis is found in one of the latest judgments of the Supreme Court in *Chander Mohan Khanna v. NCERT*, A.I.R. 1992 S.C. 76. The Supreme Court has said:

"Art.12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of welfare state, independent institution corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Art.12. The State control, however vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "state". If the Government operates behind a corporate veil, carrying out governmental activity and governmental functions of vital public importance there may be little difficulty in identifying the body as "State" within the meaning of Art.12 of the Constitution."

11. In view of the above statement of law to which no exception can be taken it is clear that an 'authority' for the purpose of Art.226 of the Constitution of India need not be an authority under Art.12 of the Constitution of India and 'any other authority' for the purpose of Art.12 of the Constitution of India may, in a given case be an instrumentality or agency of the Government of the State. It is not the look of the body concerned. It is its character that will decide whether it is an authority for the purpose of Art.226 of the Constitution of India or an authority for the purpose of Art.12 of the Constitution of India and whether its name or look is different on account of the veil or cloth. The Court, in such cases, shall pierce the veil and notice the true character of the person concerned to determine whether it is an 'authority' for the purpose of Art.226 of the Constitution of India or/and authority for the purpose of Art.12 of the Constitution. An authority under Art.12 of the Constitution of India shall always be an authority for the purpose of Art.226 of the Constitution of India.

12. On the facts that are available on the record it can safely be said that the petitioner has discharged the onus to prove that the respondent company is a Government company which is just

an agency or instrumentality of the Government of the State of Tamil Nadu and the State is in complete control of all its affairs. If the respondent company wanted to show otherwise it had to discharge a heavy onus and show by cogent material that notwithstanding the overwhelming share control and almost every Director of the company being a nominee of the State it retained its independence as a company and has not been under the deep and pervasive control of the Government of the State of Tamil Nadu.

13. Coming to the facts there is almost no controversy or little controversy that there has been an enquiry of any kind conducted into the allegations levelled against the petitioner. While on the one hand certain charges were levelled against the petitioner on the other hand the respondent company decided to terminate his services on a ground which had ceased to be a ground for the reason of the order having been recalled and a further time granted to the petitioner to join his duties at Ramagundam.

14. There are sufficient elements in the order of termination simpliciter to show that it had been contrived to avoid enquiry into the charges that had been levelled against the petitioner. The impugned order terminating the petitioner's service for the reason that it used the alleged disobedience of the transfer order as the ground is stricken by arbitrariness and for the reason that instead of proceeding with the charges levelled against the petitioner the respondent company decided to terminate the petitioner's service on a ground non est, it is hit by malice in law. For these reasons, there can be no hesitation in holding that the order of termination of the services of the petitioner issued by the first respondent is violative of Arts.14 and 16(1) of the Constitution of India.

15. It is however stated that this Court should decline to interfere with the order of termination of the services of the petitioner because that order has been challenged only in the second Writ petition that had been filed in the year 1991 after a long and inordinate delay. Taking this technical view of the matter will mean ignoring the fact that the petitioner did question the validity of the order of termination of services under the Tamil Nadu Shops and Establishments Act and when his appeal was rejected as not maintainable, moved this Court in W.P.No.10116 of 1983. This Court's power to interfere with the arbitrary and without

jurisdiction' order of the kind impugned by the petitioner herein in W.P.No.10116 of 1983 cannot be questioned. The Court must always see as to how any unconstitutional act can be avoided and how far the facts of the case require moulding the relief. In the instant case, I am satisfied that the delay in filing W.P.No.17376 of 1991 is excusable.

16. For the reasons aforesaid W.P.No.17376 of 1991 is allowed. The impugned notice of termination dated 1.9.1980 culminating in the order of termination dated 3.10.1980 of the respondent is quashed. W.P.No.10116 of 1983 is allowed to the extent that it impugned the order of the first respondent covered by W.P.No.17376 of 1991. As a consequence the petitioner shall be deemed to be reinstated and in continuous service as if there has been no termination of service at all. On the facts of this case there shall however be no order as to costs.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R P.No.364 of 1991 *11th March, 1992.*

Jayalakshmi Ammal *...Petitioner*
v.
K.Lakshmi Iyengar represented by Power Agent
M.Jayaramiyar *...Respondent.*

(A) Evidence Act (I of 1872), Sec.114 - Will - Registration of.

The court is not entitled to make surmises and assume anything contrary to the document. The court is bound to apply the presumption under Sec.114 of the Evidence Act and hold that the will was presented for registration by the executant and registered properly in accordance with law.

[Para 4]

(B) Civil Procedure Code (V of 1908), Sec.115 - Powers of High Court sitting in revision.

Strictly speaking it is not the function of High Court to appreciate the evidence. The court is sitting in revision and it should only see whether the order of the court below is vitiated by illegality

or material irregularity and whether there is any error of jurisdiction. *[Para 6]*

(C) Succession Act (XXXIX of 1925), Sec.63 - Evidence Act (I of 1872), Secs.68 and 69 - Will - Attesting witness not found - How to be proved.

Sec.68 of the Evidence Act requires that in order to prove a document required by law to be attested, at least one attesting witness should be called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. The proviso contains an exception and excludes a document not being a will which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution is specifically denied. A will even if registered, falls under the main section, as it is excluded from the purview of the proviso. Sec.69 of the Evidence Act provides that if no attesting witness can be found, it must be proved that the attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Thus Sec.69 of the Evidence Act requires proof of (1) the signature of at least one witness, and (2) the signature of the person executing the document. It is not necessary, however, for the purpose of Sec.69 of the Evidence Act that the same witness must prove the signature of the attesting witness and also the signature of the executant. The two requirements can be satisfied by two independent witnesses. *[Para 7]*

Cases referred to:

Shankarrao Gangadhar v. Ramji Harjivan, I.L.R. 28 Bom. 58; 5 Bom.L.R. 663. [Para 8]

Jagdish Das v. Emperor, A.I.R. 1938 Patna 497: 40 Crl.L.J. 27. [Para 8]

Pusaram v. Manmal, A.I.R. 1955 Raj. 186. [Para 8]

Shankarappa v. Sushilabai, A.I.R. 1984 Kant. 112. [Paras 8 and 13]

In re. Basnur Venkata Row, 14 I.C. 418 (Mad): 36 Mad. 159. [Para 8]

Mst.Jasoda Kuar v. Janak Missir, A.I.R. 1925 Pat. 787. [Para 8]

Rajmal v. Islam Mahomed, A.I.R. 1958 Raj. 6 at 7. [Para 8]

Raja Venkataramayya v. Kamiseti Ghattayya, 53 M.L.J. 216. [Paras 9, 12]

Uttam Singh v. Hukam Singh, I.L.R. 39 All. 112. [Para 9]

Ponnuswami Goundan v. Kalyanasundaram Ayyar,

- A.I.R. 1930 Mad. 770. [Paras 10, 12]*
Joshua Hands v. Herbert James, 2 Comyns. 531. [Para 10]
Harris v. Knight, (1890)15 P.D. 170. [Para 10]
Ponnuswami Goundan v. Kalyanasundaram Ayyar, 66 M.L.J. 712: I.L.R. 57 Mad. 662: 149 I.C. 267: A.I.R. 1934 Mad. 365. [Para 11]
Indukuri Venkatarama Raju v. Totakura Narasa Raju alias Chittiraju, (1966)2 An.W.R. 134. [Para 12]
Rani Purnima Devi v. Kumar Khagendra Narayan Deb, (1962)2 M.L.J. (S.C.) 27: (1962)2 An.W.R. (S.C.) 27: (1962)1 S.C.J. 725: A.I.R. 1962 S.C. 567. [Para 14]
Indayammal v. Salayath Mary, (1972)2 M.L.J. 508. [Para 15]
Mohammed Ihtishan Ali v. Jamna Prasad, 20 M.L.J. 961: A.I.R. 1922 P.C. 56: 48 I.A. 355: 64 I.C. 299. [Para 15]
Gopal Das v. Shri Thakurji, (1943)2 M.L.J. 51: A.I.R. 1943 P.C. 83: 267 I.C. 553: 70 I.A. 57. [Para 15]
Huthegowda v. Chennigowda, A.I.R. 1953 Mysore 49. [Para 15]
Revanna v. Dr. A.V. Ranga Rao, A.I.R. 1952 Mysore 119. [Para 15]
Kashubai v. Vinayak, A.I.R. 1956 Bom. 65. [Para 15]
Surendrapal v. Saraswati, A.I.R. 1974 S.C. 1999: (1974)2 S.C.C. 800. [Para 16]
Davood Rowther v. Ramanathan, I.L.R. 1938 Mad. 523: 176 I.C. 858: A.I.R. 1938 Mad. 43. [Para 17]
Timmayya Dundappa v. Channava Appaya, A.I.R. 1948 Bom. 322. [Para 17]
Valhanimal v. Rakkie Gounder, (1991)2 M.L.J. 478. [Para 17]
Blake v. Blake, 7 Law Reports - Probate Division 102. [Para 17]
Lachman Singh v. Surendra Bahadur, A.I.R. 1932 All 527. [Para 17]
Yonkata Sastri and Sons v. Rahilna Bi, A.I.R. 1962 Mad. 111. [Para 17]
Shamu Pattar v. Abdul Kadir Ravuthan, 23 M.L.J. 321: 16 I.C. 250: 39 I.A. 218: 1912 M.W.N. 935. [Para 18]
Vadla Nagiah v. Valuru Divakara Mudaliar, 1917 M.W.N. 583. [Para 18]
Rajani Kanta Barui v. Bonbehari Sarkar, A.I.R. 1952 Cal. 7. [Para 18]
Sadachii Ammal v. Rajathu Ammal, 1939 M.W.N. 651: A.I.R. 1940 Mad. 315. [Para 19]
Doraiswami v. Rathinammal, (1978)1 M.L.J. 456: A.I.R. 1978 Mad. 78. [Para 20]
Baru Ram v. Smt. Prasanna, A.I.R. 1959 S.C. 93. [Para 21]
Dhani Bai v. Neemi Kanwar, A.I.R. 1972 Raj. 9. [Para 22]
Rahim Khan v. Khurshid Ahmed, A.I.R. 1975 S.C. 290. [Para 23]
G. Subramanian, Senior Counsel, for S. Thiruvengataswamy, for Petitioner.
K. Chandrasekaran for B. Kumar, for Respondent.
 The Court made the following
 ORDER:- One Rajagopala Iyengar died on 10.1.1976, leaving his first wife by name Jayalakshmi Ammal, the petitioner herein, and second wife Dr. Kamala. The latter filed a suit O.S. No. 55 of 1976 on the file of Sub Court, Thanjavur, for partition and separate possession of one half of the properties left by the deceased husband. The suit was contested by the petitioner mainly on the ground that Rajagopala Iyengar had executed a will disposing of his properties in a particular manner. The Subordinate Judge, Thanjavur, rejected the contentions of the petitioner and passed a preliminary decree on 29.11.1980 declaring that the plaintiff was entitled to half share in the properties mentioned in the decree. The petitioner filed A.S. No. 391 of 1981 in this Court challenging the decree. The appeal was dismissed on 22.6.1987. Dr. Kamala died on 1.12.1987. The respondent filed an application for passing of final decree along with an application to bring herself on record as the legal representative of the deceased plaintiff. The respondent claimed that the deceased had bequeathed her properties by a registered will dated 27.1.1976 in her favour and thus, she was the only person entitled to the properties of the deceased. The petitioner contested the application challenging the genuineness and the validity of the will propounded by the respondent. The Subordinate Judge, Thanjavur, has accepted the case of the respondent and ordered her application to implead herself as a party to the proceedings in her capacity as legal representative of the deceased plaintiff. It is the said order which is questioned in this revision petition.
 2. It is argued vehemently by learned counsel for the petitioner that the evidence adduced on the side of the respondent in the court below does not satisfy the requirements prescribed by the Evidence Act and the Indian Succession Act for proving due execution of a will. According to learned

counsel, the burden is on the respondent, the propounder of the will, to prove that the same was executed in accordance with the procedure prescribed by law and in the present case, the respondent has miserably failed to do so. It is argued that the evidence of the Sub Registrar, who has been examined as P.W.1, who proved the registration of the will, cannot be treated as evidence of due execution of the will and the evidence of P.W.2, a vakil's clerk, is not sufficient in law to prove the due attestation of the will. In short, his contention is that the evidence placed before court by the respondent is no evidence in law and the order of the lower court is, therefore, vitiated by illegality. He submits that at any rate, this Court should interfere under Sec.115 of the Code of Civil Procedure in the interests of justice. According to him, justice requires that the surviving widow of the deceased Rajagopala Iyengar, should take his estate in entirety as against a sister of the other widow, who claims only as a legatee under the will. 3. In the counter affidavit filed by the petitioner in the court below, the relevant plea is found in the following sentence:

"It is obvious the Applicant has procured the Will either by undue influence and coercion or by forgery."

Excepting the said omnibus plea, there is nothing in the counter affidavit worthy of consideration. The petitioner has not referred to any suspicious circumstances surrounding the execution of the will. It is seen that the last part of the plea is inconsistent with the previous part. If the will was procured by undue influence or coercion, it could not be a forgery and if it was a forgery, there is no question of undue influence or coercion. The petitioner is not clear in her pleading. The petitioner has not referred to any circumstance from which the court could infer that the propounder had played a part in bringing the will into existence.

4. It is not in dispute that the propounder was the younger sister of the deceased plaintiff. In her affidavit she has described herself as a retired Professor of Education. In the will her educational qualification is stated to be M.A., M.Ed., The will gives her address as 3, Dharma Praksh Chawl at Kudand in Bilaspur, Madhya Pradesh State. According to the recitals in the will, she was working as a Principal of a Women's College at Bilaspur at that time. No attempt has been made

by the petitioner to contest the correctness of the said recitals in the will as regards the status and educational qualification of the respondent. The testatrix was herself a retired Medical Officer of the Pondicherry Government. She was living in Bangalore and she had been to Thanjavur in connection with the obsequial ceremonies following the death of her husband. Thus, the undisputed facts are that the testatrix was a highly educated person with rich worldly experience and had retired from Government service, whereas the legatee, who was her sister, was also highly educated, working as the head of an educational institution and living far away from the testatrix. The will in question was undoubtedly presented for registration on 27.1.1976 and registered as Document No.4 of 1976 in Book 3 Volume 122 on 29.1.1976 by the Joint Sub Registrar-1 at Thanjavur. The said Sub Registrar has appeared before court and given evidence that he registered the will in the normal course of his official duties. No suggestion has been made in the cross-examination that he was interested in giving evidence in support of the respondent. The very fact that he deposed that he did not know the testatrix personally previously, shows that he was speaking the truth before the court. His evidence is sufficient to make out that a person claiming herself to be Dr. Kamala Rajagopalan appeared before him and presented the will for registration stating that it was executed by her. The testatrix died nearly 12 years after the registration of the will. Unless a definite case is pleaded by the petitioner that somebody was interested in impersonating the testatrix as early as in 1976 and getting a will registered as if it was her will, the court is not entitled to make surmises and assume anything contrary to the document. The court is bound to apply the presumption under Sec.114 of the Evidence Act and hold that the will was presented for registration by its executant and registered properly in accordance with law. The plea of undue influence or coercion cannot stand scrutiny for a moment. There is not even a plea that the testatrix was of weak intellect so as to be influenced unduly by another person. It is too much to say that the undue influence or coercion continued for a period of nearly twelve years and the testatrix had no opportunity to change the will during her life time. The plea of forgery is equally reckless. The undisputed facts already referred to are sufficient to throw out the same.

5. P.W.2 is a vakil's clerk. He has been examined to speak about the signatures of the attestors found on the will. Both the attestors were admittedly advocates' clerks. They have not only attested the will, but also identified the testatrix before the Sub Registrar. Admittedly, both are dead and not available to give evidence. The evidence of P.W.2 is sought to be discredited by his statement in the cross-examination that he had not seen the two persons attesting any other document. His evidence is quite natural and there is no reason to disbelieve his version that he being an advocate's clerk, was acquainted with the signatures of two other advocates' clerks working in the same place, though they were seniors to him.

6. Though I have myself considered the acceptability of the evidence of P.Ws.1 and 2 in order to satisfy myself that there is no miscarriage of justice in this case, strictly speaking it is not my function to appreciate the evidence. I am sitting in revision and I should only see whether the order of the court below is vitiated by illegality or material irregularity and whether there is any error of jurisdiction. It is only for the purpose of bringing the case within the four corners of Sec.115 of the Code of Civil Procedure, learned counsel for the petitioner submits that the evidence of P.Ws.1 and 2 is not legal evidence. I do not agree with him. I find that the evidence is acceptable in law and no exception can be taken to the same having been accepted by the court below.

7. The law on this subject is found in Secs.47 and 67 to 69 of the Indian Evidence Act. Sec.67 of the Evidence Act requires that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting must be proved to be in his handwriting. Sec.47 of the Evidence Act makes relevant the opinion of any person acquainted with the handwriting of the person by whom the document is supposed to be written or signed that it was or was not written or signed by that person. The explanation to Sec.47 on which considerable reliance is placed by learned counsel for the petitioner, is in the following terms:

"A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that

person, or when, in the ordinary course of business, documents, purporting to be written by that person have been habitually submitted to him."

Sec.68 of the Evidence Act requires that in order to prove a document required by law to be attested, at least one attesting witness should be called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. The proviso contains an exception and excludes a document not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution is specifically denied. A will even if registered, falls under the main Section, as it is excluded from the purview of the proviso. Sec.69 of the Evidence Act provides that if no attesting witness can be found, it must be proved that the attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Thus, Sec.69 of the Evidence Act requires proof of (1) the signature of at least one witness and (2) the signature of the person executing the document. It is not necessary, however, for the purpose of Sec.69 of the Evidence Act that the same witness must prove the signature of the attesting witness and also the signature of the executant. The two requirements can be satisfied by two independent witnesses.

8. The law relating to proof of handwriting by a person acquainted with the same has been succinctly stated in Field's Law of Evidence, 11th Edition, Volume III, pages 2517 to 2519. It is worthy of reproduction as under:

"12. *Person acquainted with handwriting.* Considering the manner in which Sec.47 of the Evidence Act is framed it has been held by the courts generally that it is enough for a witness to say in examination-in-chief that he is acquainted with the handwriting, and that if it is desired to challenge that statement of his he has to be cross-examined on that statement to show that he could not be acquainted with the handwriting in the circumstances of any particular case.

The English law on the point is thus summarized by Taylor on *Evidence Act* (Vol.2, Ed.12, para.1863, p.1151): "The witness need not state in the first instance how he knows the

handwriting, since it is the duty of the opposite party to explore on cross-examination the source of his knowledge, if he be dissatisfied with the testimony as it stands.

The Indian Law of Evidence is based on the English law, and there is nothing in Sec.47 which goes against this principle which has been accepted by the English courts. Following this principle, the Indian High Courts have also taken the same view and it will be useful to refer to a few cases in support. *Shankarrao Gangadhar v. Ramji Harjivan*, I.L.R. 28 Bom. 58; 5 Bom.L.R. 663, *Jagdish Das v. Emperor*, A.I.R. 1938 Patna. 497; 40 Crl.L.J. 27, see also *Pusaram v. Manmal*, A.I.R. 1955 Raj. 186 at 187, see also *Shankarappa v. Sushilabai*, A.I.R. 1984 Kant. 112.

In *In re. Basnur Venkata Row*, 14 I.C. 418 (Mad): 36 Mad. 159, an observation was made while dealing with a criminal case that a bald statement by a witness that certain documents were not in the handwriting of the accused was not legal evidence of any knowledge of the accused's handwriting, even when he says that he had seen the accused write document and the accused had written documents for him. Without saying how long ago they were written, his evidence is of the weakest kind.

In *Pusaram v. Manmal*, A.I.R. 1955 Raj. 186 at 187, Wanchoo, C.J., while speaking for the Bench said: "These observations, in our opinion, were about the weight of the evidence and not as to whether it was the duty of the counsel examining the witness to question him about his source of knowledge. In that case, the source of knowledge of the witness was undoubted, and the question was only whether the evidence was sufficient to prove the handwriting."

In the case of *Mst. Jasoda Kuar v. Janak Missir*, A.I.R. 1925 Pat. 787, there is an observation that in order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. This observation has been taken to mean that it is for the counsel putting in the witness to bring out the circumstances, though the learned Judge has not said this in so many words.

This case is no authority for the view that it is for the counsel producing the witness to bring

out the circumstances in which the witness became acquainted with the handwriting.

It is enough if a witness states in examination-in-chief that he is acquainted with the handwriting, and it is then for the cross-examining counsel to bring out the circumstances challenging that statement, and discredit the witness. *Pusaram v. Manmal*, A.I.R. 1955 Raj. 186 at 187.

13. *Weight to be attached to the evidence of lay witnesses*:- Where direct evidence of one who was present when the document was written is not available the familiarity with the handwriting in question may be slight, an opinion based on mere inference is insufficient.

Where the evidence on a case is the result of mental comparison, such evidence according to recognised authority is of an inconclusive character.

It is laid down in *Halsbury's Laws of England* (Vol.13 at p.606, para 673, as follows: "Whilst evidence of opinion or belief is admitted for the purpose of proving handwriting, where direct evidence of one who was present when the document was written is not available, an opinion based on mere inference is insufficient."

Where a person, who was acquainted with the handwriting of a person, testified on oath to the fact that the disputed signature was the genuine signature of the person concerned and the expert witness who was called gave his contrary opinion, it was held that the witness's statement was more valuable and more worthy of credence than that of the expert witness. Under Sec.47 of the Evidence Act, the evidence of persons acquainted with the handwriting of the person by whom a particular document is supposed to be written or signed is relevant and admissible. The evidence of person acquainted with the handwriting of the executant of a document is relevant and admissible.

But in *Rajmal v. Islam Mahomed*, A.I.R. 1958 Raj. 6 at 7, however, the witness who had been produced to identify the handwriting of the executant did not express his opinion as if he was a person acquainted with the handwriting of the executant, but attempted to play the role of an expert, which he was not. The second person also did not express any opinion as if by

a person acquainted with the handwriting of the executant, but attempted to play the role of an expert. Held that the evidence of such witnesses must be rejected."

9. In *Raja Venkataramayya v. Kamisetti Ghattayya*, 53 M.L.J. 216, Waller, J. held that once the handwriting of the attestors is proved, there is a presumption in the absence of rebutting evidence that they actually witnessed the execution of the deed. The learned Judge relied on the judgment in *Uttam Singh v. Hukam Singh*, I.L.R. 39 All. 112.

10. A detailed discussion of the law is found in *Ponnuswami Goundan and another v. Kalyanasundaram Ayyar and others*, A.I.R. 1930 Mad. 770. Anantakrishna Ayyar, J. has referred to the relevant text books on the law of Evidence besides the decisions of English and Indian Courts. Ultimately, he posed the question as to whether proof of the signature of the attestors will in law be enough to prove execution against the defendant. He answered the question in the following words:

"Thus the better view in America would seem to be that when proof of the signatures of the attestors is given, it seems to be taken that they attested in the usual course of business and after execution by the executant, and after the identity of the executant is established it is open to the courts, if they think fit to do so in the circumstances, to hold the document to be proved to have been executed by the executant. There is no rule of law which prevents them from doing so, if from the circumstances of the case, the courts are inclined to do so. Whether in any particular case the courts should do so or not would depend upon the nature of the circumstances in each case. While there is the possibility of the attestors colluding together and putting their signature to a forged document, especially where the executant is a marksman and thus committing fraud on courts, there is the other possibility of a genuine document executed by a marksman and properly attested being found to be impossible to be proved when the attestors are dead. To avoid such extreme cases on both sides, courts have to be guided by all the circumstances of the particular cases before them. All that I am now concerned to point out is, that there appears to be no rule of law which prevents the courts from holding the execution of a document to be proved when the signatures of the attesting

witnesses had been proved to their satisfaction, having regard to all the circumstances of the case.

In *Joshua Hands v. Herbert James*, 2 Comyns. 531, it is stated:

"In case the witness be dead, the proof must be circumstantial, and here are circumstances: (1) three witnesses have set their names, and it must be intended that they did it regularly: (2) one witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary..... It being a matter of fact, was proper to be left to them (jury)."

In *Harris v. Knight*, (1890) 15 P.D. 170, Law Reports (by two Judges to one, a profitable case for study) Lopes L.J., said:

"The inference to be drawn in cases of this kind depends upon a number of circumstances peculiar to the cases in which they arise, and the presumption *omnia rite esse acta* applies with more or less force according to the circumstances of each case: see p.184 of the Report." The English cases support the view taken by the lower courts in the present case. As I found in the American text books a full discussion of the question raised before me and as they furnished answers to the arguments raised before me, I thought it convenient to refer to the same. I am, therefore, of opinion that the lower courts were entitled to hold in this case, if they so chose, that Ex.M. was executed by the defendant."

11. The judgment was affirmed on appeal by a Division Bench in *Ponnuswami Goundan and another v. Kalyanasundaram Ayyar and others*, 66 M.L.J. 712: I.L.R. 57 Mad. 662: 149 I.C. 267: A.I.R. 1934 Mad. 365. The Bench said,

"He states that the signature of one of the attesting witnesses is his signature. What follows from that? It follows that it is proved that that attesting witness attested the document. What follows from that? A passage from Mr. Starkie in his Law of Evidence, Edn.4, p.519, is set out in the judgment of our learned brother as follows:

"The signature of the attesting witness when proved is evidence of everything upon the face of the instrument, since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take

place.”

“Therefore the signature of the attesting witness having been proved is evidence of everything on the face of the document and that he saw the executant make his mark. The argument put forward before us by the appellants directly gives the go-by to this very obvious inference which in the English law arises and I see no reason whatever, for excluding that inference from the Indian law of evidence. It gives the go-by entirely to the provision of the Evidence Act which permits secondary evidence to be given in the absence of witnesses who are either dead or cannot be brought to court. Sec.67, Evidence Act requires nothing more than proof of the handwriting or signature of the writer of the document or its executant. The section does not specify or limit the kind of evidence required. It clearly only requires proof by admissible evidence.”

12. A similar view was taken by a Division Bench of the Andhra Pradesh High Court in *Indukuri Venkatarama Raju and others v. Totakura Narasa Raju alias Chittiraju*, (1966)2 An.W.R. 134. The Bench has relied on the rulings in *Raja Venkataramayya v. Kamusetti Ghattaya*, 53 M.L.J. 216 and *Ponnuswami Goundan v. Kalyanasundara Ayyar*, A.I.R. 1930 Mad. 770.

13. In *Shankarappa v. Sushilabai*, A.I.R. 1984 Karn. 112, Venkatachaliah, J. observed that it is not necessary for a non-expert testifying under Sec.47 of the Evidence Act to state in chief-examination as to the mode in which knowledge of handwriting was acquired by him and it was for the cross-examining counsel to challenge his statement, if it was to be disputed. In the present case, the petitioner's counsel did not choose to cross-examine P.W.2 in detail but rested content with a suggestion that he did not see the attestors attesting any other document.

14. In *Rani Purnima Debi and another v. Kumar Khagendra Narayan Deb and another*, A.I.R. 1962 S.C. 567: (1962)2 M.L.J. (S.C.) 27: (1962)2 An.W.R. (S.C.) 27: (1962)1 S.C.J. 725, the effect of registration of a will has been considered. It is pointed out that if the evidence as to registration reveals on a close examination that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed

it in token thereof, the registration will dispel the doubt as to the genuineness of the will. It is also observed that the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will, though it would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting. In the present case, the testatrix is highly educated woman with sufficient worldly experience besides being a retired Government official. The evidence of the Sub Registrar (P.W.1), which has been accepted by the court below, shows that she was aware of the nature of the document and she admitted execution thereof before him.

15. A Division Bench of this Court in *Irudayammal v. Salayath Mary*, (1972)2 M.L.J. 508, held that if no other evidence is available, the certificate of registration is *prima facie* evidence of its execution and the certificate of the registering officer under Sec.60 of the Registration Act is relevant for proving execution. The following passage in the judgment is worth reproduction:

“The first defendant has, therefore, proved the Will by other acceptable, satisfactory evidence, supplemented by such presumptions as would arise under the provisions of the Registration Act and Sec.114 of the Evidence Act on the facts of this case. There is a general presumption about the execution of the Will arising under Sec.60 of the Indian Registration Act (*vide*: Mull's Indian Registration Act, Seventh Edition, page 256). It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is *prima facie* evidence of its execution and the certificate of the registration officer under Sec.60 of the Registration Act is relevant for proving execution. (See discussion in Sarkar's Evidence, Latest (12th) Edition, Page 640). As observed by the Privy Council in *Mohammed Ihtushan Ali v. Jamna Prasad*, 20 M.L.J. 961: A.I.R. 1922 P.C. 56: 48 I.A. 355: 64 I.C. 299, registration is a solemn act and if no other evidence is available, the court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant

was duly and properly identified before him. The same view has been taken in *Gopal Das v. Shri Thakurji*, (1943) 2 M.L.J. 51: A.I.R. 1943 P.C. 83: 267 I.C. 553: 70 I.A. 57, in which, after referring to the earlier decision of the Privy Council in *Mohammed Ihtishan Ali v. Jamna Prasad*, 20 M.L.J. 961: A.I.R. 1922 P.C. 56: 48 I.A. 355: 64 I.C. 299, Sir George Rankin observed that the evidence of due registration is itself some evidence of execution as against the other side. There is a full discussion on this question as to the presumption arising from the fact of due registration, coupled with the presumption arising under Sec.114 of the Indian Evidence Act, in a Bench decision of the Mysore High Court in *Huthegowda v. Chennigegowda*, A.I.R. 1953 Mysore 49, in which it was held that the evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed. There is a full discussion of the relevant case law including the decision of the Privy Council in *Mohammed Ihtishan Ali v. Jamna Prasad*, 20 M.L.J. 961: A.I.R. 1922 P.C. 56: 48 I.A. 355: 64 I.C. 299, aforesaid. In *Revanna v. Dr.A.V.Ranga Rao*, A.I.R. 1952 Mysore 119, it was observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned, the best and the only possible evidence that may be available is that of a certified copy of the registered document and that in such cases, a presumption would arise under Sec.60 of the Registration Act along with Sec.114 of the Evidence Act (see also *Kashubai v. Vinayak*, A.I.R. 1956 Bom. 65. It will be seen that in the ultimate analysis, the problem in each case is, 'has the best evidence been adduced on the facts of each case'; in the instant case, we have not the slightest hesitation in holding that this essential test for arriving at the truth has been amply satisfied."

The present case stands on a better footing, as in addition to the certificate of registration, the Officer who registered the document has himself given evidence in the case.

16. In *Surendrapal v. Saraswati*, A.I.R. 1974 S.C. 1999: (1974) 2 S.C.C. 800, it is held that the burden of the propounder of a will is discharged when he establishes that the will was signed by the testator in a sound disposing state of mind and he put his

signature to the testament on his own free will in the presence of two witnesses, who attested it in his presence and in the presence of each other. The court observed,

"But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances, the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind."

In the present case, not even one of the circumstances catalogued by the Apex Court in the above passage is pleaded or proved. Hence, the presumptions available in law can be drawn and the court below has rightly accepted the evidence on record as sufficient proof of the will in question.

17. Learned counsel for the petitioner has argued at length that an admission made by the testatrix before the Sub Registrar as to the execution of the document cannot be treated as an admission of execution within the meaning of Sec.70 of the Evidence Act. He relied on the rulings in *Davood Rowther v. Ramanathan*, I.L.R. 1938 Mad. 523. 176 I.C. 858: A.I.R. 1938 Mad. 43, *Timmayya Dundappa v. Channava Appaya*, A.I.R. 1948 Bom. 322, and *Valliammal v. Rakkie Gounder*, (1991) 2 M.L.J. 478. It is argued that for the purposes of Sec.70 of the Evidence Act, there must be an admission in the course of the proceedings in which the document is sought to be proved and that mere admission of signature in the document will not tantamount to admission of due execution. According to him, in the case of a will, it must be proved that the requirements of Sec.63 of the Indian Succession Act are satisfied and if any admission falls short of proving the same, it cannot be treated as an admission. He has also drawn my attention to the judgment in *Blake v. Blake*, 7 L.R. - Probate Division 102. The learned Judges held in that case that though the testatrix admitted her executing the will, the evidence was not sufficient to prove that it was executed in accordance with the requirements of law. He has also referred to the rulings in *Lachman Singh v. Surendra Bahadur*, A.I.R. 1932 All. 527, and *Venkata Sastri*

and Sons v. *Rahilna Bi*, A.I.R. 1962 Mad. 111, and contended that the Sub Registrar cannot be treated as an attesting witness. It is not necessary for me to consider either the argument relating to Sec. 70 of the Evidence Act or the argument that the Sub Registrar is not an attesting witness, as learned counsel for the respondent has not raised such contentions. Hence, I do not propose to refer to the aforesaid rulings in detail.

18. Learned counsel had placed reliance on the judgment of the Privy Council in *Shamu Pattar v. Abdul Kadir Ravuthan*, 23 M.L.J. 321: 16 I.C. 250: 39 L.A. 218: 1912 M.W.N. 935, and the judgment of a Division Bench of this Court in *Vadla Nagiah v. Valuru Divakara Mudaliar*, 1917 M.W.N. 583. In both the cases it is held that the admission of execution will not amount to admission of due attestation. Similarly in *Rajani Kanta Barui v. Bonbehari Sarkar*, A.I.R. 1952 Cal. 7, a Division Bench of the Calcutta High Court held that the admission of signature in a document cannot dispense with the proof of attestation. None of the above ruling will have any bearing in the present case. I have already referred in detail to the evidence on record and the relevant case law on the subject. The attestation of the will by the two attestors, whose signatures are found in the will, has been proved and in any event, the evidence on record is legal evidence which has been accepted by the court below. The law on the subject is quite clear as pointed out by the rulings referred to already. Hence, it has to be held in this case that the due execution of the will and the attestation thereof have been proved.

19. Learned counsel has placed reliance on the judgment in *Sadachi Ammal v. Rajathi Ammal*, A.I.R. 1940 Mad. 315: 1939 M.W.N. 651, and contends that just because the testatrix presented the will to the Registrar, who does not even appear to have put any questions to her, it cannot be held that she had the testamentary capacity to execute the will. He relies on the following passage in the judgment:

"The mere fact that the testator was able to answer a few leading questions does not suffice to show that he was really capable of knowing the nature of the dispositions made in the will that was being registered. It may be that the will, except the schedules, was read to the testator by the Sub-registrar and it may be that the Sub-registrar was of opinion that the

testator understood the contents of the will, but the latter is only a question of opinion, and there is no guarantee that the Sub-registrar's opinion that the testator understood the contents of the will is correct, having regard to his extremely weak physical condition at the time. There can be no doubt from the evidence of the Sub-Registrar himself, apart from the other evidence in the case, that at the time of the registration the testator was so weak as to require assistance in order to sit on his cot and also in lying down after the signatures were affixed in token of registration. The testator died within about 40 hours after the registration and he had been suffering from a serious illness for at least two months. In these circumstances, it is impossible to regard the registration as being equivalent to proof of capacity for making a will."

The above observations must be understood in the light of the facts of the case. Even the passage extracted above makes a reference to the peculiar circumstances of the case. It is also seen from the report that there was no satisfactory evidence regarding the actual execution of the will. Out of six attestors, only one was examined and the writer was not examined. The evidence of the single attestor was found unreliable. On the other hand, two attestors were examined on the side of the person who challenged the will and their evidence proved that their signatures were obtained by some pressure or inducement and they were not really present when the testator signed the will. It was in those circumstances the learned Judge held that the proof of registration was not sufficient proof of the due execution and attestation of will.

20. The case in *Doraiswami v. Rathnammal*, (1978) 1 M.L.J. 456: A.I.R. 1978 Mad. 78, relied on by learned counsel for the petitioner is similar. The only attesting witness who was alive, gave evidence denying his attestation and execution of the will. Taking that factor along with various other circumstances including the continued illness of the concerned person made the court doubt the evidence that the said person appeared before the Sub-Registrar and admitted execution of the will. In fact, it was observed that it was possible that someone else impersonated her before the Sub-Registrar. Hence, that ruling will not help the petitioner herein.

21. Learned counsel submits that the Explanation

to Sec.47 of the Evidence Act is not satisfied in the present case by P.W.2. He relies on the observations of the Supreme Court in *Baru Ram v. Smt. Prasanni*, A.I.R. 1959 S.C. 93, that the requirements of Sec.47 should be satisfied for considering the proof of a document under Sec.67 of the Evidence Act. The relevant passage is as follows:

"Sec.67 of the Indian Evidence Act (1 of 1872) provides *inter alia* that if a document is alleged to be signed by any person the signature must be proved to be in his handwriting. Secs.45 and 47 of the said Act prescribed the method in which such signature can be proved. Under Sec.45, the opinion of the handwriting experts is relevant while under Sec.47 the opinion of any person acquainted with the handwriting of the person who is alleged to have signed the document is admissible. The explanation to the section explains when a person can be said to be acquainted with the handwriting of another person. Thus, there can be no doubt as to the manner in which the alleged signature of the appellant could and should have been proved; but even assuming that the signature of the appellant can be legally held to be proved on circumstantial evidence the principle which governs the appreciation of such circumstantial evidence in cases of this kind cannot be ignored. It is only if the court is satisfied that the circumstantial evidence irresistibly leads to the inference that the appellant must have signed the form that the court can legitimately reach such a conclusion."

The passage itself makes reference to the circumstantial evidence and points out the need for the court being satisfied that the circumstantial evidence irresistibly leads to a particular inference. In the present case, the circumstantial evidence referred to already is sufficient to lead to an inference that the will was duly executed and attested.

22. Learned counsel has also drawn my attention to the judgment of Rajasthan High Court in *Dhani Bai v. Neemi Kanwar*, A.I.R. 1972 Raj. 9. The court held in that case that much reliance could not be placed on the evidence of a non-expert witness about the identification of the executant's signature as he had only seen the executant writing only once or twice. In that case, the signature in question was alleged to have been subscribed before the witness was born. The observation made by the

court cannot be taken out of the context and applied to the present case. No attempt was made in the cross-examination of P.W.2 to elicit from him that he had no occasion at all to see the handwriting of signatures of the attesting witnesses who were also working as advocates' clerks along with him in the same court.

23. Learned counsel relies on the following passage in the judgment of the Supreme Court in *Rahim Khan v. Khurshid Ahmed*, A.I.R. 1975 S.C. 290:

"There is also oral evidence identifying the signature of the returned candidate on Exs.P-3 and P.W.11/1, particularly in the deposition of Habib, P.W.23. He has not spoken to his familiarity with the handwriting of the appellant. Opinion evidence is hearsay and becomes relevant only if the condition laid down in Sec.47 of the Evidence Act is first proved. There is some conflict of judicial opinion on this matter, but we need not resolve it here, because, although there is close resemblance between the signature of Rahim Khan on admitted documents and that in Exs.P-3 and P.W.11/1, we do not wish to hazard a conclusion based on dubious evidence or lay comparison of signature by courts. In these circumstances, we have to search for other evidence, if any, in proof of circulation of the printed hand-bills by the returned candidate, or with his consent."

It is apparent that the passage has no relevance whatever to the present case.

24. There is no substance in the contentions urged by the revision petitioner. I find that the court below has not committed any error whatever in accepting the evidence of P.Ws.1 and 2 and holding that the will propounded by the respondent is the last will and testament of the deceased plaintiff and the respondent is a person entitled to come on record as her legal representative.

25. The civil revision petition suffers a dismissal. The parties will bear their respective costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.**Present:-** *Mishra and Swamidurai, JJ.*

L.P.A.No.27 of 1988 27th March, 1992.

E.S.R.Packirisamy Pillai ...Appellant

v.

Vijayalakshmi and another ...Respondents.

Hindu Succession Act (XXX of 1956), Sec.14(1) and (2) - Will executed by husband conferring life estate on certain properties in favour of his wife - Widow in possession of the property on the date Hindu Succession Act, 1956 came into force - Interest whether enlarged under Sec.14(1) - Absence of pleading that Will under which the widow entered upon the property was executed in recognition of a pre-existing right against the property - If bars widow from contending that will only recognised a pre-existing right.

One Sundaram Pillai executed a will Exs.A-1 and B-1. On 14.3.1937 on the day the Hindu Women's Right to Property Act, 1937 came into force conferring a right on his wife Soundarathammal to enjoy the 'A' schedule property without any right of alienation. After her life time, the entire 'A' schedule properties were to belong to his brother's son Subramania Pillai, absolutely. The widow executed a Will on 3.1.1951 and the codicil dated 25.11.1974, the combined effect of both being that the suit property shall devolve on the defendant after her demise. She died on 5.3.1975. The plaintiff-respondent filed a suit claiming the property under the will of Sundaram Pillai as absolutely belonging to him. The trial court held that the widow acquired absolute interest in the properties and that the disposition in favour of the defendant-appellant was valid. The plaintiff preferred an appeal but died during the pendency of the appeal. The legal representatives were brought on record. The learned single Judge held that the Will Ex.B-1 did not refer to any pre-existing right of the widow against the property, that, therefore, there was no scope for invoking the aid of Sec.14(1) of the Hindu Succession Act and that the rigor of Sec.14(2) of that Act alone must rule. It was also held that as the widow did not plead that the property was given to her under Ex.B-1 in recognition of any pre-existing right, it would not be

permissible for the widow or any person claiming through her to say that the will only recognised a pre-existing right. In L.P. Appeal,

Held:- The court cannot fail to notice that the right to maintenance which Soundarathammal had before the Hindu Women's Right to Property Act came into force, had matured into a statutory right giving to her a limited interest for life and the recitals thus recognised only a pre-existing right in her and extended the benefits after her death to the reversioners who had vested remainders to interest, the consequence of which the law then existing had pre-determined. Such recognition of the pre-existing vestige of title under law and the nature of possession of the property she had, must be allowed to be enlarged under Sec.14(1) of the Act as it was not a grant coming to her under the testament without there being any pre-existing right in her to succeed to the estate of her husband on his demise, having a life interest. It is difficult to understand how on the facts as above, the Court can say that a specific pleading would be needed that the will under which Soundarathammal entered upon the property had been executed in recognition of a pre-existing right against the property and/or that unless such a recital is found in the will, it will not be permissible for the widow or any person claiming through her to say that the will only recognised a pre-existing right.

[Paras 8 and 9]

Cases referred to:

- Sri Mahaliamman Temple v. Vijayammal*, (1983)2 M.L.J. 442. [Para 1]
V. Tulasamma v. V. Sesha Reddi, (1978)1 S.C.J. 29: (1978)1 An.W.R. (S.C.) 6: A.I.R. 1977 S.C. 1944. [Paras 1, 4, 5, 6]
Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493: (1962)3 S.C.R. (Supp.) 418. [Paras 3, 4]
Krishna Beharilal v. Gulabchand, A.I.R. 1971 S.C. 1041: (1971)1 S.C.J. 30. [Para 3]
Gumalapura Taggina Retada Kotturawami v. Setra Veeravva, (1959)1 S.C.R. (Supp.) 968: A.I.R. 1959 S.C. 577. [Para 4]
Mangal Singh v. Rattno, A.I.R. 1967 S.C. 1786. [Para 4]
Thota Sesharathamma v. Thotta Manikyanamma, (1991)4 S.C.C. 312. [Paras 6, 10]
Badri Pershad v. Smt. Kanso Devi, A.I.R. 1970 S.C. 963: 1970 M.L.J. (Crl.) 599: (1970)2 S.C.J. 299: 1970 Crl.L.J. 885. [Paras 4, 6]
Mst. Karni v. Anru, A.I.R. 1971 S.C. 745. [Para 6]

S.Rajagopala Chettiar v. Hamsaveri Ammal, (1991)4 S.C.C. 383. [Paras 10, 11]

Letters Patent Appeal under Clause 15 of the Letters Patent against the Order of Nainar Sundaram, J., dated 12.1.1988 and made in the exercise of the Appellate Jurisdiction of the High Court in Appeal No.1067 of 1980 (O.S.No.44/77, dated 24.12.1979 on the file of the Court of the Subordinate Judge, Nagapattinam).

The Judgment of the Court was delivered by *Mishra, J.*:- One Sundaram Pillai executed a Will Exs.A-1 and B-1, on 14.4.1937, on the day the Hindu Women's Right to Property Act, 1937, came into force, disposing of his properties including the suit property, which is item 8 of A Schedule property in Ex.B-1. The relevant will recitals are as follows:

"Will executed this 14th day of April, 1937 by Ko.Rama Sundaram Pillai, son of Ko.Ram Badra Pillai of Vadakku Pogainallur, Nagapattinam Taluk, out of free will and in a sound disposing state of mind.

I have become very aged. I am suffering from diabetes for some time and day-by-day I am becoming lean and weak and I have no faith that I will live long. I want to make arrangement in respect of all the movables/immovable properties owned by me and I am making this arrangement out of free will.

The entire properties described in the Schedule below including "E" Schedule and "P" Schedule properties and the outstandings due to me were all myself-acquired properties and I am owning them exclusively. There is no other person entitled to the same. I have my third wife Soundaraththammal. I have no other heirs. Therefore my obsequies/ceremonies shall be performed by my divided brother's son Subramaniam Pillai son of Seppayam Pillai.

The 'A' Schedule property belonging to me shall be enjoyed by my third wife Soundaraththammal, without any right of alienation and shall enjoy the income therefrom. After her life time, the entirety of the A Schedule properties shall belong to my elder brother's son Subramaniam Pillai son of Seppayam Pillai absolutely with the right of alienation and over this property nobody shall have any rights....." Soundaraththammal, the third wife of Sundaram Pillai, who was given thus life interest with no power of alienation under the Will of her

husband Sundaram Pillai, executed a will on 3.1.1951 as per the original of Ex.B-2, and on 25.11.1974 as per Ex.B-3, a codicil, the combined effect being that the suit property should devolve on the defendant-appellant after the demise of Soundaraththammal. Soundaraththammal died on 5.3.1975. The plaintiff-respondent however filed the instant suit alleging that as per the last will and testament executed by Sundaram Pillai, he provided for the devolution of the property under the various schedules therein, provided for the life interest of his widow Soundaraththammal in respect of the A Schedule to the will comprising of 9 items including the suit item, and with regard to the other items and the other schedules in the will, gave right to others including the plaintiff. With respect to A schedule, however, Sundaram Pillai said that after Soundaraththammal's life time, the entirety of the A schedule property shall belong to his elder brother's son Subramaniam (and thereafter the plaintiff) absolutely with the right of alienation. Sundaram Pillai continued to enjoy the property till his demise on 18.7.1942, and after his death, Soundaraththammal had only a restricted life enjoyment of the property, and after the death of Soundaraththammal on 5.3.1975, the plaintiff became entitled to the property as per the terms of the will. The plaintiff-respondent thus claimed the property under the will as absolutely belonging to him after the death of the third wife of Sundaram Pillai, Soundaraththammal. There were several issues and contentions before the trial court, but it pronounced on the main question whether under Sec.14(1) of the Hindu Succession Act, Act 30 of 1956, (hereinafter referred to as the Act), Soundaraththammal became the absolute owner and thus acquired right of disposition of the properties described in the Will, Exs.A-1 and B-1, or it was a property given to her under the will and thus under Sec.14(2) of the Act, after her demise, Schedule A properties vested in the plaintiff, and whether disposition of a property so given to her in favour of the defendant-appellant is valid as she is the widow of Sundaram Pillai, acquired absolute interest in favour of the defendant and against the plaintiff. The plaintiff preferred an appeal in A.S.No.1067 of 1980. He, however, died during the pendency

of the appeal, and his legal representatives were brought on record. Nainar Sundaram, J., (as he then was), who finally disposed of the appeal, however, has held as follows:

"There are certain features, which have to speak, and if I take note of them, I find that the stand expressed by the learned counsel for the defendant cannot be accepted. The first feature is, the recitals in Ex.B-1 do not refer to any pre-existing right of Soundaraththammal against property, such as her right to maintenance, so as to say, that it was only in recognition thereof, or in confirmation and reiteration thereof, the suit property was given to her in the manner done under Ex.B-1. If we go by the express recitals in Ex.B-1, it is not possible to spell out a theory that the disposition under Ex.B-1 of the suit property in favour of Soundaraththammal, was done to confirm, endorse, declare or recognise any pre-existing right of Soundaraththammal against property. It will be proper and safer to go by the express recitals found in the document itself to find out as to whether only in recognition of any pre-existing right against property the disposition could be stated to have been made. Another feature, which speaks against the case of the defendant is that there is no pleading at all that only in recognition or confirmation or declaration of any pre-existing right of Soundaraththammal against property, the suit site was given to her under Ex.B-1. While deciding this question, the parties are bound by their pleadings, unless the express recitals in the deed do support their cases one way or the other. Here, the express recitals do not in any way indicate that the disposition was in confirmation or reiteration of declaration of any pre-existing right of Soundaraththammal against property, such as her right to maintenance. In my view, the recitals being unambiguous and there being no pleading on the part of the defendant that the disposition under Ex.B-1 was only in confirmation, reiteration and declaration of any pre-existing right of Soundaraththammal against property, there is no scope for invoking the aid of Sec.14(1) of the Act and on the facts of the case, the rigor of Sec.14(2) alone must rule. The third feature is, that even assuming that without pleadings, evidence could be let in, which proposition will certainly offend the well accepted norm in this

behalf, I find that the defendant has not placed any evidence at all that the disposition of the suit site under Ex.B-1 was intended to reiterate, declare and confirm any pre-existing right of Soundaraththammal against property, such as her right to maintenance."

Nainar Sundaram, J., (as he then was) has stood by his view in spite of his attention being drawn to a judgment of this Court in *Sri Mahaliamman Temple v. Vijayammal*, (1983) 2 M.L.J. 442, for in his view, the law on the subject has been stated clearly and in detail in the judgment of the Supreme Court in *V.Tulasamma v. V.Sesha Reddi*, (1978) 1 S.C.J. 299: (1978) 1 An.W.R. (S.C.) 6: A.I.R. 1977 S.C. 1944, but on the facts of that case, that in a compromise arrived at between the parties, allotting the properties in question to a woman for her maintenance and giving her limited interest in such properties, the Supreme Court held that such allotment in lieu of her maintenance was in recognition of her right to maintenance, which was a pre-existing right, and, therefore, the case of the woman would be taken out of the ambit of Sec.14(2) and would fall squarely within Sec.14(1) read with the explanation thereto,

"No material has been exposed in the case by the defendant to demonstrate that the suit property was given to Soundaraththammal in reiteration, confirmation or in declaration of any pre-existing right of her against property. Neither the recitals in Ex.B-1 nor the pleadings put forth by the defendant, nor the evidence placed by him supports such a theory."

Sundaram Pillai's will is not in question. He executed the will on the date the Hindu Women's Right to Property Act came into force. Sundaram Pillai died on 18.7.1942. On that day, under Sec.3 of the Hindu Women's Right to Property Act, his widow Soundaraththammal, in the event of intestate succession, became entitled to limited interest, known as the Hindu Women's estate, and inheritance, equal to the share of her son, if there was one living at the time of her husband's death. It is, however, agreed that there was no son to inherit and/or there was no other person to share the A schedule properties in the will in the event of intestate succession to Sundaram Pillai with his widow Soundaraththammal. When the Hindu Succession Act, 1956, came into force, Soundaraththammal was alive and was in possession of the A schedule properties in the will. Sec.14 of the Act

reads as follows:

"14. (1) Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

Explanation:- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance, or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-sec.(1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order of award prescribe a restricted estate in such property."

2. It is not in dispute before us, and it is not possible to so dispute, that the plaintiff has got no right to the property except as reversioner and vested remainder in the event of intestate succession or under the will Ex.B-1, if the property is given to Soundaraththammal by Sundaram Pillai under the will.

3. In *S.S.Munnalal v. S.S.Rajkumar*, A.I.R. 1962 S.C. 1493: (1962)3 S.C.R. (Supp.) 418, the Supreme Court has said,

"By Sec.14(1) the Legislature sought to convert the interest of a Hindu female which under the Sastric Hindu Law would have been regarded as a limited interest into an absolute interest and by the Explanation thereto gave to the expression "property" the widest connotation. The expression includes property acquired by a Hindu female by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever. By Sec.14(1) manifestly it is intended to convert the interest which a Hindu female has in property however

restricted the nature of that interest under the Sastric Hindu Law may be into absolute estate. *Pratapmull's case*, 63 I.A. 33: A.I.R. 1936 P.C. 20, undoubtedly laid down that till actual division of the share declared in her favour by a preliminary decree for partition of the joint family estate a Hindu wife or mother, was not recognised as owner, but that rule cannot in our judgment apply after the enactment of the Hindu Succession Act."

Proceeding further, the Supreme Court has, in this judgment, said:

"The Act is a codifying enactment, and has made far-reaching changes in the structure of the Hindu law of inheritance and succession. The act confers upon Hindu females a full right of inheritance, and sweeps away the traditional limitations on her powers of dispositions which were regarded under the Hindu Law as inherent in her estate. She is under the Act regarded as a fresh stock of descent in respect of property possessed by her at the time of her death. It is true that under the Sastric Hindu Law, the share given to a Hindu Widow on partition between her sons or her grandsons was in lieu of her right to maintenance. She was not entitled to claim partition. But the Legislature by enacting the Hindu Women's Right to Property Act, 1937, made a significant departure in that branch of the law; the Act gave a Hindu widow the same interest in the property which her husband had at the time of his death, and if the estate was partitioned she became owner in severality of her share, subject of course to the restrictions on disposition and the peculiar rule of extinction of the estate on death actual or civil. It cannot be assumed having regard to this development that in enacting Sec.14 of the Hindu Succession Act, the Legislature merely intended to declare the rule enunciated by the Privy Council in *Pratapmull's case*..... Sec.4 of the Act given an overriding effect to the provision of the Act. It enacts: "save as otherwise expressly provided in this act,

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of the law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

(b)

Manifestly, the Legislature intended to supersede the rules of Hindu law on all matters in respect of which there was an express provision made in the Act. Normally a right declared in an estate by a preliminary decree would be regarded as property, and there is nothing in the context in which Sec.14 occurs or in the phraseology used by the Legislature to warrant the view that such a right declared in relation to the estate of a joint family in favour of a Hindu widow is not property within the meaning of Sec.14. In the light of the scheme of the Act and its avowed purpose it would be difficult without doing violence to the language used in the enactment to assume that a right declared in property in favour of a person under a decree for partition is not a right to property. If under a preliminary decree the right in favour of a Hindu male be regarded as property the right declared in favour of a Hindu female must also be regarded as property."

The above cited judgment of the Supreme Court thus has clarified how a wider meaning should be given to the expression "property" and with respect to a joint family property any declaration by a court as to the right in favour of a Hindu female be regarded as a right and how a departure from the Sastric or textual Hindu Law has been made by the provisions made in Sec.14(1) of the Act. It is, however, pointed out by the Supreme Court again in its judgment in *Krishna Beharilal v. Gulabchand*, A.I.R. 1971 S.C. 1041: (1971) 1 S.C.J. 30, that it shall always be on the basis of a true construction of the document about which a dispute has arisen that it should be decided whether it is conferment of a new right or recognition of any existing right. In this judgment, the Supreme Court has said:

"The ordinary rule of construction of a document is to give effect to the normal and natural meaning of the words employed in the document. The compromise deed specifically says that the properties given to Pattobai were to be enjoyed by her as "Malik Mustakil"..... The circumstances under which the compromise was entered into as well as the language used in the deed do not in any manner go to indicate that the estate given to Pattobai was anything other than an absolute estate."

.....

It was a compromise entered into with the

presumptive reversioners. Further, at no stage the plaintiff had pleaded that the compromise entered into in 1951 was an illegal compromise. The plaintiffs took no such plea in the plaint. There was no issue relating to the validity of the compromise. Hence the High Court was not justified in going into the validity of the compromise. Further even if the compromise was an invalid one, the parties to the compromise are estopped from challenging the impugned alienation."

4. Prior to the enactment of Sec.14 of the Act, the textual Hindu Law as well as the Hindu Women's Right to Property Act, 1937, extracted above, restricted the nature of the interest of a Hindu female in property acquired by her, and even as regards the nature of this restricted interest, there was great diversity of doctrine on the subject. In *V. Tulasamma v. V. Sesha Reddi*, (1978) 1 S.C.J. 29: (1978) 1 A.L.J. (S.C.) 6: A.I.R. 1977 S.C. 1944, the Supreme Court has said about the effect of Sec.14 as regards the nature of the restricted interest of Hindu female, in view of the diversity of doctrine on the subject as follows:

".....The Legislature by enacting sub-sec.(1) of Sec.14, intended as pointed out by this Court in *S.S. Munnalal v. S.S. Rajkumar*, A.I.R. 1962 S.C. 1493: (1962) 3 S.C.R. (Supp.) 418, to convert the interest which a Hindu female has in property, however restricted the nature of that interest under the Sastric Hindu law may be, into absolute estate". This Court pointed out that the Hindu Succession Act 1956 is a codifying enactment, and has made far-reaching changes in the structure of the Hindu Law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance and sweeps away the traditional limitations of her powers of disposition which were regarded under the Hindu Law as inherent in her estate". Sub-sec.(1) of Sec.14, is wide in its scope and ambit and uses language of great amplitude. It says that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The words "any property" are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all comprehensive, the

Legislature has enacted an explanation which says that property would include "both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement" of the Act. Whatever be the kind of property, movable or immovable and whichever be the mode of acquisition, it would be covered by sub-sec.(1) of Sec.14, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Sastric Law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelage and to recognize her status as an independent and absolute owner of property. This Court has also in a series of decisions given a most expansive interpretation to the language of sub-sec.(1) of Sec.14 with a view to advancing the social purpose, of the legislation and as part of that process, construed the words 'possessed of' also in a broad sense and in their widest connotation. It was pointed out by this Court in *Gumalapura Taggina Metada Kotturawami v. Setra Veeravva*, (1959)1 S.C.R. (Supp.) 968: A.I.R. 1959 S.C. 577, that the words 'possessed of' mean "the state of owning or having in one's hand or power". It need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law. It may be actual or constructive or in any form recognised by law. Elaborating the concept, this Court pointed out in *Mangal Singh v. Rattne*, A.I.R. 1967 S.C. 1786, that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of the property, provided of course, that she has not parted with her rights and is capable of obtaining possession of the property. It will, therefore, be soon that sub-sec.(1) of Sec.14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including

acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or the subsequently acquired and possessed, she would become the full owner of the property.

xxx xxx xxx

Now, sub-sec.(2) of Sec.14 provides that nothing contained in sub-sec.(1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. This provision is more in the nature of a proviso or exception to sub-sec.(1) and it was regarded as such by this Court in *Badri Prasad v. Snu.Kanso Devi*, (1970)2 S.C.J. 114: A.I.R. 1970 S.C. 1963: (1970)2 S.C.R. 95. It excepts certain kinds of acquisition, of property by a Hindu female from the operation of sub-sec.(1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of woman in Hindu Society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-sec.(1). It cannot be interpreted in a manner which would rob sub-sec.(1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-sec.(1). The language of sub-sec.(2) is apparently wide to include acquisition of property by a Hindu female under an instrument or a decree or order or award where the instrument, decree, order or award prescribes a restricted estate for her in the property and this would apparently cover a case where property is given to a Hindu female at a partition or in lieu of maintenance and the instrument, decree, order or award giving such property prescribes limited interest for her in the property. But that would virtually emasculate sub-sec.(1), for in that event, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument, order or award and would be excluded from the operation of the beneficial provision enacted in sub-sec.(1), since in most of such cases, where property is allotted to the Hindu female prior to the enactment of

the Act, there would be a provision in consonance with the old Sastric law then prevailing, prescribing limited interest in the property and where property is given to the Hindu female subsequent to the enactment of the Act, it would be the easiest thing for the dominant male to provide that the Hindu female shall have only a restricted interest in the property and thus make a mockery of sub-sec.(1). The Explanation to sub-sec.(1) which includes within the scope of that sub-section property acquired by a female Hindu at a partition or in lieu of maintenance would not contain a provision prescribing restricted estate in the property. The social purpose of the law would be frustrated and the reformist zeal underlying the statutory provision would be chilled. That surely could never have been the intention of the Legislature in enacting sub-sec.(2). It is an elementary rule of construction that no provision of a statute should be constructed in isolation but it should be construed with reference to the context and in the light of other provisions of the statute so as, as far as possible to make a consistent enactment of the whole statute. Sub-sec.(2) must, therefore, be read in the context of sub-sec.(1) so as to leave as large a scope for operation as possible to sub-sec.(1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which, prescribe a restricted estate in the property. This constructional approach finds support in the decision in *Badri Prasad's case*, A.I.R. 1970 S.C. 963: 1970 M.L.J. (Crl.) 509: (1970) 2 S.C.J. 299: 1970 Crl.L.J. 88, where this Court observed that sub-sec.(2) "can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property."

Proceeding further, the Supreme Court has dealt with the Legislative intent, and stated conclusively,

"This circumstance would also seem to indicate that the legislative intendment was that sub-sec.(2) should be applicable only to cases where acquisition of property is made by a Hindu female for the first time without any

pre-existing right-a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-sec.(2) even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property."

5. A Bench of this Court, to which one of us was a member, in O.S.A.Nos.29 and 30 of 1982 *Doraibabu v K.Masilamani*, judgment, dated 29.4.1991, dealt with a case which had arisen on the following facts: One Thirumalai Chetti died on 28.9.1944, leaving behind Mylai Ammal *alias* Alamelu Ammal, his widow. At the time of his death, he constituted a joint family with his two brothers Govindarajulu Chetty and Jagannatha Chetty, and possessed joint family properties. Mylai Ammal became entitled to her husband's share in the joint family properties along with her grandson Doraibabu under the Hindu Women's Right to Property Act, 1937, to the extent of one-sixth share in the joint family properties. Suits were filed for partition, and a preliminary decree was passed on 13.3.1946 awarding one-sixth share to Mylai Ammal. In the final decree dated 18.3.1947, Mylai Ammal was allotted 9 items of properties with limited estate for her one-sixth share in addition to cash of Rs.10,374-6-0. In the said suit, one Gopalakrishna Chetty was awarded a right of maintenance as the illegitimate son, even though he had claimed a share in the properties. Gopalakrishna Chetty subsequently instituted another suit against Mylai Ammal and others claiming that he was entitled to a separate interest in the properties belonging to the share of his father Thirumalai Chetty. A preliminary decree was passed on 4.4.1955 granting a share to Gopalakrishna Chetty and modifying the share allotted to Mylai Ammal to 5/12 share with limited interest in the suit properties and also that after the death of Mylai Ammal, her share would devolve on Gopalakrishna Chetty and the first defendant in C.S.No.313 of 1976, that is to say, the grandson in the ratio of 1/4 : 3/4 respectively. The grandson and another preferred appeals against the preliminary decree in the suit by Gopalakrishna Chetty. During the pendency of the appeal, a compromise was arrived at on 24.6.1960, under which Mylai Ammal was allotted 7 houses, that is to say, the suit properties and a cash of

Rs.9820. The compromise provided that the first defendant in the suit and Gopalakrishna Chetty should take the suit properties allotted to Mylai Ammal in the ratio of 3 : 1 after her death. A final decree was accordingly passed on 28.6.1960. Mylai Ammal, however, executed a settlement deed on 12.6.1967 in favour of another person. He filed C.S.No.313 of 1976 saying that Mylai Ammal had absolute interest and that she had executed the settlement deed as the full owner of the properties. The question that arose for consideration in the suit, and ultimately in the appeals, O.S.A.Nos.29 of 1982 and 30 of 1992, was whether the compromise decree granting a life interest was one falling under sub-sec.(2) of Sec.14 of the Act or was one that was arrived at only for recognition of the pre-existing rights with respect to which the suits were contested between the parties, although the compromise decree was passed after the Hindu Succession Act came into force. The Bench referred to the judgment in *V.Tulasamma v. V.Sesha Reddi*, (1978)1 S.C.J. 29: (1978)1 An.W.R. (S.C.) 6: A.I.R. 1977 S.C. 1944, and other authorities on the subject and held as follows:

"We have already noticed that it was only in acknowledgement of the pre-existing right of Mylai Ammal in the preliminary decree and the final decree in C.S.No.608 of 1949, she was given a share in the properties and that thereafter it was said that after her demise, her grandson and the illegitimate son of her husband would divide the properties in the manner indicated therein. This division as indicated in the final decree is said to be a result of a compromise. We have also noticed that it is not possible to say that Mylai Ammal had evidently given up her absolute interest that had accrued to her under Sec.14(1) of the Hindu Succession Act. The right that Mylai Ammal exercised during her life time with respect to the properties belonging to her was not one acquired by her for the first time under the civil court's decree. It would be in consonance with the observation of the Supreme Court to hold that mention of any division of her properties after her demise between her grandson and the illegitimate son of her husband was not binding upon her because if held otherwise, it would virtually be a concession to dominant males to succeed providing to a Hindu female only a restricted interest in the

properties, one of the instances referred to in *V.Tulasamma v. V.Sesha Reddi*, (1978)1 S.C.J. 299: (1978)1 An.W.R. (S.C.) 6: A.I.R. 1977 S.C. 1944."

6. On the heels of the judgment of this Court, and obviously without reference to the Judgment in O.S.A.Nos.29 and 30 of 1982 has come a judgment by the Supreme Court in *Thota Sesharathamma v. Thotta Manikyamma*, (1991)4 S.C.C. 312. The facts in the case before the Supreme Court are almost similar to the facts in the instant case. One Thota Madhav Rao, the plaintiff, filed a suit against Thota Manikayamma on the allegation that his father Yellamanda and the husband of Thota Manikyamma were brothers. As Manikayamma and her husband had no issue, they brought up Thota Madhav Rao as their foster son from the age of 8 years, and thereafter he continued to live with them and was brought up treating him as their own son. Manikyamma's husband died on January, 14, 1932. Before his death, he executed a will bequeathing the suit properties in favour of his wife Manikyamma for her life with a vested remainder in favour of Thota Madhav Rao. Manikyamma, however, executed a registered will on October 26, 1969, bequeathing the suit properties in favour of one Ramiseti Koteswara Rao. Thota Madhav Rao claimed absolute right in the suit properties after the lifetime of Manikyamma. The question involved in the suit was whether the life interest in the property acquired by Thota Manikyamma under the will executed by her husband and continued to be in her possession became her absolute property under Sec.14(1) of the Act. There were other cases having similar facts which were brought before the Supreme Court by Special Leave. The Supreme Court has referred to the judgment in the case of *Badri Pershad v. Smt. Kanso Devi*, A.I.R. 1970 S.C. 963: 1970 M.L.J. (Crl.) 599: (1970)2 S.C.J. 299: 1970 Crl.L.J. 885, *Mst.Karmi v. Amru*, A.I.R. 1971 S.C. 745, and *V.Tulasamma v. V.Sesha Reddi*, (1978)1 S.C.J. 299: (1978)1 An.W.R. (S.C.) 6: A.I.R. 1977 S.C. 1944, supra, and then stated the law as follows:

"A mention of all the above cases shows that this Court in a long series of case has taken a consistent view that Sec.14(2) of the Act is in the nature of a proviso or an exception to Sec.14(1) and comes into operation only if acquisition in any of the methods indicated therein is made for the first time without there

being any pre-existing right in the female Hindu to the property. If the case falls under the provisions of Sec.14(1) of the Act then the female Hindu shall be held to be full owner of the property and sub-sec.(2) of Sec.14 will only apply where the property is acquired without there being any pre-existing right of the female Hindu in such property. Thus we affirm and reiterate that sub-sec.(2) of Sec.14 will be construed more in the nature of a proviso or an exception to sub-sec.(1) of Sec.14 of the Act. This view lends support to the subject of the section which was to remove the disability on women imposed by law and to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society."

K.Ramaswamy, J. supplementing the above view, reiterated and indicated how in *V.Tulasamma's case*, (1978)1 S.C.J. 299; (1978)1 An.W.R. (S.C.) 6; A.I.R. 1977 S.C. 1944, the Supreme Court has recognised the social purpose and stated as follows:

"Sub-sec.(1) of Sec.14 cannot be interpreted in a manner which would deprive the Hindu women of the protection sought to be given to her by sub-sec.(1). The social purpose of the law would be frustrated and reformist zeal underlying the statutory provisions would be chilled. It was not the intention of the legislature in enacting sub-sec.(2) which must be construed as an exception or a proviso to sub-sec.(1). No provision should be construed in isolation and should be read in the context so as to take a consistent enactment of the whole statute. Sub-sec.(2) must be read in the context of sub-sec.(1) of Sec.14 and if so read sub-sec.(2) must be confined to cases where the Hindu female acquires the property for the first time as a grant without any pre-existing right to the property under a will or by way of gift or in any other instruments or a decree or order of the civil court or an award, the terms of which prescribe a restricted estate in the property. Sub-sec.(2) must be read as an exception or proviso to sub-sec.(1) so as to leave as large a scope for operation as possible to sub-sec.(1) of Sec.14. It was, therefore, held that the property given to Tulasamma in a compromise decree in lieu of her maintenance with restricted estate known as widow's estate in Hindu law was enlarged

and she became an absolute owner under the Act. She had the right to alienate the property in favour of others."

In this judgment, K.Ramaswamy, J., has referred to other judgments of the Supreme Court on the subject, and finally said:

"Thus I hold that the Act revolutionised the status of a Hindu female; used Sec.14(1) as a tool to undo past injustice to elevate her to equal status with dignity of person on par with man; extinguished pre-existing limitation of women's estate, or widow's estate known to Shastric Law and removed all the fetters to blossom the same into full ownership. The discrimination suffered by Hindu female under Sastric law was exterminated by legislative fiat. The social change thus envisaged must be endeavoured to be given full vigour, thrust and efficacy. Sec.14(1) enlarges the restricted estate into full ownership when the Hindu female has pre-existing right to maintenance etc. Sub-sec.(2) operates when the grant was made for the first time under the document with no pre-existing right. Sub-sec.(2), therefore, must be read as an exception or a proviso to sub-sec.(1). Both the sub-sections read with the explanation to be pragmatically considered as a constituent integral scheme. The court would sit in the armchair of the testator or its maker and summon to its aid the attending circumstances to execute the instrument; the relationship of the parties and to see whether the Hindu female acquired the property with vestige of pre-existing right and the will, gift deed, order, decree or an award of the civil court or in any of the forms known to law was executed in recognition thereof or entitled under the existing law. If the finding is positive her limited estate, though created with restrictive covenants in instrument or an omission to expressly so mention in full particulars thereof in the instrument in that regard are of little consequence. Her limited estate gets blossomed into full ownership under Sec.14(1) with a right to bequeath, gift over, alienate or to deal in any manner recognised by law. If on the other hand the Hindu female acquires for the first time the title therein as a grant with restrictive estate under the instrument with on pre-existing title or right, sub-sec.(2) of Sec.14 gets attracted and the restrictive covenants

contained in the instrument would bind her. She remains to be a limited owner in terms thereof. The subsequent alienee or transverse acquires no higher right thereunder than the legatee etc. The reversioner to the last male holder is not bound by such transfer and is entitled to succeed to the estate, on her demise, in terms of the instrument. It is too late in the day to take retrograde step to reopen *Tulasamma* ratio."

7. Coming to the facts of the case in the suit instituted by Thota Madhav Rao, the Supreme Court has said:

"The courts are not giving retrospective operation to Sec.14(1) or to the instrument. The courts only would be applying the law to the facts found as on the date when the question arose to find whether legatee has pre-existing vestige of title under law; and the nature of possession of the property held by her and whether the legatee would get the benefit of Sec.14(1) of the Act. There need be no express recital even in the will of the enjoyment of the property devised under the will in lieu of maintenance as a limited owner for her life. Even if so mentioned, it would be a reflection or restatement of the law existing as in 1932 when the will was executed. The respondent, admittedly, being a widow of the testator who, under Shastric Law, was obliged to provide maintenance to his wife, and it being personal obligation, the property bequeathed was in lieu of maintenance for her life. She was in enjoyment of the property and the beneficial interest therein stood vested in her. As per existing law as in 1932 the widow as a legatee was entitled to widow's estate and she remained in possession on the date the Act came into force and was in enjoyment of the income derived therefrom for her life. No one had a right to interdict it. The restrictive covenant, therefore, does not stand an impediment to Sec.14(1) to have full play to extinguish the same and enlarge the limited estate of widow into an absolute ownership. The restrictions contained in the will, though falls both under sub-sec.(2) as well as sub-sec.(1), of Sec.14 the right to maintenance being a pre-existing right over property "*res ad rem*" Sec.14(1) would apply. The testamentary succession with restrictive conditions in the will was

obliterated. She became an absolute owner on or after June 17, 1956. Accordingly, I have no hesitation to hold that, though the will created a restrictive covenant, Sec.14(2) does not apply. Sec.14(1) enlarged the widow's limited estate held by Manikyamma into an absolute ownership as full owner with a right to disposition by testamentary instrument or otherwise."

8. Coming to the facts of the instant case, we cannot fail to notice that the right to maintenance which Soundarathammal before the Hindu Women's Right to Property Act came into force, had matured into a statutory right giving to her a limited interest for life, and the recitals abovequoted thus recognised only a pre-existing right in her and extended the benefits, after her death to the reversioners who had vested remainders to inherit, the consequence of which the law then existing had pre-determined. Such recognition of the pre-existing vestige of title under law and the nature of possession of the property she had, must be allowed to be enlarged under Sec.14(1) of the Act as it was not a grant coming to her under the testament without there being any pre-existing right in her to succeed to the estate of her husband on his demise, having a life interest.

9. We fail thus to understand how on the facts as above, the court can say that a specific pleading would be needed that the will under which Soundarathammal entered upon the property had been executed in recognition of a pre-existing right against the property and/or that unless such a recital is found in the will, it will not be permissible for the widow or any person claiming through her to say that the will only recognised a pre-existing right. We are of the opinion that the learned single Judge has committed an error of law and that he has not applied the law engrafted in Secs.14(1) and 14(2) of the Act properly on the Acts of the case.

10. To be fair, however, to learned Counsel for the respondents, we must also refer to a judgment of the Supreme Court in *S.Rajagopala Chettiar v. Hamsaveni Ammal*, (1991)4 S.C.C. 383, which ended with an extract from the Judgment of the High Court and the recitals in the will. The recitals, it seems were not similar to the one in the case of *Thota Sesharathamma v. Thota Manikyamma*, (1991)4 S.C.C. 312, and the recitals in the will of Sundaram Pillai under consideration by us. The

Supreme Court has said:

"The question which arises on the basis of the contents of the above will is whether Rajalakshmi Ammal had acquired a life estate under the will or an absolute estate. The High Court took the view that it was one of the cardinal principles of construction of wills that so far as legally possible effect should be given to every disposition contained in the will unless the law prevents such effect being given to it. The High Court held that the fact that the testator directed that after Rajalakshmi Ammal it shall go to her male children clearly showed an intention that Rajalakshmi Ammal's interest in the properties should not be absolute."

One can see the obvious distinctions in the rights in the estate of Rajalakshmi Ammal and the estate in the hands of Manikyamma in the case of *Thota Sesharathamma v. Thota Manikyamma*, (1991)4 S.C.C. 312. Whereas limited estate in the hands of Manikyamma on her demise was determined to go to the vested remainder, in the case of Rajalakshmi to go to her male child only a departure from the pre-existing law. On these facts, the Supreme Court has said in the case of *S.Rajagopal Chettiar*, (1991)4 S.C.C. 383,

"After going through the contents of the will we agree with the view taken by the High Court. We do not agree with the contention of the learned counsel for the appellant raised before us that Padmanabha Chettiar, the testator of the will wanted to give absolute right in the property to his wife Dhanalakshmi Ammal and thereafter absolute right in favour of his daughter Rajalakshmi Ammal. The above intention is negatived by a clear mention in the will that after Rajalakshmi Ammal the property shall ultimately go to her male children. In case the intent of the testator was to give the properties absolute in favour of Rajalakshmi and not merely life interest then there was no question of mentioning that after her it should go to her male children."

11. An attempt, however, was made in the case of *S.Rajagopal Chettiar*, (1991)4 S.C.C. 383, before the Supreme Court to consider whether the life interest of Rajalakshmi Ammal under the will became absolute under Sec.14(1) of the Act. The Supreme Court, however, declined to enter into that contention saying:

"This contention was neither raised in any of the

Courts below nor before the High Court nor in the petitioner for special leave and we cannot permit this ground to be raised for the first time before us during the course of arguments."

12. The principles of law stated in *S.Rajagopal Chettiar*, (1991)4 S.C.C. 383, are not different from the principles of law stated in the case of *Thota Sesharathamma*, (1991)4 S.C.C. 312. We are satisfied that the judgment under Appeal has not been delivered in accordance with law. It is accordingly set aside. The Judgment and Decree of the trial Court are confirmed. The appeal is allowed. On the facts of the case, however, we are making no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

O.S.A.Nos.84 of 1981 and 180 of 1981

25th February, 1992.

The Managing Director, M/s.Dunlop India Ltd. and others

...Appellants

v.

S.G.Krishnakumari and others *...Respondents.*

(A) *Torts - Negligence - Accident - Proof of negligence - Onus.*

(B) *Maxim 'Res ipsa loquitur' Scope and Applicability of - (Maxims - Res ipsa loquitur).* The maxim *res ipsa loquitur* does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the

knowledge of the defendant. But though the parties' relative access to evidence an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an advance inference against him if the odds otherwise point to his negligence. The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on common-sense and its purpose is to do justice when the facts bearing on causation and on the case exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. In the case of fatal accident, thus, when the victim of the accident himself is no more to disclose all the facts and his heirs and legal representatives know not how the death occurred beyond knowing that he suffered the accident while performing his duty, that the circumstances prove the result and once the result is proved by them, they make it probable that it was caused by the negligence of the defendant. On such facts and doctrine of *res ipsa loquitur*, the court must ask the defendant to explain how the accident occurred and how the defendant is not guilty of negligence. This has to apply, particularly when it is not in doubt that in the ordinary course of things the accident would not have occurred if the management had used proper care. A court can deduce from the evidence and only a reasonable deduction will have the validity of legal proof. The court cannot recognise fanciful theories unsupported by evidence how the event might have occurred. In other words, the court shall not enter into assumption or guess or conjecture first to rule out lack of due care or act of negligence of the management.

[Paras 6 and 12]

Cases referred to:

Jeet Kumari v. Chittagong, A.I.R. 1947 Cal. 195. [Paras 5, 6]

Shyam Sunder v. State of Rajasthan, A.I.R. 1974 S.C. 890. [Paras 6, 7]

Scott v London and St., Katherine Docks, (1865) 3 H. and C. 596. [Para 6]

Ballards v. North British Railway, Company, 1923 S.C. (H.L.) 43. [Para 6]

Barkway v. South Wales Transport, (1950) 1 All E.R. 392. [Para 6]

Jones v. Great Western, (1930) 47 T.L.R. 39. [Para 7]

G.K.S. Iyer v. T.K. Nair, A.I.R. 1970 S.C. 876.

[Para 14]

Taff Vale Railway Company v. Jenkins, 1913 A.C. 1. [Para 14]

Appeals under Clause 15 of the Letters Patent against the order of Shanmugham, J., dated 25.4.1979 and made in the exercise of the ordinary original civil jurisdiction of the High Court in C.S.No.183 of 1974 Pauper.

The Judgment of the Court was delivered by *Mishra, J.*:- This is a "most pathetic case" to borrow the words of the learned trial Judge, where a dutiful servant, who was employed as senior charge-hand, Card No.450 in the Electrical Department of the factory of the first defendant-respondent in O.S.No.180 of 1981 and appellant in O.S.No.84 of 1981, had a fatal fall while attending to his duty and where consequently his widow and two children moved the court for compensation.

2. On 10.10.1970, at about 6.45 p.m. while Gopalakrishnamurthy was attending to his duty, he had a fatal fall. He sustained injuries to his brain and spine solely on account of the accident. He died on account of the injuries sustained on account of the fall while on duty, at about 10.30 p.m. on 10.10.1970. He was the only bread earner for the widow, the first plaintiff, and the two young children, Plaintiffs 2 and 3. He died at the age of 34 years, In the ordinary course he would have superannuated only on attaining the age of 55 years. There has been some dispute as to the total emoluments actually drawn by him until his death, but there is proof on record that he was getting a total emolument of Rs.617-81 per month.

3. Although there were three defendants in the suit, only one contested, that is to say, the first defendant, the Managing Director of Dunlop (India) Ltd., who stated in the written statement that Gopalakrishnamurthy instructed one K.Narayanan, a driver of fork lift truck to hoist him to 'C' line sky wrecker Panel situate at a height of about 15 feet from the ground level in front of C-6 Mabath Press, and while so attending to the work by standing on the forks of the said truck, he instructed the driver to lower the fork and reverse it and that when the driver did so, he (Gopalakrishnamurthy) lost his balance and fell down, and later died at the Government Hospital at about 10.50 p.m. on 10.10.1970. To quote from the judgment of the trial court.

"According to the 1st defendant, as per rule 5

under Chapter "Persons Falling" in the defendant's Factory Safety Code, no one but the driver should be allowed to ride on a fork lift truck, therefore any act done by the employee liable to cause danger to himself or to his co-workers and failure to observe factory instructions constitute misconduct under Clauses 22 and 24 of the defendant's standing orders and that therefore, Gopalakrishnamurthy died due to his own negligence."

4. The plaintiffs, who *in forma pauperis* estimated the damage at Rs.3,00,000, however, restricted the claim to Rs.2,00,000. The trial court dismissed the suit, but ordered.

".....in the peculiar circumstances without costs; so too, I direct the 1st defendant to pay the court-fee payable to the Government because the deceased met with the accident in his anxiety to carry out immediately repairs to sky wrecker."

While the plaintiffs appealed against the dismissal of the suit, the first defendant appealed against the order directing him to pay the court-fee. The two appeals have been posted for hearing. They have been heard together. They are being disposed of under a common judgment.

5. We have not detailed many facts which are stated in the plaint and controverted in the written statement, and further facts that are stated in the written statement, for we shall presently notice that before the trial court, the first defendant gave up the dispute as to the claim of the first plaintiff that she was the wife of the deceased, and that of plaintiffs 2 and 3 that they were the legitimate children of the deceased. The learned trial Judge mainly took up two issues, (1) whether Gopalakrishnamurthy died due to the negligence of the 1st defendant, and (2) whether Gopalakrishnamurthy met with the accident on account of his own negligence as alleged in paragraph 11 of the written statement, and proceeded to examine the same by stating as follows:

"Really the burden is on the plaintiffs to establish that the unfortunate accident took place solely due to the negligence of the 1st defendant; only then, will the plaintiffs be entitled to sustain their claim for damages as against the 1st defendant, the employer of the deceased."

This, he stated, it appears, on a reference to the decision brought to his notice in the case of *Jeet Kumari v. Chittagong, A.I.R. 1947 Cal. 195*. In the

said decision, it had been ruled.

"There is no liability for negligence unless there is in the particular case a legal duty to take care. Where there is no duty to exercise care at all, negligence in the popular sense has no legal consequences. Two things have to be kept distinct. First, there must be the existence of such a legal duty to take care; and secondly the decree or amount of care which is obligatory."

6. What is stated in the judgment of the Calcutta High Court, in *Jeet Kumari v. Chittagong, A.I.R. 1947 Cal. 195* is not on the principle of burden of proof. A landmark judgment of the Supreme Court in *Shyam Sunder v. State of Rajasthan, A.I.R. 1974 S.C. 890*, has made it clear that the maxim *res ipsa loquitur* is attracted to a case under Fatal Accidents Act, and the meaning of the word 'negligence' should be understood in the light of the said maxim for the purpose of proving such negligence by the employer. The Supreme Court has said.

"The *maxims res ipsa loquitur* is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negligence of the defendant. The fact of the accident may, sometimes, constitute evidence of negligence and then the *maxim res ipsa loquitur* applies."

How to understand the maxim is also stated in *Shyam Sunder v. State of Rajasthan, A.I.R. 1974 S.C. 890*, cases supra. The Supreme Court has said,

"The maxim is stated in its classic form by Erle, C.J. See *Scott v. London and St. Katherine Docks, (1865) 3 H. and C. 596, 601*:

".....Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked

that "If the phrase had not been in Latin, nobody would have called it a principle. See *Ballard v. North British Railway, Company*, 1923 S.C. (H.L.) 43. The maxim is only convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without, having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him if the odds otherwise point to his negligence. (See John G. Fleming. *The Law of Torts*, 4th ed. p.264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (See *Barkway v. South Wales Transport*, (1950) 1 All E.R. 392, 399).

Based upon the above, the Supreme Court has said,

"The plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it makes it more probable than not that it was caused by the negligence of the defendant, the doctrine of *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability."

In the case of fatal accident, thus, when the victim of the accident himself is no more to disclose all the facts, and his heirs and legal representatives know not how the death occurred, beyond knowing that he suffered the accident while performing his duty, that the circumstances prove the result, and once the result is proved by them, they make it probable that it was caused by the negligence of

the defendant. On such facts and doctrine of *res ipsa loquitur*, the Court must ask the defendant to explain how the accident occurred, and how the defendant is not guilty of negligence. This has to apply, particularly when it is not in doubt that in the ordinary course of things the accident would not have occurred if the management had used proper care.

7. The Supreme Court has also pointed out that in such cases, the answer needed by the defendant to meet the plaintiff's case may take alternative forms, and firstly it may consist in a positive explanation by the defendant of how the accident did in fact occur, of such a kind as to exonerate the defendant from any charge of negligence. In such a case of defence, the Supreme Court said, it should be noticed that the defendant does not advance his case by inventing fanciful theories unsupported by evidence, of how the event might have occurred, and the whole inquiry is concerned with probabilities, and facts are required, not mere conjecture unsupported by facts. Here again, another caution.

"As Lord Macmillan said in his dissenting judgment in *Jones v. Great Western*, (1930) 47 T.L.R. 39.

"The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved."

Thus it is said,

"...an inference is a deduction from established facts and an assumption or a guess is something quite different but not necessarily related to established facts."

The above is the method applied when the defendant gives a positive explanation of how the

accident did in fact occur. In a case, however, where the defendant is unable to explain the accident, the Supreme Court has pointed out,

"...It is incumbent upon him to advance positive proof that he had taken all reasonable steps to avert foreseeable harm."

The Supreme Court has, in *Shyam Sundar's case*, A.I.R. 1974 S.C. 890 not minced words, and recognised that "over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to plaintiffs", and said,

"Concomitant with the rise in safety standards and expanding knowledge of the mechanical devices of our age, less hesitation is felt in concluding that the miscarriage of a familiar activity is so unusual that it is most probably the result of some fault on the part of whoever is responsible for its safe performance."

8. The learned trial Judge has thus committed error of law in saying that the burden is on the plaintiffs to establish that the unfortunate accident took place solely due to the negligence of the first defendant and only then will the plaintiffs be entitled to sustain their claim for damages as against the 1st defendant, the employer of the deceased. He was not made aware of the *maxim res ipsa loquitur*, and the fact that when it was shown that the accident took place when the victim was working in the factory of the first defendant, he should call upon the management to explain by positive proof how the accident did in fact occur and whether the management had taken all reasonable steps to avert foreseeable harm. The learned trial Judge asked none of these questions. He has thus fallen in error and denied on account of such error only the claim which the heirs and legal representatives of the victim should receive in an action in tort.

9. Learned counsel for the first defendant management, however, has drawn our attention to the pleading in paragraph 5 of the written statement in particular, wherein it is said in answer to the allegations contained in paragraph 7 of the plaint, as follows:

"The deceased instead of using a ladder instructed one Mr. K. Narayanan, Ch. No. 2293, a driver of a Fork Lift Truck, to hoist him to the said 'C' Line Panel. While so attending to the work by standing on the forks of the said truck, the deceased instructed the driver to lower the fork and reverse it. When the driver did so, the

deceased lost his balance and fell down at about 6.25 p.m., and later died at the Government Hospital, Madras, at about 10.50 p.m. on 10.10.1970."

and further,

"This defendant states that as per Rule 5 under Chapter "Persons Falling" in the Defendant's Factory Safety Code, no one but the driver should be allowed to ride on a fork lift truck. This defendant further submits that any act done by the employee liable to cause danger to himself or to his co-workers and failure to observe factory instructions constitute misconduct under clauses XXII and XXIV of the Defendant's Standing Orders. Thus it may be seen that Gopalakrishnamurthy died due to his own negligence."

and contended that the management has advanced a positive explanation as to how the accident did in fact occur. He has taken us through the evidence of the witnesses and to the standing Orders and the Safety Code of the Factory. The booklet called "Our Factory Safety Code" brought on the record does not bear any print line. There is no evidence showing when the Safety Code was published and when enforced. D. W. 2., who has described himself as Safety Manager, has said that his two-fold functions were, (1) to prevent accidents by promoting safety consciousness among the employees; and (2) to investigate accidents so as to prevent their recurring in the factory, and deposed that there is a Factory Safety Code compiled by him (D. W. 2.), the booklet which we have seen already; but the exact day when it was prepared, he did not remember. He was put on the job in 1960, and it took three months, he thought it should be in the year 1964. When asked whether it was issued to every member, he answered "yes", and added that subsequently even the new entrants of the factory were also issued with a copy as part of the induction training, and that Gopalakrishnamurthy was also furnished with a copy. But no other evidence is available to corroborate his oral testimony. It is not known thus who furnished a copy of the so-called "Safety Code" to Gopalakrishnamurthy and when a copy of the Safety Code was furnished to Gopalakrishnamurthy.

10. On the question how the accident occurred, D. W. 1 is the sole witness. He was a fitter at the relevant time working in the Engineering Department of the Factory. He has stated that he was

present at the time of the accident. A mould had to be fixed in B6 Pressing machine. He was carrying the mould in the fork lift. There were three lines. He took the mould in the C-line. At that time, Gopalakrishnamurthy was working, attending to break-down in 'C' Line. There was some Electrical trouble in the machine called "Skyraker". He was waiting in front of skyraker. When this witness neared him, he wanted him (the witness) to lift him (victim) up to attend to some repairs, which he said would take only two minutes. Obeying him, this witness lifted the victim in the fork lift. The victim gave some connections in the line and finished his job. After that, this witness has said;

"I lowered the fork lift and reversed it. At that time, he was having the fuse-carriers, test lamps and other things in his hands. When the fork lift was in the reverse direction, there was a jerk and he fell down."

If there is anything in this narration, it shows that the victim had the concern of the management in his mind that he wanted to make some repairs in the Skyraker. When D.W.1 came near him, he asked him to lift him to complete the work. This witness lifted him and he (victim) gave connections in the line and finished his job. The accident occurred when this witness lowered the fork lift and reversed it. When asked, "was the fork lift in a good condition?", this witness answered "yes". It was in good condition" and when asked whether the accident occurred due to defects in the fork lift, he said, "I cannot say."

11. We have also been taken through the evidence of D.W.3, the Shift Engineer, who was responsible to maintain plant machinery. He was informed about the accident by a co-worker, and made entry in the accident register. He has deposed that the victim should not have used fork lift truck, and instead, should have used the ladder that was available. His evidence about the condition of the fork lift truck is not based upon any personal knowledge. He has said,

"It was in good condition. Otherwise, Mr.Narayanan (D.W.1) could not have changed the mould. He was able to ride and use. It was perfect."

The evidence that the management has produced has substantially fallen short of any positive proof that it had taken all reasonable steps to avert any foreseeable harm or that it had used proper care, and that the accident arose not from want of care.

It is not in dispute that Narayanan (D.W.1) lifted the victim (the deceased) in the fork lift and when he finished his job, Narayanan lowered the fork lift and reversed it. When the fork lift was in the reverse direction, there was a jerk, and the victim fell down. Thus, the accident occurred not on account of any carelessness of the victim, but on account of the reversal of the fork lift by D.W.1 and the jerk that followed. There is nothing to establish conclusively that the victim violated any instruction or Standing Order or Rule, by asking D.W.1 to lift him in the fork lift. There is also nothing to show that there was any ladder nearby except the oral testimony above-noticed, and that by not using the ladder, the victim had violated any of the instructions. In view of the above, it is a case, in our opinion, in which it can be reasonably said that the accident in which Gopalakrishnamurthy sustained injuries was one which does not happen in the ordinary course of things. There is no reliable evidence that the fork lift was in a good condition or that the management had used proper care to ensure that no such accident occurred. In other words, there is neither a positive explanation by the first defendant of how the accident did in fact occur, nor there is any positive proof advanced by him that he had taken all reasonable steps to avert the accident.

12. A court can deduce from the evidence, and only a reasonable deduction will have the validity of legal proof. The Court cannot recognise fanciful theories unsupported by evidence how the event might have occurred. In other words, the court shall not enter into assumption or guess or conjecture first to rule out lack of due care or act of negligence of the management. It is a case, in our opinion, in which the learned trial Judge should have found, as we have found, that the management has failed to discharge the onus of proof, and the plaintiffs have proved the Accident, and that in the circumstances, it could have happened only on account of the negligence of the management.

13. Since the case failed before the trial court for the reason of a mistake of law, the trial court made no attempt to ascertain the quantum of damages. It is not in dispute that the victim was 34 years old at the time of his death. Learned counsel for the first defendant has drawn our attention to a standing order under which an employee of the first defendant superannuated at the age of 55. The

victim Gopalakrishnamurthy would have served for atleast another 21 years and superannuated, but for, the reasons of Providence or otherwise, termination of his service. In any case, he would have earned the bread of his family until his demise, which in the ordinary circumstance one can always fix until the age of superannuation, if not more. We have already found that inspite of a controversy created as to the emoluments, it is proved beyond doubt that Gopalakrishnamurthy received emoluments, all told, Rs.617-81 per month. We do not have any material to show whether he had earned any provident fund and/or gratuity or would have earned had he continued in service. In fact, there is no such case pleaded in the plaint, and no evidence also taken by either side in this behalf. Calculated on the basis of salary/emoluments last drawn by the victim, had he lived and served in the capacity he was serving, he would have drawn Rs.617.81 per month, if not more. In this, we do not take notice of the increase in emoluments and/or any promotions that the victim would have earned in course of his tenure of service. Calculated on that basis, thus, for period of 21 years, the minimum that the victim would have earned can be worked out at Rs.1,55,694 or more. Plaintiffs, in our opinion, are thus entitled to compensation atleast of Rs.1,55,694. (We have not taken into account the fractions).

14. In *G.K.S.Iyer, v. T.K.Nair, A.I.R. 1970 S.C. 876*, it has been pointed out that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact. There must be a basis of fact from which the inference could reasonably be drawn. But, in the words of Lord Atkinson in the decision in *Taff Vale Railway Company v. Jenkins, 1913 A.C. 1*, which case has been referred to by Hegde, J., who delivered the judgment of the court in *G.K.S.Iyer, v. T.K.Nair, A.I.R. 1970 S.C. 876*, case supra.

".....but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence, and the necessary inference can I think be

drawn from circumstances other than and different from them."

It is available in the judgment in *G.K.S.Iyer, v. T.K.Nair, A.I.R. 1970 S.C. 876*, as to how the quantum of compulsory damages under Sec.1-A of Fatal Accidents case should be worked out. The Supreme Court has said,

"The law on the point arising for decision may be summed up thus; Compulsory damages under Sec.1-A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under Sec.2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damage cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In the matter of ascertainment of damages, the appellate court should be slow in disturbing the findings reached by the courts below, if they have taken all the relevant facts into consideration."

We have applied the above rule rather as conservatives in reaching the figures to award compensation to the plaintiffs rather than liberals, who would have granted more in terms of the law on the point as stated by the Supreme Court.

15. The plaintiffs, in our opinion, thus are entitled to compensation of Rs.1,55,694 with interest at the rate of 6 per cent per annum from the date of the application to sue *in forma pauperis*. (Since in the instant case, the suit was instituted *in forma*

pauperis) until realised.

16. In the result, O.S.A.No.180 of 1981 is allowed. The judgment and decree of the trial court are set aside. The suit is decreed for a sum of Rs.1,55,694 with interest at the rate of 6 per cent per annum from the date of the application to sue *in forma pauperis* until realisation with costs throughout. Court-fee payable on the plaint and the memorandum of appeal shall be realised from the first defendant.

17. O.S.A.No.84 of 1981 is disposed of in terms of our order in O.S.A.No.180 of 1981. There will be no order as to costs.

B.S. ----- O.S.A.No.180 of 1981 allowed
and O.S.A.No.84 of 1981 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.No.3237 of 1988 18th August, 1992.

R.Krishnaswamy ...Petitioner
v.

N.Arumugam ...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(c) - Petition for eviction under, by landlord for additional accommodation - No averment as to relative hardship as contemplated by proviso to section - Maintainability.

In a petition for eviction filed under Sec.10(3)(c) of the Act, the landlord should clearly state that he required the petition premises by way of additional accommodation. But according to the proviso, the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. In order to decide this question of hardship, there must be proper pleadings in the petition. If the hardship is not pleaded in the petition, that is fatal to the petition.

[Para 6]

In the present case, the petition filed under

Sec.10(3)(c) of the Act contains no averment with regard to the hardship as contemplated under the proviso to Sec.10(3)(c) of the Act and hence the petition is not maintainable. Therefore, it is liable to be dismissed.

[Para 6]

Cases referred to:

Radhakrishnan v. Seethalakshmi, (1988) 1 L.W. 67.

[Para 6]

Annakkili Ammal v. H.C.Hussain, 97 L.W. 116.

[Para 6]

T.R.Rajagopalan, for Petitioner.

T.R.Mani, Senior Counsel, for *J.M.Hanharan*, for Respondent.

The Court made the following

ORDER:- The tenant is the petitioner herein. The petition for eviction was filed under Secs.10(3)(c) and 14(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as amended by Act 23 of 1976, hereinafter referred to as 'the Act'. The landlord purchased the petition premises along with the downstairs portion from one Ramasubramania Iyer on 6.5.1982. The tenant is in occupation of the upstairs portion and the staircase. The tenant was in the petition premises even prior to the purchase of the premises by the landlord. In the downstairs portion the landlord is conducting a general merchant shop. The tenant is doing business as a newspaper agent. According to the landlord, the portion under his occupation is not sufficient for his business. Hence, he required the portion under the occupation of the tenant *bona fide* by way of additional accommodation under Sec.10(3)(c) of the Act. According to the landlord, the petition premises required extensive repairs. Therefore, he also required the petition premises for repairs under Sec.14(a) of the Act. The tenant filed a suit for injunction against the landlord in O.S.No.523 of 1982 and obtained an order of interim injunction against the landlord. The landlord sent a notice to the tenant dated 16.8.1982 calling upon him to quit and deliver the vacant possession. The tenant sent a reply dated 24.9.1982 refusing to vacate. Hence, the landlord came forward with this petition for eviction.

2. According to the tenant the portion under the occupation of the landlord is sufficient to carry on his business. The tenant submitted that the landlord does not require the portion under the occupation of the tenant *bona fide* under Sec.10(3)(c) of the Act. According to the tenant, the petition

premises is in good condition. Therefore, it requires no repairs. It was, therefore, pleaded that the petition for eviction is liable to be dismissed. The landlord filed Ex.A-1 to Ex.A-5. The tenant filed Ex.B-1 to Ex.B-10. Ex.C-1 is the report filed by the commissioner. The landlord examined himself as P.W.1. The tenant examined himself as R.W.1. Considering the facts arising in this case, the Rent Controller came to the conclusion that the request of the landlord for eviction under Sec.10(3)(c) of the Act and under Sec.14(a) of the Act cannot be acceded to. Accordingly, the petition for eviction was dismissed. On appeal, the Rent Control Appellate Authority came to the conclusion that the landlord established his *bona fide* in requiring the petition premises under Sec.10(3)(c) of the Act. Accordingly, the Rent Control Appellate Authority set aside the order passed by the Rent Controller under Sec.10(3)(c) of the Act. In so far as the order passed by the Rent Controller under Sec.14(a) of the Act is concerned, the same was confirmed by the Rent Control Appellate Authority. It is against this order, the present revision has been preferred by the tenant.

3. The learned counsel appearing for the tenant submitted as under:

There is no *bona fide* on the part of the landlord in requiring the petition premises under Sec.10(3)(c) of the Act. In the petition for eviction the landlord failed to plead hardship that may be caused to him if the tenant is not evicted from the petition premises. There is also no averments to the effect that if the tenant is evicted, the hardship caused to the tenant would not outweigh the advantage to the landlord. The portion under the occupation of the landlord is sufficient for his business and, therefore, his requirement of the petition premises under Sec.10(3)(c) of the Act is not *bona fide*. There is no evidence on record to show that his business was improving so as to require additional accommodation for expanding the business. It is not correct to state that the tenant vacated the premises and conducted his business elsewhere. It is also not correct to state that the tenant sublet the portion under his occupation to a third party. The landlord's business turnover per month does not warrant for additional accommodation. The landlord required the petition premises by way of additional accommodation for his crackers business. The business in crackers is only a seasonal business. In the petition for eviction the landlord

has not stated as to what is the *bona fide* reason for requiring the additional accommodation. The tenant was doing his business in the petition premises for the past several years and if he is vacated, that would cause great hardship to him which would outweigh the advantage that the landlord may get. It was, therefore, pleaded that the first appellate court was not correct in ordering eviction.

4. On the other hand, the learned senior counsel, Mr.T.R.Mani, appearing for the landlord/respondent herein submitted as under:

The landlord purchased the petition premises for the purpose of expanding his business. The landlord is doing business in the downstairs portion as a general merchant and also doing the business in crackers. The portion under the occupation of the landlord is 8 feet x 15 feet. The tenant is not carrying on his business in the upstairs portion. In the staircase, he pulled down three steps and constructed a platform, on which he is doing his business as newspaper agent. The report filed by the commissioner would go to show that in the upstairs portion the tenant dumped a cartload of sand. The upstairs portion was also not kept in good condition. The roof with palm leaves and tin sheets is also in a bad condition. In that small space, the landlord has sunk Rs.5,000 by way of capital for his business and he is earning Rs.300 to Rs.400 per month from the said business. In fact, the tenant has vacated the premises and he is doing his business in a different place. The tenant also sublet the portion under his occupation to a third party, who is doing his business there. The subsequent development of events would go to show that the tenant is not occupying the petition premises. According to the landlord if the tenant is not vacated that would cause great hardship to him. It was, therefore, pleaded that the Rent Control Appellate Authority was correct in ordering eviction under Sec.10(3)(c) of the Act. Since the order passed by the Rent Control Appellate Authority is based upon facts, no further interference is called for.

5. I have heard the rival submissions.

6. The fact remains that originally the premises belonged to one Rama Subramania Iyer. In the said premises in the ground floor the landlord's father was conducting his business as a general merchant and the tenant herein was conducting his business as newspaper agent in the upstairs portion. Later on, on 6.5.1982, the downstairs portion

and the upstairs portion was purchased by the landlord herein. According to the landlord, he required the portion under the occupation of the tenant by way of additional accommodation under Sec.10(3)(c) of the Act. In fact, the tenant is in occupation of the upstairs portion and the staircase. A commissioner was appointed. In the commissioner's report it is stated that the upstairs portion was dumped with a cartload of sand and it is also not in a clean condition. The roof is made up of palm leaves and tinsheets. According to the commissioner, there are holes in the roof. The tenant pulled down three of the steps in the staircase and constructed a platform, on which he is doing his business as a newspaper agent. According to the landlord the portion under his occupation is 8 feet x 15 feet. He is doing business as a general merchant and also selling crackers. He sunk a sum of Rs.5,000 towards capital of his business. His monthly turnover is from Rs.300 to Rs.400. The landlord submitted that the tenant is not carrying on his business in the upstairs portion. According to him the tenant vacated the premises and he is doing his business elsewhere, after subletting the petition premises to a third party, who is doing his lottery business in the petition premises. This was stated to be a subsequent event that took place after the appeal was disposed of by the learned Rent Control Appellate Authority. In order to support this version, the landlord also filed an application for permission, to file additional documents in this revision proceedings. The landlord got affidavits from three persons in his locality to show that the tenant has vacated the petition premises and conducting his business elsewhere. The learned counsel appearing for the tenant on this aspect submitted that if according to the landlord, the tenant has sublet the portion under his occupation to a third party, then it is always open to him to file a petition for eviction on the ground of subletting and without doing that, the learned counsel submitted that the landlord cannot bring this fact as a subsequent event to the notice of this Court and claim eviction on this ground. According to the learned counsel for the tenant, the tenant is still in occupation of the petition premises and doing his business there. The learned counsel for the tenant submitted that there is nothing wrong on the part of the tenant in doing business at two places. According to the learned counsel simply because the tenant is doing

his business elsewhere that would not lead to the conclusion that the tenant vacated the petition premises. This line of reasoning adduced by the learned counsel appearing for the tenant appears to be acceptable. The landlord says that the tenant vacated the premises subsequent to the order passed by the learned Rent Control Appellate Authority. But according to the tenant he did not vacate the premises but he is still in occupation of the petition premises and doing his business. This question cannot be decided here without appreciating the evidence adduced by both the parties of this aspect. No doubt, the report filed by the commissioner says that the upstairs portion was dumped with cartload of sand and it is not kept clean. It was also pointed out that the tenant pulled down three steps in the staircase and constructed a platform, over which he is doing his newspaper agent business. It is also the case of the landlord that the portion under his occupation is only 8 feet x 15 feet. Therefore, he required the portion under the occupation of the tenant by way of additional accommodation. It may be true, that the landlord required the petition premises by way of additional accommodation. But the fact remains that the petition for eviction on the ground of additional accommodation must be filed in accordance with the provisions contained under Sec.10(3)(c) of the Act. In a petition for eviction filed under Sec.10(3)(c) of the Act, the landlord should clearly state that he required the petition premises by way of additional accommodation. But according to the proviso, the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. In order to decide this question of hardship, there must be proper pleadings in the petition. In the present case, the petition was filed by the landlord under Sec.10(3)(c) of the Act, but there was no averment regarding the hardship as contemplated under the proviso to Sec.10(3)(c) of the Act. If the hardship is not pleaded in a petition filed under Sec.10(3)(c) of the Act that is fatal to the petition. (See the decisions in *Radhakrishnan v. Seethalakshmi*, (1988) 1 L.W. 67 and *Annakkili Ammal v. H.C. Hussain*, 97 L.W. 116. In the present case, the petition filed under Sec.10(3)(c) of the Act contains no averment with regard to the hardship as contemplated under the proviso to Sec.10(3)(c) of the Act and hence the petition is

not maintainable. Therefore, it is liable to be dismissed. This legal aspect was not considered by the Rent Control Appellate Authority. Thus on a careful consideration of the facts arising in this case and the legal principle on this aspect. I hold that the Rent Control Appellate Authority was not correct in confirming the order of eviction passed by the Rent Controller. Accordingly, the revision filed by the tenant stands allowed. The order of the eviction passed by the Rent Control Appellate Authority under Sec.10(3)(c) of the Act stands set aside, and the petition for eviction dismissed.

7. In the result, the revision is allowed. However, there will be no order as to costs. -

V.K.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra* and *Janarthanam, JJ.*

W.M.P.No.17001 of 1992 in W.P.No.7656 of 1992
14th August, 1992.

M.Shakur Chathik (Minor) represented by his father and natural guardian A.Mohammed Abdul Habeeb ...*Petitioner*
v.

Association of Private Schools affiliated to the Central Board of Secondary Education represented by its President, V.Venkatachalam and others

...*Respondents.*

Constitution of India (1950), Art.226 - Writ proceedings under Order of Court in collateral review of - Competency - Powers of Judge sitting in a collateral proceeding.

A judgment of the Court is final subject to appeal and if there is any mistake or error therein is found, it is corrected by the appellate court or by way of review in accordance with the procedure prescribed therefor and constructively recognised by the Courts in India and accordingly applied to the writ proceedings. The decision of the Court in the case of *Mayavaram Financial Corporation*

Limited, Mayiladuthurai v. The Registrar of Chits, Pondicherry, 1991 Writ L.R. 519, completely rules out any collateral review and interference thus in the orders or directions issued by a Bench of the Court. The collateral proceedings, unless are in the nature of review petitions are incompetent and no court can make any order of any kind in such proceedings whether a single Judge or a larger Bench. A Judge sitting in a collateral proceeding can go into the question of any *obiter dicta* or the judgment being *per incuriam* only for the purpose whether he would be bound by one or the other judgment as the rule of *obiter dicta* and *per incuriam* are the rules attached to the *ratio decidendi* of the judgment and thus for deciding whether one or the other judgment is a binding precedent and not for the purpose of review of any of the two judgments on the plea that one is wrong and the other is right. [Paras 3 and 6]

Cases referred to:

Rathnaswamy, Dr.V. v. Director of Medical Education, 1986 Writ L.R. 207. [Paras 2 and 6]

Punjab Engineering College, Chandigarh v. Sanjay Gulati, A.I.R. 1983 S.C. 580. [Para 2]

Mayavaram Financial Corporation Limited, Mayiladuthurai v. The Registrar of Chits, Pondicherry, 1991 Writ L.R. 519. [Para 3]

Application under Sec.114 of the Civil Procedure Code presented to this Court to grant leave to the petitioner to seek a review of the judgment dated 24.7.1992 in W.P.No.7656 of 1992 and batch cases-W.P.No.7656 of 1992 presented to this Court under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records comprised in the proceedings of the first respondent dated 15.6.1992 in G.O.Ms.No.555, Education and quash the same.

K.Chandru, for Petitioner.

The Order of the Court was made by *Mishra, J.*: Before we order whether to grant leave to the petitioner, who is claimed to be a third party to seek review of the judgment in W.P.Nos.7656 etc. of 1992, we propose to hear the respondents and accordingly order notice of motion returnable in one week as to why leave be not granted.

2. It has been brought to our notice that a number of writ petitions in W.P.Nos.10337 etc. of 1992 have been ordered by a learned single Judge of this Court on 10.8.1992, it appears, for collaterally and indirectly seeking a review of our judgment in W.P.No.7656 of 1992 and other analogous cases.

Our attention has been drawn to the order of the learned single Judge dated 10.8.1992, who it seems, has not passed any positive order, but has stated as follows:

"A Division Bench of this Court in *Rathnaswamy, Dr.V. v. Director of Medical Education*, 1986 Writ L.R. 207, considered the scope and effect of the conditions prescribed in the *Prospectus* and held,

"Then the question is what is the place and significance of a prospectus with regard to admissions to educational courses. We shall not mix up and confuse the prospectus as understood in Company law parlance with the prospectus for educational courses..... Forgetting the notion of the prospectus in the Company law parlance, we must deal with the matter from the practical angle of selection of candidates for educational courses offered by institutions run by the State. The principle has been uniform that violation of the norms of admission laid down and rules and regulations governing the same with impunity have been frowned upon and many times have been struck down. These rules and norms are there to be strictly and solemnly adhered to. They alone should be the guidelines for such admissions. In fact, the very decision of the Supreme Court in *Punjab Engineering College, Chandigarh v. Sanjay Gulari*, A.I.R. 1983 S.C. 580, relied on by the learned counsel for the petitioner, countenances the principles. The word prospectus is derivative from the word prospect. One of the dictionary meanings for the word prospect is to look around, to make a search, to explore. A prospectus issued with regard to admission to educational courses is a declaration to the candidates that a field for development of educational potentialities is available for exploration and that there could be a chance of success. It is a piece of information. But, at the same time, we shall not belittle the significance of the need to set out in the prospectus itself a summary or an essence of the norms and rules which should guide and which will be adopted for selection of the competitors in the field of exploration in educational development or at least indicate in the prospectus that there are norms and rules which shall govern. It is highly desirable that a summary or an essence of the relevant norms and rules governing such

admissions are set out in the prospectus themselves or their existence at least is indicated therein. But an omission to do so shall not be taken advantage of by any one to negate and ignore the very norms and rules. *The very rules and norms have come to be laid down only to govern and to be adhered to and not to be ignored and breached.* It is true that if the relevant norms and rules are set out or referred to in the prospectus, a controversy of the present nature would have been very wisely avoided. But the omission in the prospectus is not an omission or erosion or deletion of the very norms and rules themselves. *The norms and rules subsist and they have to hold the field.*" (emphasis supplied).

In view of the above decision of the Division Bench of this Court reported in *Rathnaswamy, Dr.V. v. Director of Medical Education*, 1986 Writ L.R. 207, the claims of the petitioners that the conditions prescribed in the prospectus should be followed, cannot be ignored. The cases referred to hereinabove, not only relate to the scope and effect of the conditions laid down in the prospectus, but also relate to the other points raised, as set out hereinabove. The later decision of the Division Bench of this Court dated 24.7.1992 in a batch of writ petitions (W.P.No.7656 of 1992 etc.) has had no occasion to consider the scope and effect of the conditions laid down in the prospectus and the other points set out hereinabove. It cannot be said that these two decisions of two Division Benches of this Court are in conflict with each other with reference to the same issue. In order to set an uniform criteria to be followed, having due regard to the law as laid down by the two Division Benches with reference to the points considered and decided therein, the Registry is directed to place the above cases before My Lord, the Chief Justice for orders for being posted before a larger Bench for final disposal."

3. It seems, attention of the learned single Judge was not brought to the fact that a judgment of the Court is final subject to appeal and if there is any mistake or error therein is found, it is corrected by the appellate Court or by way of review in accordance with the procedure prescribed therefor and constructively recognised by the Courts in India and accordingly applied to the writ proceedings. A

Full Bench of this Court has gone into the issue of review of an order passed in a writ proceeding in the case of *Mayavaram Financial Corporation Limited, Mayiladuthurai v. The Registrar of Chits, Pondicherry*, 1991 Writ L.R. 519. This completely rules out any collateral review and interference thus in the orders or directions issued by a Bench of the Court. The collateral proceedings, unless are in the nature of review petitions, are incompetent and no court can make any order of any kind in such proceedings, whether a single Judge or a larger Bench.

4. We are informed at the Bar that a number of Special Leave Petitions have been filed in the Supreme Court (S.L.P.No.9481 of 1992) against our judgment in W.P.No.7656 etc. of 1992. It goes without saying that if our judgment is affirmed by the Supreme Court, it will merge in the judgment of the Supreme Court. This Court then shall not be competent to review the judgment. If, however, our judgment is reversed by the Supreme Court, nothing will survive for a review. Any attempt, however, at this stage to review the judgment may be found incompetent for another reason that some interim orders were sought for in the Special Leave Petitions before the Supreme Court and the Supreme Court has declined the same.

5. Mrs.Nalini Chidambaram, appearing for one of the petitioners in the batch of writ petitions aforementioned in which orders have been passed by the learned single Judge, has tried to convey that there is no attempt in the writ petitions to seek any review of our order and that all that the petitioners have mainly asked for is a direction to accommodate them in accordance with the prospectus, for they prepared themselves for the prospectus, for they prepared themselves for admission to the professional courses only in accordance with the representations in the prospectus. Since Mrs.Nalini Chidambaram, however assisted only as *amicus curiae*, if we pronounce our opinion upon this, that may prejudice the case of the petitioners in the writ petitions. We, however, cannot desist from saying that the plea that the representations in the prospectus is binding upon the respondent/ State Government has been raised under some serious misapprehensions. Representation, if any, in the prospectus was not confined to the H.S.C. students only. It was equally applicable to the C.B.S.C. students. We have already noticed in our judgment that the equations between the C.B.S.C.

and H.S.C. students stood seriously disturbed on account of the doubts that were created as to the extra marks allotted to the C.B.S.C. students. Where then the representation in the prospectus existed?

6. It is the above argument upon which learned single Judge has thought that a conflict has arisen on account of our directions in W.P.No.7656 and etc. of 1992 and a Division Bench of this Court in *Rathnaswamy, Dr.V. v. Director of Medical Education*, 1986 Writ L.R. 207. If we may point out, a Judge sitting in a collateral proceeding can go into the question of any *obiter dicta* or the judgment being *per incuriam* only for the purpose whether he would be bound by one or the other judgment as the rule of *obiter dicta* and *per incuriam* are the rules attached to the *ratio decidendi* of the judgment and thus for deciding whether one or the other judgment is a binding precedent and not for the purpose of review of any of the two judgments on the plea that one is wrong and the other is right.

7. It is unfortunate that it was not clarified to the learned single Judge by any party that the judgment in the case of *Rathnaswamy, Dr.V. v. Director of Medical Education*, 1986 Writ L.R. 207, in which this Court said that the norms and rules in the prospectus have alone to be obeyed, was not concerned with the issue how far the promise or representation in the prospectus would hold the field in view of the charged circumstance that the Government of the State found that a reservation should be applied confining consideration of the C.B.S.C. students to 2% of the seats only and the court in W.P.Nos.7656 and etc. of 1992 found that the equations which alone could enable the candidates seeking admission in accordance with the prospectus between the C.B.S.C. students and H.S.C. students had been seriously disturbed, a situation in which norms and rules in the prospectus could not be applied.

8. For the reasons as above, since we are of the opinion that there could be no review of our judgment in W.P.Nos.7656 and etc. of 1992 in the collateral proceedings and the review proceedings have not been started at the instance of any party except the instant petitioner, it will be necessary to hold that the proceedings in W.P.Nos.10337 and etc. of 1992 are not competent in so far as they attempt to get the review of the judgment in W.P.Nos.7656 and etc. of 1992 and they are not maintainable. The proceedings in the said writ petitions to the said extent thus must remain

stayed. This, however, will not mean that any person aggrieved, cannot approach the Supreme Court against our judgment in W.P.Nos.7656 and etc. of 1992. If there is a proper case for review, any person can move this Court for the review of our judgment in W.P.Nos.7656 and etc. of 1992. It will be appropriate, however, that since the Supreme Court has already passed some orders in the Special Leave Petition with respect to the current admission, no attempt is made to interfere with that.

B.S.

Petition ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Ratnam and Somasundaram, JJ.*

W.A.No.187 of 1991

8th August, 1992.

The Assistant Collector of Central Excise, Coimbatore and others *...Appellants*
v.

M/s.Elgi Equipments Limited *...Respondent.*

Central Excise and Salt Act (I of 1944), Sec.11-B (as amended by Central Excise Amendment Act (XL of 1991) - Refund of excise duty - High Court directing Excise Authorities to refund excise duty on 8.1.1991 - Writ appeal filed and pending - Amended Act coming into force on 20.9.1991 - Act if will apply barring the Court to direct refund.

The respondent is a manufacturer of Service Station Equipments. The first appellant demanded a sum of Rs.1,15,502.57 towards the differential duty for the period from 10.1.1979 to 31.3.1980. This order was set aside by the Collector of Central Excise (Appeals), Madras. The first appellant was directed to approve the price list based on the sales value at the factory gate. The first appellant, basing on the above order approved the price list. The respondent filed an application for refund of Rs.19,83,225.64 before the first appellant. This was rejected. An appeal against that order was allowed with a direction to the first appellant to decide the refund claim, if admissible otherwise.

Pursuant to this order, the respondent submitted an application for refund. It was dismissed and an appeal against that order was also dismissed. He filed a writ petition. A learned single Judge allowed the writ petition and directed the appellants to refund Rs.16,59,721.30 to the respondent with interest at 12% per annum from 23.6.1987 within four weeks from 8.1.1991. In appeal, it was contended that by reason of Sec.3 of the Central Excise (Amendment) Act, 1991, no refund can be made to the respondent except as provided in Sub-sec.(2) of Sec.11-B of the Act of 1940.

Held: Admittedly, during the pendency of the present writ appeal, Sec.11-B of the Act was amended by the Central Excise (Amendment) Act, 1991, with effect from 20.9.1991. The Central Excise (Amendment) Act, 1991 will apply to the facts of the present case because the order of the learned single Judge passed in W.P.No.6260 of 1987 has not become final on the date when the Amendment Act, 1991 came into force. The order in W.P.No.6260 of 1987 is challenged by the appellants by filing the present writ appeal and when the Central Excise (Amendment) Act XL of 1991 came into force, the whole matter was pending in the present writ appeal. As per the amended Sec.11-B, all pending claims for refund on or from 20.9.1991, that is, the date on which the Amendment Act came into force will have to be dealt with and disposed of only in accordance with the Amended provision of law. By reason of the amended Sec.11-B(3), notwithstanding the direction given by the learned single Judge by the order made in W.P.No.6260 of 1987 to refund a sum of Rs.16,59,721.30 to the respondent, no refund can be made to the respondent except as provided in Sub-sec.(2) of Act XL of 1991. As rightly contended by the learned counsel for the appellant, the order of the learned single Judge under appeal is subject to Sec.11-B of the Act as amended by Act XL of 1991. Therefore, it is for the respondent to seek refund of the concerned amount from the Assistant Collector as provided in Sub-sec.11-B(1)(2) of the Act as amended by the Amendment Act XL of 1991 and in compliance of the Rules and Regulations framed thereunder. [Para 7] Application under Clause 15 of the Letters Patent against the Order of K.M.Natarajan, J., dated 8.1.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.6260 of 1987 presented under Art.226 of

the Constitution of India to issue a writ of *mandamus*, directing the respondents 1 and 2 to pay the amount of refund of Rs.19,83,225.64 due to the petitioner together with the interest at the rate of 12% per annum from April, 1980 within one month from the date of order.

K.Jayachandran, Additional Central Government Standing Counsel, for Appellant.

V.Santhanam, for Respondent.

The Order of the Court was made by

Somasundaram, J.: This writ appeal is directed against the order in W.P.No.6260 of 1987 directing the appellants to refund a sum of Rs.16,59,721.30 with interest at 12% p.a. from 23.6.1987 to the respondent within four weeks from 8.1.1991.

2. The respondent herein is a manufacturer of Service Station Equipments. The first appellant in his order dated 30.8.1983 confirmed the earlier order passed by his predecessor and demanded a sum of Rs.1,15,502.57 towards the differential duty for the period from 10.1.1979 to 31.3.1980. As against the said order of the first appellant, the respondent filed an appeal before the third appellant and by his order dated 19.11.1983, the third appellant set aside the order of the first appellant dated 30.8.1983 and remanded the matter to the first appellant with a direction to approve the price-list based on the sales value at the factory gate under Sec.4(1)(a) of the Central Excise and Salt Act (hereinafter called the Act). Pursuant to the order dated 19.11.1983, passed by the 3rd appellant, the first appellant by the order dated 20.10.1984 approved the price-list under Sec.4(1)(a) of the Act *i.e.*, the price at which the goods are sold at the factory gate to the independent buyers. Further, an application for refund of Rs.19,83,225.64 was also filed by the respondent before the first appellant. Thereafter, the second appellant filed an appeal against the order of the first appellant dated 20.10.1984 in Appeal No.58 of 1986 before the 3rd appellant. By the order dated 12.5.1986, the third appellant set aside the order dated 20.10.1984 on the ground that the order dated 20.10.1984 is not in conformity with the order passed by the third appellant dated 19.11.1983. Aggrieved by the order dated 12.5.1986 the respondent filed an appeal before the Customs Excise and Gold Control Appellate Tribunal. The Customs Excise and Gold Control Appellate Tribunal by the order dated 20.3.1987 allowed the appeal and set aside the order of the third

appellant dated 12.5.1986 on the ground that the department has not filed any appeal against the order of 3rd appellant dated 19.11.1983 and it has become final. In the meantime, by the order dated 30.9.1986, the first appellant rejected the respondent's claim for refund of Rs.19,83,225.64. Against the order of the first appellant dated 30.9.1986, rejecting the respondent's claim for refund, an appeal was filed in appeal No.13 of 1987 before the 3rd appellant. By the order dated 30.4.1987, the third appellant allowed the appeal setting aside the order of the first appellant dated 30.9.1986 and remanded the matter to the first appellant with the direction to decide the refund claim, if admissible otherwise, as per Sec.11-B of the Act. Pursuant to the order of the 3rd appellant dated 30.4.1987, the respondent on 2.5.1987, submitted an application for refund. Thereafter, the respondent also filed W.P.No.6260 of 1987 before this Court praying for the issue of *mandamus* directing the appellants to refund the sum of Rs.19,83,225.64 together with interest at 12% p.a. from April, 1980. Subsequently, on 18.8.1988, the first appellant passed an order rejecting the refund claims made by the respondent on 2.5.1987. As against the said order dated 18.8.1988, the respondent filed an appeal before the third appellant who by the order dated 8.5.1989 dismissed the said appeal.

3. The appellants herein as respondents 1 to 3 in the W.P.No.6260 of 1987 filed counter affidavit contending that the assessee/respondent herein has been making sales to branches and distributors; that refund can be sanctioned only after verifying all the documents of the assessee including the branch sales invoices; that the first appellant directed the assessee to produce the relevant documents for sanctioning the eligible refund amount to them, but, the respondent herein has not produced the same before the first appellant; and that the first appellant has taken sincere efforts to refund the eligible amount, after calling for the relevant branch sales invoices, as the respondent did not produce the same the refund claim was rejected.

4. The learned single Judge who heard the writ petition took the view that the assessable value of the goods in question has already been determined under Sec.4(1)(a) of the Act and that the records relating to the Branch sales are not necessary. Consequently, the learned single Judge held

that the respondent is entitled to a refund of Rs.16,59,721.30. As a result the learned single Judge allowed the writ petition and directed the appellants to refund the said sum Rs.16,59,721.30 to the respondent with interest at 12% per annum from 23.6.1987 within four weeks from 8.1.1991. This writ Appeal is directed against the order of the learned single Judge.

5. Mr.K.Jayachandran, learned Additional Central Government Standing Counsel appearing for the appellants contended that by reason of Sec.3 of the Central Excise Amendment Act, 1991 (Central Act 40 of 1991), Sec.11-B of the Act is so amended as to incorporate Sub-sec.(3) to the effect that notwithstanding anything to the contrary, contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-sec.(2) and therefore notwithstanding the order of the learned single Judge in W.P.No.6260 of 1987 directing the refund to the respondent, no refund can be made to the respondent except as provided in Sub-sec.(2) of the said Act. The learned counsel for the appellants further submitted that on or from 20.8.1991 i.e., the date on which the Central Act XL of 1991 came into force, any claim for refund has to be made only under the amended provision of Sec.11-B before the competent authority in the form prescribed by the regulations and in the manner provided by the Rules and that in any case, this Court has no jurisdiction to order refund by virtue of the provision contained in Sec.11(3) as amended. There is merit in the contention of the learned counsel for the appellants.

6. First, let us refer to Sec.3 of Central Excise Amendment Act 1991 (Central Act XL of 1991) which reads thus:

"3. Amendment of Sec.11-B:- In Sec.11-B of the Central Excise Act,

(a) in Sub-sec.(1):-

(i) after the words "from the relevant date", the following shall be inserted, namely:-

In such form as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Sec.12-A) as the applicant may furnish to establish that the amount or duty of excise in relation to which such refund is claimed was collected from, or

paid by, him and the incidence of such duty had not been passed on by him to any other person; Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this subsection as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-sec.(2) substituted by that Act;

(ii) In the existing proviso, for the words "Provided that" the words "Provided further that" shall be substituted;

(b) for Sub-secs.(2) to (5), the following Sub-sections shall be substituted, namely:-

"(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund: Provided that the amount of duty of excise as determined by the Assistant Collector of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Collector of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person,

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued

unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of the Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-sec.(2).

(4) Every notification under Clause (f) of the first proviso to Sub-sec.(2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-sec.(2), including any such notification approved or modified under Sub-sec.(4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

(c) in the Explanation, in clause (B), for Sub-clause (e), the following sub-clause shall be substituted, namely:-

"(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person."

The amendments introduced by the Central Act XL of 1991 not only regulate the manner of refund and the conditions to be satisfied before claiming any refund, but also prohibits any refund being ordered by any Tribunal or Court except in accordance with the amended provisions contained in the Central Excise Amendment Act 1991. By virtue of the amendment of Sub-secs.(1) and (2) of Sec.11-B of the Act, the assessee like the

respondent herein has to make an application in the prescribed form accompanied by such documentary or other evidence as the assessee may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty has not been passed on by him to any other person. Sub-sec.(2) provides for the manner in which the application in the prescribed form shall be dealt with by the competent authority. It is also provided that the Assistant Collector of Central Excise shall direct refund if such amount is relatable to duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person. Further, by virtue of the said amendment any claim for refund has to be made by the assessee before the competent authority in the form prescribed by the Regulations and in the manner provided in the Rules. Again, the amended Sec.11-B(3) provides that notwithstanding anything to the contrary contained in any judgment or order or direction of the Appellate Tribunal or any Court, no refund shall be made except as provided in Sub-sec.(2).

7. In the present case, when the respondent submitted an application before the first appellant claiming refund for the period from 1.4.1980 to 10.8.1983, the first appellant by his order dated 30.9.1986, rejected the same. As against the said order dated 30.9.1986, the respondent filed an appeal before the third appellant, who by the order dated 30.4.1987, set aside the order of the first appellant and remanded the matter to the first appellant to decide the refund claim, if admissible otherwise, as per Sec.11-B of the Act. On 2.5.1987, the respondent again submitted his application before the first appellant claiming refund. The respondent also filed W.P.No.6260 of 1987 before this Court, out of which the present writ appeal arises, for the issue of a writ of *mandamus* directing the appellants to refund a sum of Rs.19,83,225.64. During the pendency of the above writ petition, on 18.8.1988, the first appellant passed an order again rejecting the respondent's claims for refund. The appeal filed by the respondent against the order of the first appellant dated 18.8.1988 was also dismissed by the 3rd appellant on 8.5.1989. Subsequently, on 8.1.1991, the learned single Judge allowed W.P.No.6260 of 1987 and issued direction to the appellants to refund a sum of Rs.16,59,721.30 to the respondent and as against

the order of the learned single Judge, the appellants have filed the present writ appeal and the same was admitted on 25.2.1991. Admittedly, during the pendency of the present writ appeal, Sec.11-B of the Act was amended by the Central Excise (Amendment) Act, 1991, with effect from 20.9.1991. The Central Excise (Amendment) Act, 1991 will apply to the facts of the present case because the order of the learned single Judge passed in W.P.No.6260 of 1987 has not become final on the date when the Amendment Act, 1991 came into force. The order in W.P.No.6260 of 1987 is challenged by the appellants by filing the present writ appeal and when the Central Excise (Amendment) Act XL of 1991 came into force, the whole matter was pending in the present writ appeal. As per the amended Sec.11-B, all pending claims for refund on or from 20.9.1991, that is, the date on which the Amendment Act came into force, will have to be dealt with and disposed of only in accordance with the Amended provision of law. By reason of the amended Sec.11-B(3), notwithstanding the direction given by the learned single Judge by the order made in W.P.No.6260 of 1987 to refund a sum of Rs.16,59,721.30 to the respondent, no refund can be made to the respondent except as provided in Sub-sec.(2) of Act XL of 1991. As rightly contended by the learned counsel for the appellant, the order of the learned single Judge under appeal is subject to Sec.11-B of the Act as amended by Act XL of 1991. Therefore, it is for the respondent to seek refund of the concerned amount from the Assistant Collector as provided in Sub-sec.11-B(1)(2) of the Act as amended by the Amendment Act XL of 1991 and in compliance of the Rules and Regulations framed thereunder. A similar view has been taken by a Division Bench of the Karnataka High Court in *The Assistant Collector of Central Excise, Davangere and others v. M/s.South Asbestos Cement Ltd., Karur, Dharwad District, W.P.No.2369 of 1991 of Karnataka High Court dated 20.1.1992*, and in *M/s.Brooke Bond India Ltd. Hyderabad v. Union of India and another, W.P.No.1047 of 1987 dated 10.10.1991*, of the High Court of Andhra Pradesh by a Division Bench of Andhra Pradesh High Court.

8. Dealing with a similar situation, the Division Bench of the Karnataka High Court in *The Assistant Collector of Central Excise, Davangere v. M/s.Southern Asbestos Cement Ltd., W.A.No.2369 of 1991 dated 20.1.1992*, has held as follows:

"Secondly, reliance is placed upon the amendment to the ACT subsequent to the order under appeal to cover cases of what has come to be known as "unjust enrichment". By reason of the amendment to Sec.11-B, Sub-sec.(3) thereof reads thus:

"(3) Notwithstanding anything to the contrary contained in any judgment, decree order or direction of the Appellate Tribunal or any Court or in any other provision of the Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-sec.(2)."

Sub-sec.(1) now requires the applicant refund to establish that the amount of excise duty in relation to which refund is claimed "was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person." By reason of the amendment to Sub-sec.(2), the Assistant Collector of Central Excise is required to be satisfied upon such application that "the whole or any part of the duty of excise paid by the applicant is refundable," and thereupon "he may make an order accordingly and the amount so determined shall be credited to the Fund". The "Fund" is defined by Sec.2(cc) to mean the consumer Welfare Fund established under Sec.120 and the money credited to the fund is required by reason of Sec.12-D, to be utilised by the Central Government for the welfare of consumers in accordance with Rules in that behalf that it might make.

It is submitted, and rightly, that the order under appeal can operate only subject to the aforesaid provisions. Thus, the writ petitioner shall now have to establish before the first appellant that the incidence of the excise duty in question had not been passed on by it to any other person and if any amount is found to be refundable, the first appellant shall credit the same to the said consumer Welfare Fund." The Division Bench of the Karnataka High Court in the above decision taking such a view modified the order of the learned single Judge directing the Central Government to refund to the respondent in that appeal the excise duty paid by the later under the Act and allowed the writ appeal.

9. *M/s.Brooke Bond India Ltd. v. Union of India and another, W.P.No.1047 of 1987, dated 10.10.1991*, the Division Bench of the Andhra Pradesh High Court dealing with the effect of the amendment

introduced to Sec.11-B of the Act by Act XL of 1991 was the procedure to be adopted in matters pending in writ petitions observed as follows:

"We are of the opinion that it is for the petitioner to seek refund of the concerned amount from the Assistant Collector of Customs as provided in Sec.11-B(1) and (2) of the Central Excise Act as amended by Amending Act, 1991, and in compliance with the rules and regulations framed thereunder. It is for the petitioner to comply with the provisions contained in the Act, Rules and the Regulations as amended primarily, so as to seek enforcement of his claim for refund.

In view of the above it is not necessary this Court now to consider the relief which the petitioner seeks in this writ petition. The writ petition is disposed of without prejudice to the right of the petitioner to file an application in the prescribed form before the competent authority. No costs."

10. In view of the above position of law, the order of the refund sum of Rs.16,59,721.30 to the respondent is liable to be set aside and accordingly it is set aside. However, the judgment in this writ appeal is without prejudice to the right of the respondent to file an application for refund afresh in the manner known to law and it is open to the respondent to seek refund of the amount concerned, afresh, from the Assistant Collector of Central Excise as provided under Sec.11-B(1)(2) of the Act as amended by Act XL of 1991. The respondent is directed to submit his application for refund before the competent authority within 8 weeks from today and the Department is directed to pass orders on the refund application according to law within three months from the date of receipt of the application for refund. It is needless to say that the question of limitation prescribed under Sec.11-B does not arise in this case, because admittedly the duty was paid by the respondent during the relevant period under protest. Further, the order of the Collector (Appeals) (the 3rd appellant herein) dated 8.5.1989 in Appeal No.48 of 1989 (C.B.E.) rejecting the appeal filed against the order of the first appellant dated 18.8.1988, will not stand in the way of the competent authority considering the respondent's application claiming refund afresh, because the order of the third appellant dated 8.5.1989 was not passed on merits and the said appeal was dismissed by the

third appellant on the ground that the same matter was pending before this Court in W.P.No.6260 of 1987.

11. In the result, the writ appeal is allowed and the order of the learned single Judge is set aside subject to the above directions. No costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: K.S.Bakthavatsalam, J.

W.P.No.2173 of 1991

17th July, 1992.

P.Devendran

...Petitioner

The State of Tamil Nadu and another

...Respondents.

Land Acquisition Act (I of 1894), Secs.4(i), 6 and Proviso as inserted by Land Acquisition (Amendment) Act (LXVIII of 1984), Sec.4(1) - Notification published on 9.8.1978 - Declaration under Sec.6 published on 8.8.1981 - Declaration challenged in writ petition - Stay of declaration not obtained - Writ petition allowed and appeal against dismissed on 1.3.1990 - Fresh declaration published afterwards - Legality - Limitation prescribed by Proviso to Sec.6 if applies - Decision in Vadari alias Chellappa v. State of Tamil Nadu, (1990)1 M.L.J. 219, held would apply and not that in Chinnathambi Gounder v. Government of Tamil Nadu, (1980)2 M.L.J. 269. The Government sought to acquire certain lands including the petitioner's lands by a notification under Sec.4(1) of the Act which was published in the Gazette on 9.8.1978. The declaration under Sec.6 of the Act was published in the Gazette on 8.8.1981. The petitioner challenged the declaration under Sec.6 by way of a writ petition. It was allowed and on appeal against the order was dismissed on 1.3.1990. Thereafter, the petitioner received a notice on 28.1.1991 calling on him to appear and submit his objections to the notification under Sec.4(1) dated 9.8.1978. He filed a

petition challenging the proceedings contending that a declaration cannot be made after three years after the publication of the notification under Sec.4(1). He relied on the proviso to Sec.6 inserted by Central Act LXVIII of 1984. He further contended that the ratio in *Vadari alias Chellappa v. State of Tamil Nadu*, (1990)1 M.L.J. 219, would apply to the facts of this case. Relying on the Full Bench decision in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, it was contended by the respondent that it was enough if the first declaration was made within three years from the date of notification under Sec.4(1) of the Act.

Held: The Court of the view that the facts of the case which are placed before it, in all force are one and the same to the case decided in *Vadari alias Chellappa v. State of Tamil Nadu*, (1990)1 M.L.J. 219. The reliance of the decision of a Full Bench of this Court in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, is wholly unsustainable. That was a case which arose before the Central Act LXVIII of 1984 came into force. After coming into force of Act LXVIII of 1984, the principle laid down by the Full Bench of this Court in the above mentioned case will not hold good. The Full Bench of this Court in the decision cited supra, applied the *maxim actus curiae neminem gravabit* and took note of the fact that there was no stay in that case in favour of the petitioner. After the passing of the Central Act LXVIII of 1984, an express provision has been made regarding the period of limitation when a stay order of the court is in operation. So, the decision in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, will not apply to the facts of this case.

[Paras 7 and 8]

Cases referred to:

Chinnathambi Gounder v. Government of Tamil Nadu, (1980)2 M.L.J. 269. [Paras 4 and 8]

Vadari alias Chellappa v. State of Tamil Nadu, (1990)1 M.L.J. 219. [Paras 5, 6 and 7]

Lakshmi Venkatesan (Minor) v. Special Tahsildar Land Acquisition, (1978)91 L.W. 1. [Para 8]

Director, Income-tax v. Pooran, (1975)4 S.C.C. 568. [Para 8]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first

respondent in his notification G.O.Ms.No.1096/78, dated 17.7.1978, Housing and Urban Development Department, published in Tamil Nadu Government Gazette on 9th August, 1978 made under Sec.4(1) of the Land Acquisition Act regarding the petitioner's land in Survey No.85/2, 85/3 and 85/5 of an extent of 0.27 acres, 5.26 acres and 1.90 acres respectively in Thiruvannamiyur Village, Mylapore and Triplicane Taluk and quash the same.

M.Raghavan, Senior Counsel for *M.Subramanian*, for Petitioner.

Mrs.Kalaiselvi, Government Advocate (Housing), on behalf of Respondents.

The Court made the following

ORDER: The petitioner challenges the acquisition proceedings of certain lands in S.Nos.85/2, 85/3 and 85/5 for an extent of 0.27 acres, 5.26 acres and 1.90 acres respectively in Thiruvannamiyur village.

2. For the implementation of the Besant Nagar Phase II Scheme by the Tamil Nadu Housing Board, the Government sought to acquire certain lands including the petitioner's lands by a notification under Sec.4(1) of the Land Acquisition Act, (hereinafter referred to as the 'Act') which was published in the Gazette on 9.8.1978. The declaration under Sec.6 of the Act was published in the Gazette on 8.8.1981. The petitioner challenged the declaration under Sec.6 of the Act by way of Writ Petition No.10128 of 1981 in respect of those lands, mentioned above, on the ground that he has got an approved layout in respect of S.No.85/3 prior to the publication of notice under Sec.4(1) of the Act and that he is entitled to get exclusion of layouts approved prior to the publication of notification under Sec.4(1) of the Act. Mohan, J. (as he then was) allowed the Writ Petition No.10128 of 1981 by order dated 23.1.1984 thereby quashing the declaration under Sec.6 of the Act. The learned Judge remitted the matter back to the Government. Subsequently the State preferred a writ appeal in W.A.No.304 of 1985 against this order. The First Bench of this Court dismissed the writ appeal on 1.3.1990. After the disposal of the writ appeal, the petitioner received a notice on 28.1.1991 calling upon him to appear submit his objections to the notification under Sec.4(1) of the Act dated 9.8.1978. The petitioner having filed objections, has come up to this Court challenging the land acquisition proceedings issued under Sec.4(1) of

the Act and published on 9.8.1978. The petitioner alleges in the affidavit that the notice issued to the petitioner is not valid in law since a declaration under Sec.6 of the Act cannot be made after three years after the publication of notification under Sec.4(1) of the Act. It is also alleged that there has been a gross and culpable inaction on the part of the respondents in not implementing the orders of this Court within a reasonable time. It is also stated that the respondents themselves exempted the lands abutting the petitioner's lands on all the sides and that their proceeding with the petitioner's land alone is discriminatory and arbitrary and violative of Art.14 of the Constitution. It is also pointed out in the affidavit that if the acquisition is allowed to be proceeded with, the petitioner will be paid compensation at the market rate of the year 1978 whereas the lands, if acquired after 1990, the compensation will be illusory. With these allegations, the petitioner is before me with the prayer as stated above.

3. Notice of motion has been ordered by this Court on 20.2.1991.

4. A counter affidavit has been filed by respondents 1 and 2. The facts upto the disposal of the W.A.No.304 of 1985 dated 1.3.1990 are not disputed in the counter. Subsequent to the disposal of the writ appeal, the Government was addressed by the Special Tahsildar (Land Acquisition) to inform whether any decision has been taken by the Government in the light of the judgment in W.P.No.10128 of 1981. At that stage, the Government, it seems instructed the Special Tahsildar (Land Acquisition) to proceed with fresh enquiry under Sec.5-A of the Act in respect of the lands covered in W.P.No.10128 of 1981 and in W.A.No.304 of 1985 and to submit draft declaration under Sec.6 of the Act immediately. In view of that it seems that a notice has been issued to the petitioner under Sec.5-A of the Act. It is contended in the counter affidavit that it is enough if the first declaration is made within three years from the date of notification under Sec.4(1) of the Act and the decision in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, is relied upon in the counter-affidavit, for the proposition that if the first declaration is made within three years from the date of notification, it serves the purpose and that it cannot be contended that the second declaration should also be within a period of three years from the date of notification under

Sec.4(1) of the Act. It is also stated in the counter affidavit that the writ appeal filed by the Government was dismissed on 1.3.1990, that till that date the petitioner has not applied to the Government, on the basis of the abovementioned judgments for exclusion, that fresh proceedings under Sec.3-A were initiated and that notice under Sec.5-A of the Act was issued on 28.1.1991.

5. Mr.Raghavan, the learned Senior Counsel mainly contends that the notification under Sec.4(1) of the Act, issued in the year 1978 cannot be enforced against the petitioner at this stage. The learned counsel points out the proviso to Sec.6 of the Act which has been inserted by Central Act No.68 of 1984. Relying upon the said proviso, the learned Senior Counsel states that the State Government cannot take its own time and try to deprive the citizens of their property rights. The learned Senior Counsel points out that the notification under Sec.4(1) of the Act is dated 9.8.1978 and the declaration under Sec.6 of the Act is dated 8.8.1981 and that the same were quashed by this Court earlier. It is also pointed out by the learned Senior Counsel that the writ appeal was filed by the State and that the petitioner has not obtained an order of stay of operation of the order in writ petition during the period of appeal. According to the learned Senior Counsel no proceedings can be taken under the Act based upon the notification under Sec.4(1) of the Act dated 9.8.1978. The learned Senior Counsel draws my attention to the decision of this Court in *Vadari alias Chellappa v. State of Tamil Nadu*, (1990)1 M.L.J. 219, in which a decision has been taken by this Court with regard to certain lands for the very same purpose in the very same locality in almost similar circumstances. The learned Senior Counsel relies upon the said decision stating that the facts of the said case are almost similar to the facts of this case and as such the notification under Sec.4(1) of the Act made in this case, in so far as the petitioner's lands are concerned, should be set aside.

6. Mrs.Kalaiselvi, the learned Government Advocate (Housing) who appears for the respondents reiterates the contentions raised in the counter affidavit. Further the learned Government Advocate is not able to controvert the contentions of the learned Senior counsel that the ratio in *Vadari alias Chellappa v. State of Tamil Nadu*, (1990)1 M.L.J. 219, would apply to the facts of this case.

7. Considering the arguments of the learned

Senior Counsel appearing for the petitioner and of the learned Government Advocate (Housing), I am of the view that the facts of the case which are placed before me, in all force are one and the same to the case decided in *Vadari alias Chellappa v. State of Tamil Nadu*, (1990)1 M.L.J. 219, cited supra. In my view the judgment of this Court, mentioned supra, squarely applies to the facts of this case and the respondents cannot escape from that.

8. The reliance of the decision of a Full Bench of this Court in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, in my view, is wholly unsustainable. That was a case which arose before the Central Act 68 of 1984 came into force. After coming into force of Act 68 of 1984, I do not think the principle laid down by the Full Bench of this Court in the above mentioned case will not hold good. The Full Bench of this Court, in the decision cited supra, applied the *maxim actus curiae neminem gravabit* and took note of the fact that there was no stay in that case in favour of the petitioner and observed at page 278 as follows:

“..... We will now proceed to consider the application of the *maxim actus curiae neminem gravabit* to the proceedings in question. This maxim “is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law”. (Vide Broom’s Legal Maxims, Page 99). We have already adverted to the period during which W.P.No.2544 of 1970 remained pending on the file of the court. During that period there was an order of stay in favour of the petitioners. The Government was not therefore, a free agent during that period to set right any mistakes committed by it. In spite it, can time run out against Government so as to denude it of its full period of three years to make a declaration under Sec.6(1) of the Act for acquiring the petitioners’ lands? It is this anomaly which has been pointed out by Ismail, J., in W.P.No.642 of 1969 in the following words:-

“The anomaly of the acceptance of the argument of the learned counsel for the petitioner in this behalf will become apparent in such a case because, without there being any delay on the part of the Government, it will be said to have been disabled from completing that acquisition.”

The Division Bench which disposed of *Lakshmi Venkatesan (Minor) v. Special Tahsildar Land Acquisition*, (1978)91 L.W. 1, has conceded, “that the principle that an act of Court shall prejudice nobody is well established”. It, however, refused to apply the principle to a case of land acquisition, because, the period of three years specified in the proviso is absolute”. The Supreme Court has however, taken a different view in *Director, Income-tax v. Pooran*, (1975)4 S.C.C. 568. This decision had not been placed for consideration by the Division Bench of this Court. At page 71, of the report their Lordships have stated as follows:

“It is a well-established principle of judicial procedure that where any proceedings are stayed by an order of a Court or by an injunction issued by any Court, that period should be excluded in computing any period of limitation laid down by law. Especially after the Limitation Act, 1963, the provisions of which are now applicable to all proceedings, a provision like Explanation (1) to Sec.132 is superfluous and no argument can be based on it”.

Therefore, the view of the Division Bench that the *maxim actus curiae neminem gravabit* will not apply to a specific legislative measure providing limitation which does not except from its domain causes which are delayed by reason of issuance of a Court’s order, cannot be held a correct one. We therefore hold that as per the ratio laid down by the Supreme Court in *Director, Income-tax v. Pooran*, (1975)4 S.C.C. 568, the maxim under consideration will apply to the legislative measure contained in the first proviso to Sec.6(1) of the Act notwithstanding there being no express provision in the proviso to causes which are delayed by reason of issuance of a Court’s order.....”

After the passing of the Central Act LXVIII of 1984, an express provision has been made, regarding the period of limitation when a stay order of the court is in operation. So, I do not think that the reliance of the learned Judge in *Chinnathambi Gounder v. Government of Tamil Nadu*, (1980)2 M.L.J. 269, will not apply to the facts of this case. 9. However, the learned counsel appearing for the petitioner points out that with regard to S.No.85/3 measuring about 5.26 acres, acquisition proceedings have been withdrawn by the Government on 1.7.1992. Therefore, as I have already stated the notification under Sec.4(1) of the Act is

quashed and the writ petition shall stand allowed in so far as S.Nos.85/2 and 85/5 measuring about 0.27 and 1.90 acres respectively are concerned. However, there will be no order as to costs. However, it is open to the respondent State to proceed with the land acquisition proceedings a fresh if it thinks necessary as the acquisition is for the public purpose, exercising its power of eminent domain.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

S.A.No.521 of 1982 15th July, 1992.

Pachaiyappan and others ...*Appellants*
v.
Sri Kamatchi Amman Koil Devasthanam represented by its President Gopal Pathar and others ...*Respondents.*

French Civil Code, Art.745 - 'Descendant' - Meaning of - If includes wife.

According to the definition of the term 'descendant' as contained in Art.745 of the French Civil Code a wife cannot claim herself as the descendant of her deceased husband. Further, this Court while considering the meaning of the word 'santhathi' in *Sundaram Iyer v. Sarojini*, (1984) 1 M.L.J. 255, took a similar view. In view of the abovesaid decision and on the plain reading of Art.745 of the French Civil Code it remains to be seen that the plaintiff in the present suit cannot claim herself as the descendant of her husband. If that is so, she would not have any right under the Will dated 1.1.1913 either to collect the rental income from the suit property or to perform the Thai Poosam festival as claimed by her. [Para 9]

Cases referred to:

Sundaram Iyer v. Sarojini, (1984) 1 M.L.J. 255. [Para 9]

Indramani Devi v. Raghu Nath Bhanya Birbar Jagadeb, A.I.R. 1961 Ori 9. [Para 9]

R.Gopalakrishnan, for Appellants.

K.S.Ahmed, for Respondents.

The Court made the following

ORDER: The legal representatives of the plaintiff are appellants herein. The plaintiff filed O.S.No.254 of 1972 for declaration that the plaintiff is entitled to collect the rent and to perform Thai Poosam Festivals as per the terms of the will dated 1.1.1913 executed by one Sundarambal, wife of Palani Pathar. The case of the plaintiff is as under:

The suit property originally belonged to one Palani Pathar, who died leaving behind him his wife Sundarambal as his sole Legal Representative. They did not have any issues. Sundarambal in turn executed a will dated 1.1.1913 in respect of the suit property stating that 1/4th of the rent accrued from the suit property shall be utilised for the payment of taxes and towards repairing charges. The remaining portion of 3/4th of the rent should be spent for Subramanya deity of Kamatchiamman temple during Poosam Festivals in the month of Thai. It was also stated therein that the Testator's brother-in-law Pavadai Pathar and Vaiyapuri Pathar and after them their descendants shall collect the income from the suit property and utilise the same for the purposes as stated above. It was further submitted that after the death of Pavadai Pathar and his son Vyapuri Pathar, their descendants should celebrate the Thai Poosam festivals as stated above. The plaintiff is the wife of Vyapuri Pathar. According to her, after the death of her husband, she was celebrating the Poosam festivals as stipulated in the abovesaid Will. The second defendant is the lessee under the plaintiff and had been paying the rent to her. For the past 12 months the second defendant did not pay the rent representing that the first defendant is claiming the rent and the same has been paid to him. The first defendant is stated to be Kamatchi Amman Koil Devasthanam, represented by its President, Gopal Pathar. According to the plaintiff, the first and second defendants have colluded together in order to deprive the plaintiff of her rights of management as per the will dated 1.1.1913. The plaintiff issued a notice dated 9.2.1972 to the first and second defendants reiterating her rights. The first and second defendants sent their respective replies through their Advocates. The third defendant is the lessee under the second defendant. Hence, the suit.

2. The case of the first defendant is as under:

It is not correct to state that the plaintiff was performing the Thai Poosam festivals as alleged by her. The plaintiff is not a descendant of the said Vyāpuri Pathar. Therefore, she is not entitled to collect the rent from the suit property and perform the Poosam festivals as per the will dated 1.1.1913. The plaintiff never conducted the Poosam festivals as alleged by her. After the death of Vyapuri Pathar the second defendant was conducting the Poosam festivals on behalf of Agana Group. The second defendant became one of the member in the temple Committee and performed the festivals. Since the public was dissatisfied with his performance of festivals, the temple committee took over the performance of the festival for the past ten years. The second defendant occupied the house as a lessee of the first defendant, and executed a registered lease deed to that effect. The second defendant was paying the rent to the first defendant. Since the first defendant took steps to evict the second defendant, he colluded with the plaintiff in filing the present suit. According to the will dated 1.1.1913, the real intention of the testatrix was that if the descendants of Vyapuri Pathar failed to conduct the Poosam festivals, the Agana Group would conduct and if they also failed, the temple committee would conduct the Poosam festivals by collecting the rent from the suit property. It was therefore, pleaded that the suit as framed and filed by the plaintiff is not maintainable.

3. The case of the second defendant is that he is a lessee under the first defendant. He executed a lease deed in favour of the first defendant and he was also paying the rent to the first defendant. As per the terms of the will, the plaintiff is not entitled to collect the rent from the second defendant. It is not correct to state that the plaintiff was repairing the suit property. It was, therefore, pleaded that the suit filed by the plaintiff is not maintainable.

4. The case of the third defendant is that there is no cause of action to file the suit against this defendant. The second defendant represented to this defendant that he was the owner of the suit property. When this defendant came to know that the Kamatchi Amman Koil Devasthanam was the owner of the property, he started paying the rent to the first defendant. This defendant also denies the allegation that the plaintiff got the right to collect the rent. It is under the instigation of the second

defendant, the plaintiff filed the present suit. This defendant is not a necessary party. Therefore the suit is liable to be dismissed.

5. On these pleadings, the trial court framed six issues. The plaintiff filed 4 documents, No document was filed on the side of the defendants. Angammal examined herself as P.W.1. One Dorai kannu and Krishna Pathar were examined as P.Ws.2 and 3 respectively. Gopal Pathar examined himself as D.W.1. Considering the facts arising in this case, the trial court decreed the suit as prayed for with costs. However, on appeal, the first appellate court considering the facts arising in this case, held that the plaintiff is not entitled to maintain the suit. Accordingly, the first appellate court set aside the judgment and decree of the trial court allowed the appeal and dismissed the suit. It is against this judgment and decree, the legal representatives of the plaintiff are in appeal before this court.

6. The learned counsel appearing for the appellants herein submitted as under:

As per Will dated 1.1.1913 executed by Sundarambal, Pavadai Pathar and his son Vyapuri Pathar are directed to perform the Poosam festivals from the rental collection of the suit property. After the life time of Pavadai Pathar and Vyapuri Pathar, their descendants are directed to perform the Poosam festivals from and out of the rental income. The plaintiff is the wife of Vyapuri Pathar. Therefore, she is entitled to perform the Thai Poosam festivals out of the rental collection from the suit property. In fact, for the past many years, she was collecting the rent from the suit properties and she was also performing the Thai Poosam festivals as directed under the above said Will. Latter on, the intervention of the first defendant she was unable to carry out the instruction as given in the abovesaid Will. Since Vyapuri Pathar and the plaintiff have no issues, the plaintiff, being the wife of Vyapuri Pathar should be considered as the descendant and permitted to carry out the obligations as given in the above said Will. The first appellate court was not correct in stating that the plaintiff is not the descendant. Further, the first appellate court was also not correct in stating that the first defendant is entitled to collect the rental income from the suit property and perform the Poosam festivals. Even according to the Will dated 1.1.1913, if the plaintiff cannot be considered as a descendant of Vyapuri Pathar, the next

line of descendant mentioned in the above said will would be the community people of Agana Group and at no stretch of imagination the first defendant could claim any right to perform the festival by collecting the rental income from the suit properties. It was, therefore pleaded that the judgment and decree of the first appellate court are liable to be set aside and that of the trial court restored.

7. On the other hand, the learned counsel appearing from the first defendant/first respondent herein submitted as under:

The plaintiff cannot call herself as descendant of her husband Vyapuri Pathar. As per the will dated 1.1.1913, it is only the descendants of Vyapuri Pathar alone can perform the Thai Poosam festivals from and out of the rental income from the suit property. It is not correct to state that the plaintiff was conducting the Thai Poosam festivals as alleged by her. The first defendant is collecting the rent from the second defendant since he is the tenant under the first defendant. In the absence of any document to the said Vyapuri Pathar, the next line of descendant would be the first defendant. Therefore, the first defendant is entitled to collect the rent from the suit property and perform the Thai Poosam festival. The term 'Descendant' is explained in Art.745 of French Civil Code. According to the said Article, a wife is not considered as a descendant of her deceased husband. In order to support his contention, the learned counsel also relied upon a decision of this Court rendered in *Sundaram Iyer v. Sarojini*, (1984) 1 M.L.J. 255. For all these reasons, the learned counsel submitted that the first appellate court was correct in holding that the plaintiff is not entitled to perform the Thai Poosam festivals. Ultimately, it was pleaded that the first appellate court was correct in holding that the first defendant is entitled to collect the rental income from the suit property and perform Thai Poosam festival. It was, therefore, submitted that inasmuch as the conclusion arrived at by the first appellate court was in accordance with the abovesaid provisions of the French Civil Code and the decision of this Court stated supra no interference is called for.

8. I have heard the rival submissions.

9. The only point that arises for my consideration in this second appeal is whether the plaintiff can call herself as the descendant of her husband Vyapuri Pathar. In order to decide this point, we have to

depend upon the Will executed by one Sundarambal dated 1.1.1913. The plaintiff is the wife of one Pavadai Pathar. The suit property originally belonged to the said Pavadai Pathar. After his death, his wife Sundarambal inherited the same and the said Sundarambal executed a will dated 1.1.1913 in the said will, she dedicated the suit property to Subramanya Deity at Kamatchi Amman temple. She also directed that 1/4th of the income from the suit property should be utilised for the payment of taxes and towards repairs. The remaining 3/4th of the income should be spent for Subramanya deity at Kamatchi Amman temple during Poosam festivals in the month of Thai. In the said will, it was stipulated that the testator's brother-in-law Pavadai Pathar and his son Vyapuri Pathar should collect the income from the suit property without having any right to sell or donate or gift and shall celebrate the Poosam festival in the month of Thai. It was further stipulated that after the death of Pavadai Pathar and his son Vyapuri Pathar, their descendant should perform the Poosam festival out of the income from the suit house. The plaintiff is the wife of Vyapuri Pathar. Pavadai Pathar and Vyapuri Pathar died subsequently. Vyapuri Pathar and his wife, the plaintiff in the suit, have no issues. Now the plaintiff claims that as the descendant she is entitled to carry out the instructions as given in the aforesaid will. The point is whether the plaintiff can call herself as the descendant of her husband Vyapuri Pathar. The plaintiff was residing in the French territory at Pondicherry. According to the French Civil Code, Art.745 the term 'Descendant' has been explained in the following manner:

"745. Children or their descendants inherit the property of their father and mother, grandparents or other ancestors, without distinction of sex or right of primogeniture, even if they are the issues of different marriages. They inherit equally or per capita when they are all related in the first degree to the deceased and entitled in their own right; they succeed per stripes when all or some of them inherit by representation."

Therefore, according to the abovesaid definition of the term 'descendant' as contained in Art.745 of the French Civil Code a wife cannot claim herself as the descendant of her deceased husband. Further, this Court while considering the meaning of the word 'Descendant' in the decision reported in

Sundaram Iyer. v. Sarojini, (1984)1 M.L.J. 255, wherein it has been held as under:

"From the abovesaid decisions it is clear that "Hairs" (Varsu) would mean both males and females who are entitled to the property of another under the law of inheritance. Another term used in the trust deed which requires to be considered is the word 'santhathi'. In the Tamil Lexicon, published under the authority of the University of Madras, Vol.3 Part I 1928 Edition at page 1262 the word "santhathi" is given the following meaning:

"Santhathi" descendant, heir son, lineage pendigrsa". It is clear from the decision of the Orissa High Court in *Indramani Devi v. Raghunath Bhanja Birbar Jagadeb*, A.I.R. 1961 Ori. 9, that according to Mistakshara of Vignaneswara, the word 'Santhathi' would mean only male issues. Further even though the expression 'Santhathi' according to the dictionary meaning connotes all classes of issues or heirs, whether male or female, yet in a particular context they may be restricted to male heirs only."

In view of the abovesaid decision of this Court and on a plain reading of Art.745 of the French Civil Code, it remains to be seen that the plaintiff in the present suit cannot call herself as the descendant of her husband. If that is so, she would not have any right as contemplated under the Will dated 1.1.1913 either to collect the rental income from the suit property or to perform the Tahi Poosam festival as claimed by her. In such circumstances, when the plaintiff has got no right to collect the rental income and to perform the Poosam festival as per the Will dated 1.1.1913, we need not delve into this matter any further. In fact, the suit was filed by the plaintiff for a declaration to declare her right to perform the festival and for collecting the rental income. Since the plaintiff failed to establish her right to collect the rental income and to perform the festival as per the Will dated 1.1.1913, the suit is liable to be dismissed. The first appellate court further went into the matter and observed that the first defendant is entitled to collect the rental income from the suit property and perform the festival. The observation made by the first appellate court is not only incorrect but also out of context. The question, viz. after Vyapuri Pathar who will perform the Poosam festival and collect the rent is altogether a different matter which has

got to be agitated in a separate forum. In the present proceedings, this Court cannot give any direction in that regard. In that view of the matter, the conclusions arrived at by the first appellate court are confirmed and the second appeal is dismissed.

10. In the result, the judgment and decree of the first appellate court are confirmed and this second appeal is dismissed. However, there will be no order as to costs.

V.K.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Lakshmanan, J.

W.M.P.No.11880 of 1992 in W.P.No.8211 of 1992
14th July, 1992.

A.M.Jain College by Honorary Secretary, Madras
...Petitioner

v.

Government of Tamil Nadu and another

...Respondents.

(A) *Constitution of India (1950), Art.30(1) - Minority institution - Admission of students from minority communities to - Resolution of State Government Order directing the institution to make available not less than 30% of annual permitted strength in each branch - Faculty to other condition - If valid - Supreme Court's direction that minority institutions shall make available atleast 50% of annual admission to members of communities other than the minority community - Interpretation.*

(B) *Constitution of India (1950), Arts.29(2) and 30(1) - Minority institution giving preference to the religious minority candidate in their own institution - If amounts to discrimination and violative of Art.29(2).*

The petitioner A.M.Jain College was founded in 1952 and was primarily meant for the benefit of the young men of the Jain community, but it is open to young men of all communities. The institution has been declared a minority institution. As

the Jain community is essentially engaged the trading business and industry, education in commerce and business related subjects were taught to the Jain students. In 1992, 124 Jain students were admitted to B.Com., (evening college) as against the capacity of 150. Similarly, the day college provisional admission cards were issued to 103 Jain students-Jain students were given preference in B.Com. and B.A. (Corporate) courses. The Supreme Court in *St. Stephen's College v. The University of Delhi*, (1992)1 S.C.C. 558: (1991)2 Scale 1217, directed that the minority institution shall make available at least 50% of annual admissions to members of communities other than the minority community. After referring to the above decision the State Government issued G.O.Ms.No.561, Education, dated 15.6.1992 directing that the intake of candidates of minority communities should not exceed 50% of the annual permitted strength in each Branch/Faculty and that the minority educational institutions shall make available not less than 50% of the annual permitted strength in each Branch/Faculty to the members of the community other than the minority community. The petitioner challenged the order on behalf of the State, it was contended that the 50% directed by the Supreme Court indicated only 50% of seats in every Branch/Faculty and that the institutional preference for admission based on religious was violative of Art.29(2) of the Constitution of India.

Held: The Supreme Court states that the State may regulate the intake of students from the minority community with due regard to the need of the community in the area which the institution intended to serve. The petitioner college is undoubtedly intend to serve the Jain community in Madras, Tamil Nadu. The Jain students in Madras generally and basically join B.Com. and B.A. (Corporate) course and not in other courses. The impugned G.O. restricting intake of minority community students to 50% in each Branch/Faculty affects the Jain community students in B.Com and B.A. (Corporate) courses also. This will very adversely affect the Jain community people in Madras, which the petitioner college intend to serve, and this also violates the law and the judgment of the Supreme Court. It will also violate Art.30(1) of the Constitution of India. The impugned G.O. is trying to stretch the Supreme Court judgment beyond its scope and intends and

lays down fresh rule which interferes with the right guaranteed under Art.30(1) of the Constitution of India. The language used by the Apex Court should be interpreted by to reason that 50% of the total number of seats in the annual admission of the institution should made available to students of other communities and not 50% in each Branch/Faculty as directed by the State Government in the impugned G.O. [Paras 12 and 16]

Any preference given to the religious minority candidate in their own institution cannot be a discrimination falling under Art.29(2) of the Constitution of India. The institution in answer is established for the transit of the Jain community and if they are prevented from admitting their own community candidate, the very purpose of establishing the institution would be defeated. Minority institutions are entitled to admit their candidates by preference or by reservation. They are also entitled to admit them to the exclusion of all others and that right, flows from the right to establish and administer the educational institutions guaranteed under Art.30(1) of the Constitution of India. The State can lay down reasonable conditions for obtaining and for admission of students in their institutions but the State has no right to compel the minority institutions to give up their right under Art.30(1) of the Constitution of India. [Para 13]

Case referred to:

St. Stephen's College v. The University of Delhi, (1992)1 S.C.C. 558: (1991)2 Scale 1217. [Paras 6, 15, 18]
R. Krishnamurthi, Senior Advocate, for *M/s. Surana and Surana*, for Petitioner.

P. Shanmugham, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- The main writ petition has been filed by the petitioner college through its Honourary Secretary for the following relief: To issue a writ of *certiorari* or any other appropriate writ, order or direction, calling for the records from the 1st respondent in G.O.Ms.No.561, Education, dated 15.6.1992, conveyed to the petitioner in the proceedings of the 2nd respondent in Rc.No.25393/Ha.8/92 dated 17.6.1992 and quash the same.

2. The writ petition was admitted by this Court on 26.6.1992 and notice was ordered to the respondents on the same date in W.M.P.No.11880 of 1992. The prayer in W.M.P.No.11880 of 1992 is as follows: To stay the operation of the impugned

G.O.Ms.No.561, Education, dated 15.6.1992 in so far as it relates to B.Com. and B.A. (Corporate) courses for Jain students in the petitioner college pending disposal of the writ petition.

3. The petitioner college is registered under the Societies Registration Act. It was founded in the year 1952 and primarily meant for the benefit of the young men of the Jain Community, but is open to the young men of the Jain Community, but is open to the young men of all communities. In W.P.No.1149 of 1975, this Court has held that Sri S.S.Jain Educational Society, which is conducting the petitioner college, is a minority institution within the meaning of Art.30(1) of the Constitution of India. By G.O.Ms.No.549, dated 6.4.1988, Education Department of the Government of Tamil Nadu, the petitioner college has been declared as a minority institution on the basis of the order of this Court in W.P.No.1149 of 1975, and that the privileges provided in the Tamil Nadu College (Regulation) Act, 1967, and the rules framed thereunder are allowed to the petitioner college.

4. It is also an admitted fact that the Jain community in Madras, Tamil Nadu, is a religious and linguistic minority and is a educationally backward community. Basically, it is a community engaged in trading, business and industry. From the beginning of the college, education in commerce and business related subjects were taught to the Jain students with a view to encourage them to undergo college education at least in commerce and business related subjects, since the Jain Community in Madras is basically engaged in trading, commerce and industry. The petitioner college was one of the very few colleges from the beginning which had the B.Com. course. The object was to encourage Jain students, who were otherwise reluctant to undergo college education due to the general educational backward character of the community, to undergo B.Com. course which will be useful for their business career.

5. In the year 1992, admission, 124 Jain students have already been admitted to B.Com., (Evening College) as against the capacity of 150 seats. Similarly, the Day College also for the year 1992, more number of Jain students have applied than the seats available and the Principal was instructed to issue provisional admission cards to 103 Jain students. It is also stated that the non-Jain students are not totally denied admission in B.Com. and B.A. (Corporate) courses and they do get

admitted on merit in B.Com. and B.A. (Corporate) courses. But, Jain students are given preference to meet the specific and peculiar need of the Jain community students.

6. While so, the petitioner received from the office of the 2nd respondent Proceedings Rc.No.25393/ Ha.8/92, dated 17.6.1992 enclosing therewith a copy of G.O.Ms.No.561, Education, dated 15.6.1992 for necessary action. G.O.Ms.No.561, Education, dated 15.6.1992, referred to the judgment of the Supreme Court dated 6.12.1991 in *St. Stephen's College v. The University of Delhi*, (1991) 2 Scale 1217: (1992) 1 S.C.C. 558. It is pertinent to extract or reproduce the relevant portion in that judgment.

"The Minority Aided Educational institutes are entitled to prefer their community candidates to maintain the minority character of the institution, subject, of course, to conformity with the University standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institutions is intended to serve. But, in any case, such intake shall not exceed 50% of the annual admission. The minority institution shall make available atleast 50% of annual admissions to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit."

7. After referring to the Supreme Court judgment, the impugned G.O. directs as follows:

"(i) The minority aided colleges are permitted to admit their community candidates subject to the conditions that in case such intake shall exceed 50% of the annual permitted strength in each Branch/Faculty; and

(ii) The aided minority educational institutions shall make available not less than 50% of the annual permitted strength in each Branch/Faculty to the members of the community other than the minority community and such admissions shall be done purely on the basis of merit subject to the rules of reservation of the Government in force."

The impugned G.O. further states that it comes into force with effect from the academic year 1992-93. The said G.O. is challenged in the main writ petition.

8. I have heard Mr.R.Krishnamurthi, learned Senior Advocate for the petitioner, as instructed by

Mr. Surana, Advocate, and Mr. P. Shanmugham, learned Additional Government Pleader, for the respondents.

9. Mr. R. Krishnamurthy, learned Senior Advocate states, that the decision dated 6.12.1991 of the Supreme Court of India in the case of *St. Stephen's College v. The University of Delhi*, only states that (1) That State may regulate the intake of students of the minority community with due regard to the community in the area which the institution is intended to serve; and (2) This intake shall not exceed 50% of the *annual admission*. The balance of 50% of the annual admission should be made available to the members of the communities other than the minority community. He further submits that more than 50% of the total number of seats in the petitioner college every year (annual admission) are allowed to non-Jains and that the petitioner college is prepared to abide and is abiding by the decision of the Supreme Court of India, which stipulates that the intake of the students belonging to the minority community shall not exceed 50% of the annual admission. Mr. R. Krishnamurthy also submits that the Supreme Court only refers to 50% of the annual admission (total) and that *annual admission* can only mean that total annual admission in all the courses in the college put together and does not refer to each Branch/Faculty/Course offered by the college. According to him, however, the impugned G.O. directs that 50% of the admission for each branch/faculty should be from the members of the other communities. It also restricts admission of Jain students in each branch/faculty to 50% and that such a restriction is beyond the scope of the Supreme Court judgment and as such *ultra vires*.

10. It is useful to refer to the decision of the Supreme Court in this context. The Supreme Court says, the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions, subject, of course, the conformity with the University standard. It further states that the State may regulate the intake in this category *with due regard to the need of the community in the area which the institution is intended to serve*. But, in no case, such intake shall exceed 50% of the *annual admission*. The minority institutions shall make available at least 50% of the *annual admission* to members of communities other than the minority

community and that the admission of other community candidates shall be done purely on the basis of merit.

11. Mr. P. Shanmugham, learned Additional Government Pleader reiterates the points raised by the 2nd respondent/Director of Collegiate Education, in his counter affidavit. According to Mr. P. Shanmugham, the petitioner is mis-interpreting the judgment of the Supreme Court and if the contention of the petitioner is conceded, the spirit of the judgment will be lost. Strong reliance was placed on paragraph 78 of the judgment of the Supreme Court in *St. Stephens College* case. He also placed reliance on paragraph 81 of the said judgment. Referring to paragraphs 78 and 81 of the judgment, Mr. P. Shanmugham submitted that segregated faculties or universities for imparting general secular education are undesirable and that they may undermine secular democracy, which would be inconsistent with the central concept of secular and equality embedded in the Constitution.

12. I am of the *prima facie* view that the interpretation now made by the State Government of the Supreme Court judgment in *St. Stephens College* case is not proper and appropriate. However, it is a matter for decision ultimately in the main writ petition. The Supreme Court states that the State may regulate the intake of students from the minority community with due regard to the need of the community in the area which the institution intended to serve. The petitioner college, in my view, is undoubtedly intended to serve the Jain community in Madras, Tamil Nadu. As already stated, the Jain students in Madras generally and basically join B.Com. and B.A. (Corporate) course and not in other courses. The impugned G.O. restricting intake of minority community students to 50% in each Branch/Faculty affects the Jain community students in B.Com and B.A. (Corporate) courses also. This will very adversely affect the Jain community people in Madras, which the petitioner college intend to serve, and this also violates the law and the judgment of the Supreme Court. It will also violate Art. 30(1) of the Constitution of India. In my opinion, the impugned G.O. is trying to stretch the Supreme Court judgment beyond its scope and intends and lays down fresh rule which interfere with the right guaranteed under Art. 30(1) of the Constitution of India.

13. In the concluding part of his argument

Mr.P.Shanmugham submits that the institutional preference for admission based on religion is violative of Art.29(2) of the Constitution of India. He further submits that the petitioner college shall not prefer or deny admission to candidates on grounds of religion. Any preference given to the religious minority candidate in their own institution, in my view, cannot be a discrimination falling under Art.29(2) of the Constitution of India. The institution in question is established for the benefit of the Jain community and if they are prevented from admitting their own community candidates, the very purpose of establishing the institution would be defeated. In my view, minority institutions are entitled to admit their candidates by preference or by reservation. They are also entitled to admit them to the exclusion of all others, and that right, in my view, flows from administer the educational institutions guaranteed under Art.30(1) of the Constitution of India. In my view, the State can lay down reasonable conditions for obtaining and for admission of students in their institutions but the State has no right to compel the minority institutions to give up their right under Art.30(1) of the Constitution of India.

14. Admittedly, the institution is a minority institution, which is entitled to protection under Art.30(1) of the Constitution of India. Of the 14 courses/faculties offered by the institution, the students from Jain community, for whose benefit the institution was originally founded, seek admission only to B.Com., and B.A. (Corporate) courses. Therefore, when the students of the minority community seek admission to a particular course, it will not be fair on the part of the State Government to compel the management to admit them in some other course, having in mind the fact that the institution is for their benefit and development.

15. Even the Apex Court in paragraph 102 of the judgment *St.Stephen's College v. The University of Delhi*, (1992)1 S.C.C. 558: (1991)2 Scale 1217, has observed as follows:

"In the light of all these principles and factors, and in view of the importance which the Constitution attaches to protective measures to minorities under Art.30(1), the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course to conformity with the University

standard. The State may regulate the intake in this category *with due regard to the need of the community in the area which the institution is intended to serve*. But in no case such intake shall exceed 50 per cent of the *annual admission*. The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit." [*Italicised is mine*]

16. The language used by the Apex Court, in my considered opinion, should be interpreted by to reason that 50% of the total number of seats in the annual admission of the institution should be made available to students of other communities and not 50% in each Branch/Faculty as directed by the State Government in the impugned G.O.

17. It is also seen that applications have been received in large number from the students of the minority community only for B.Com., and B.A. (Corporate) courses. It is also stated that admission cards have already been issued to the minority students. Therefore, at this juncture, it would be unfair and unjust to unsettle the process of admission adopted by the management all these years.

18. It is also pertinent to note that the petitioner has sought stay of the impugned G.O. in so far as it relates to B.Com., and B.A. (Corporate) courses alone. Hence, all the other courses are available for students of other communities. Hence, I feel that the management has made out a *prima facie* case for grant of stay. The balance of convenience is also in favour of the management. Hence, there shall be a stay of the operation of the impugned G.O.Ms.No.561, Education, dated 15.6.1992, in so far as it relates to B.Com., and B.A. (Corporate) courses for the Jain students of the petitioner college. However, the petitioner management is directed to consider the applications of the students from other communities for filling up the seats in B.Com., and B.A. (Corporate) courses, which are available after admitting the Jain community students, who have applied prior to the passing of the impugned G.O. It is made clear that the stay granted above is with reference to the petitioner college alone. The Supreme Court in *St.Stephen's College v. The University of Delhi*, (1992)1 S.C.C. 558: (1991)2 Scale 1217, while issuing *rule nisi* in the writ petition by St.Stephen's College,

had stayed the operation of the impugned Circular in that case and permitted the college to continue to follow its own admission policy, modality and schedule in the succeeding years - vide para 11 of the judgment of the Supreme Court. Hence, I feel justified in staying the impugned G.O. in the instant case, as prayed for.

19. For the fore-going reasons, there will be stay of the impugned G.O., as indicated above.

B.S. ---- Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Venkataswami, J.*

C.R.P.No.3376 of 1989 21st September, 1992.

J.Ramamurthy ...Petitioner
v.

M/s.Endas by Partner Moorjimal and others
...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Secs.14(1)(b) and 19 - Civil Procedure Code (V of 1908), Sec.11 - Petition filed under Sec.14(1)(b) dismissed as not maintainable - Findings given on merits also - Finding if operates as res judicata or as bar under Sec.19.

The landlord's earlier petition for eviction under Sec.14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act was dismissed on the ground that he was only a life estate holder and that his claim was not *bona fide*. After the decision of the Supreme Court in *S.M.Gopala Krishna Chetty v. Ganeshan*, A.I.R. 1975 S.C. 1750, holding that a life estate holder could also file an eviction petition, the petitioner filed another petition for eviction under Sec.14(1)(b) of the Act. It was allowed by the Rent Controller but that order was set aside by the appellate authority on the ground that the petition was barred under Sec.19 of the Act. In revision,

Held: A perusal of the judgments in *Shankaralal Patwari v. Hiralal Murarka*, A.I.R. 1950 P.C. 80, *M.Govindarajulu v. M.Jayaraman*, (1976)1 M.L.J.

406 and *M/s.Associated Traders v. T.M.A.Abdul Hameed*, (1983)2 M.L.J. 583, will clearly support the contention that when the dismissal of the earlier petition under Sec.14(1)(b) of the Act was mainly on the ground that it was not maintainable any findings given on merits in that case will not operate as *res judicata* or as a bar under Sec.19 of the Act. [Para 14]

Cases referred to:

S.M.Gopala Krishna Chetty v. Ganeshan, A.I.R. 1975 S.C. 1750. [Para 7]

Shankaralal Patwari v. Hiralal Murarka, A.I.R. 1950 P.C. 80. [Para 7]

M.Govindarajulu v. M.Jayaraman, (1976)1 M.L.J. 406. [Paras 7, 13]

M/s.Associated Traders v. T.M.A.Abdul Hameed, (1983)2 M.L.J. 583. [Paras 7, 13]

S.Balasubramaniam v. Gulab Jan, 94 L.W.102. [Para 7]

B.Paras Devi v. M/s.Vijaya Auto Parts, 100 L.W. 319. [Para 7]

M/s.Variety Emporium v. R.M.Mohd. Ibrahim, A.I.R. 1985 S.C. 207. [Para 7]

Gulabbai v. Nalim Nersi Yohra, (1991)3 S.C.C. 483. [Para 7]

K.A.Vadivelu v. R.Govindarajulu, (1992)1 L.W. 190. [Para 7]

Official Trustee v. S.N.Chatterjee, (1969)3 S.C.R. 92; (1969)2 S.C.J. 123; A.I.R. 1969 S.C. 823. [Para 14]

B.Yamuna Bai v. N.Ramaswamy, (1977)1 M.L.J. 223. [Paras 8, 14]

M/s.P.Orr. & Sons (P) Ltd. v. M/s.Associated Publishers, (1990)2 M.L.J. (S.C.) 12; (1990)2 L.W.547. [Para 15]

K.Sarvabhauman, Senior Counsel for *M.S.Krishnan* and *S.Parthasarathi*, for Petitioner.

S.V.Jayaraman, for *S.K.Narayanan*, for Respondents.

The Court made the following

ORDER:- This revision petition, preferred by the landlord in rent control proceedings, is directed against a common judgment of the Appellate Authority in R.C.A.No.404, etc. of 1987, dated 17.8.1989.

2. The petitioner filed R.C.O.P.No.5140 of 1983 under Sec.14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as 'the Act') against 12 tenants occupying different portions of the premises belonging to the landlord. When that R.C.O.P. was allowed in

favour of the landlord, the tenants preferred different individual R.C.As. to the Appellate Authority. Hence there were number of Appeals before the Appellate Authority. Further, in addition to the petition under Sec.14(1)(b) of the Act, the landlord also filed additional eviction petitions against some of the tenants under other provisions. But here we are not concerned with those. We are concerned now only with the case relating to eviction petition filed under Sec.14(1)(b) of the Act.

3. It is the case of the landlord that the premises in the occupation of various tenants was in a dilapidated condition requiring demolition. He has means to demolish and reconstruct the same. According to the petitioner, the petition under Sec.14(1)(b) of the Act was *bona fide* and he has undertaken to demolish and commence reconstruction within the period allowed by the Statute.

4. The tenants resisted the eviction petition under Sec.14(1)(b) of the Act contending *inter alia* that the petition was not *bona fide*, that the building was not in a dilapidated condition as claimed by the landlord, and that a similar petition (R.C.O.P.No.479 of 1972) filed by the landlord having ended in dismissal, the present petition for eviction is barred under Sec.19 of the Act.

5. Before the Rent Controller, the petitioner (landlord) examined himself as P.W.1 and an engineer was examined as P.W.2, and two other witnesses were examined on the side of the petitioner as P.W.3 and 4 to support his case. The petitioner filed as many as 47 documents which were marked as Exs.P-1 to P-47. On the side of the tenants, eight witnesses were examined. Of them, except R.W.7 and R.W.8, an Engineer, the others, namely, R.Ws.1 to 6 were tenants. On the side of the respondents (tenants) Exs.R-1 to R-17 were marked. Exs.C-1 to C-5 were marked as Court exhibits.

6. The Rent Controller, on the basis of the pleadings, evidence both oral and documentary and the arguments advanced before him, found that the building was in a dilapidated condition requiring immediate demolition, that the claim for demolition was *bona fide*, that the petitioner has got sufficient means to demolish and reconstruct, that the petition was not barred under Sec.19 of the Act. Consequent to these findings, the Rent Controller ordered eviction. Aggrieved by that, as mentioned above, the tenants preferred

independent appeals, and the Appellate Authority, on a reappreciation of evidence, came to a different conclusion and found that though the building was in a bad condition, the claim was not *bona fide*, and the petition was barred under Sec.19 of the Act. However, he found that the petitioner has got means to demolish and reconstruct. Ultimately, the Appellate Authority allowed the appeals preferred by the tenants against the order of eviction. Aggrieved by the judgment of the Appellate Authority dismissing the eviction petitions and allowing the tenant's appeals, the landlord has filed this revision petition.

7. Mr.K.Sarvabhauman, learned Senior Counsel appearing for the petitioner/landlord, took me through the order of the Rent Controller and the common judgment of the Appellate Authority. According to the learned Senior Counsel, the judgment of the Appellate Authority dismissing the eviction petition is unsustainable both on facts and on law. According to him, the Appellate Authority, having found that the building is in a bad condition, erred in dismissing the eviction petition on the ground that the claim was no *bona fide* and the petition for eviction was barred under Sec.19 of the Act. Learned Senior Counsel contended that the reasons given by the Appellate Authority for reaching the above two conclusions are totally unsustainable. According to the learned Senior Counsel, the principle of *res judicata* or the bar under Sec.19 of the Act cannot be pressed into service to the facts of this case. Because, the previous eviction petition, namely R.C.O.P.No.479 of 1972, filed under Sec.14(1)(b) of the Act was dismissed by the Rent Controller on the ground that the eviction petition was not maintainable under Sec.14(1)(b) of the Act at the instance of a life-estate holder. Having held so, the Rent Controller ought not to have gone into the other issue, namely, whether the claim was *bona fide* or not. According to the learned counsel, any findings given on merits after having found that the petition was not maintainable will not be of any consequence and cannot stand in the way of the landlord filing a fresh eviction petition. No doubt, the order of the Rent Controller was confirmed on appeal by the Appellate Authority and further by this Court is revision. It is only after the Supreme Court has declared the law in *S.M.Gopala Krishna Chetty v. Ganeshan, A.I.R. 1975 S.C. 1750*, holding the life-estate holder can also file eviction petition

under Sec.14(1)(b) of the Act, the petitioner has filed the present petition for eviction under Sec.14(1)(b) of the Act and, therefore, the judgment of the Appellate Authority holding that the decision given in the earlier eviction petition regarding *bona fides* will operate as *res judicata* is not sustainable. In support of that, he cited the following decisions: *Shankaralal Panwari v. Hiralal Murarka and others*, A.I.R. 1950 P.C. 80, *M.Govindarajulu v. M.Jayaraman*, (1976)1 M.L.J. 406 and *M/s.Associated Traders v. T.M.A.Abdul Hameed*, (1983)2 M.L.J. 583. He also submitted that apart from holding that the finding regarding *bona fides* rendered in the earlier eviction petition will operate as *res judicata*, the Appellate Authority, in the present case, has found that the sanction for demolition and reconstruction was obtained subsequent to the filing of the R.C.O.P. and therefore the claim was not *bona fide*. This reasoning is not against sustainable in view of several decisions of this Court, namely *S.Balasubramaniam v. Gulab Jan*, 94 L.W.102, *B.Paras Devi v. M/s.Vijaya Auto Parts by its Proprietor M.Gulapchand*, Madras, 100 L.W. 319 and *K.A.Vadivelu v. R.Govindarajulu*, (1992)1 L.W. 190. Finally, he brought to my notice certain subsequent events which will have some relevance to decide the issue regarding the condition of the building in this case. It is stated that some of the tenants have filed R.C.O.Ps. for direction to the landlord to carry out repairs to the respective portions in their occupation. In that proceedings, the Court seems to have appointed a civil engineer as Commissioner and has filed a report which would show that presently the building is in a dangerous condition and it is likely to crumble at any time, and repairs cannot be carried out and the only solution is demolition. Learned counsel also placed reliance on a notice issued by the Corporation on 27.6.1986 under Sec.258 of the Madras City Municipal Corporation Act, 1991 bringing to the notice of the landlord about the dangerous condition of the building and calling upon him to take necessary steps to prevent the danger. In support of his contention that the subsequent events can be relied upon, learned counsel placed reliance on two judgments of the Supreme Court, namely, *M/s.Variety Emporium v. R.M.Mohd. Ibrahim*, A.I.R. 1985 S.C. 207 and *Gulabbai v. Nalim Nersi Yohra and others*, (1991)3 S.C.C. 483.

8. Mr.S.V.Jayaraman learned counsel appearing

for the tenants, in his usual fairness, has submitted that as regards the condition of the building, in the light of the findings and the evidence available, he cannot possibly contend contra. However, he strongly pressed into service two arguments, namely, that there were no *bona fides* in the claim of the landlord, and that the petition under Sec.14(1)(b) of the Act is barred under Sec.19 of the Act. In support of his argument that the present petition for eviction is barred under Sec.19 of the Act, he placed reliance on a judgment of this Court in *B.Yamuna Bai v. N.Ramaswamy*, (1977)1 M.L.J. 223.

9. I have considered the rival submissions.

10. From the recent report of the Civil Engineer (Ex.C-5) who was appointed a Commissioner by the Rent Controller, it is quite clear that the building is in a dangerous condition requiring immediate demolition. The conclusion in the report Ex.C-5 reads as follows:

"1. Entire superstructure of the said portion already collapsed 1 year ago to the best of my opinion.

2. Madras terraced portion both the ground first floor are completely collapsed and dumped at site excepting main door.

3. The flooring both ground and first floor are also the same like above which cannot be used for business or any other purpose on account of the dilapidated condition. At any time, the entire building may collapse, or one part may collapse and the other part may collapse some time later.

4. I certify that the whole building is in a dilapidated condition and cannot be repaired or altered under any circumstances, excepting demolishing the whole building for reconstruction with all modern type of amenities as required to a non-residential accommodation in a civilized city like Madras."

11. In the light of the above Report, the notice issued by the Corporation of Madras under Sec.258 of the Madras City Municipal Corporation Act, 1919 also gives an idea about the condition of the building presumably, realising this, Mr.S.V.Jayaraman, learned counsel appearing for the tenants, has not seriously attacked the condition of the building.

12. The other two points that were urged by the learned counsel for the respondents have to be considered now.

13. Let me first consider the position whether the present eviction petition under Sec.14(1)(b) of the Act is barred either on the principle of *res judicata* or under Sec.18 of the Act.

14. In *Shankarlal Patwari v. Hiralal Murarka*, A.I.R. 1950 P.C. 80, Head-note 'a' reads as follows:

"Court holding that suit is not maintainable by reason of failure to comply with Sec.80 - Findings given on merits are *obiter* and do not support plea or *res judicata* either in favour of or against party."

In *M.Govindarajulu v. M.Jayaraman*, (1976)1 M.L.J. 406, Gokulakrishnan, J., as he then was, while considering a similar question, has found as follows:

"There is no difficulty in accepting the said contention. But it is for the Court to find out as to whether the finding given by the Court on issues which are not necessary to dispose of the suit is an observation without the seal of finding or is *ab initio* void as per the provisions of the particular enactment. Sec.10(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 states:

"No order for eviction shall be passed under Sub-sec.(3)-(i) against any tenant who is engaged in any employment or class of employment not filed by the Government as essential service for the purpose of this subsection unless the landlord is himself engaged in any employment or class of employment which has been so notified."

The prior eviction proceeding was dismissed because of this provision in Sec.10(4). Subsequently, the landlord obtained exemption, as far as this section is concerned, from the Government under Sec.29 of the Act. After obtaining exemption, the landlord has filed the present eviction petition. It is unnecessary for the Rent Controller's Court, which decided the prior proceeding, to go into the question of *bona fides* in as much as Sec.10(4) specifically states that no order for eviction shall be passed in such cases. When there is such a mandatory direction prohibiting the court to pass any eviction order against that person who comes squarely under Sec.10(4)(i) of the Act, the finding on others issues regarding the *bona fides* must be construed as *ab initio* void. In cases wherein want of notice was raised and the same was decided as one of the issues along with other issues, there is no prohibition to go into such issues along with

the question of want of notice. In those circumstances, the cases cited by Mr. Viswanatha Rao, held that the findings which went against a party concerned, even though he succeeded on the question of notice or lost on the question of notice will constitute a bar for the subsequent proceedings on the same issues. In as much as the present finding in the prior proceedings has to be construed as *ab initio* void in view of Sec.10(4)(i) of the Act. I am of the view that Sec.19 is not a bar for the present proceedings. Further, in *Official Trustee v. S.N.Chatterjee*, (1969)2 S.C.J. 123: (1969)3 S.C.R. 92: A.I.R. 1969 S.C. 823, the Supreme Court has held:

"It is clear that before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties."

Thus, it is clear from the abovesaid decision that the Rent Control Court in the prior proceeding should not have decided the other issues in view of the clear prohibition contained in Sec.10(4)(i) of the Act.

In those circumstances, the civil revision petition is dismissed and the order of eviction passed by the Courts below is confirmed. There will be no order as to costs. Time to vacate two months." [paragraphs 10 & 11]

In *M/s.Associated Traders v. T.M.A.Abdul Hameed*, (1983)2 M.L.J. 583, a Division Bench of this Court, while considering a question whether a petition filed under Sec.10(3)(c) will operate as *res judicata* when an application was subsequently filed under Sec.10(3)(a)(iii) of the Act, held that 'any decision given by the Rent Controller on an application for eviction filed under Sec.10(3)(c) cannot therefore operate as a bar under Sec.19 to an application for eviction filed under Sec.10(3)(a)(iii) of the Act'. The Division Bench further held as follows:

"The question whether the hardship that might be caused to a tenant by granting an order of eviction will outweigh the advantage to landlord will arise only in dealing with an

application under Sec.10(3)(c) of the Act filed by the landlord for additional accommodation. When the application by the landlord is itself dismissed as not maintainable, the Appellate Authority had no jurisdiction to give any finding as to whether the hardship that might be caused to the tenant by granting the application would outweigh the advantage to the landlord. In the circumstances, we are of the opinion that the finding that was given by the appellate authority and heavily relied upon by the learned counsel for the petitioners was *obliter*. Similarly, when once the appellate authority had come to the conclusion that the application for eviction of the revision petitioners was not maintainable under Sec.10(3)(c) of the Act in as much as the respondent was not carrying on any business in any portion of the building, the appellate authority was equally not competent to go into the question whether the respondent needed the premises for the purpose of the business which he was carrying on. We are therefore of the view that the present petition for eviction filed under Sec.10(3)(a)(iii) of the Act is not barred by Sec.19 of the Act by the principle of *res judicata* enacted in the section....." A perusal of the above judgments will clearly support the contention that when the dismissal of the earlier petition under Sec.14(1)(b) of the Act was mainly on the ground that it was not maintainable, any findings given on merits in that case will not operate as *res judicata* or as a bar under Sec.19 of the Act. The decision relied on by the learned counsel for the respondent, namely *B.Yamuna Bai v. N.Ramaswamy*, (1977)1 M.L.J. 223, is not apposite, and, as a matter of fact, the very same decision was relied on before the Division Bench that rendered the decision reported in *M/s.Associated Traders v. T.M.A Abdul Hameed*, (1983)2 M.L.J. 583 and the Division Bench has distinguished the same. Therefore, I do not think that the decision reported in *B.Yamuna Bai v. N.Ramaswamy*, (1977)1 M.L.J. 223, will apply to the facts of this case. In the circumstances, I hold that the learned Rent Controller was right in holding that the earlier dismissal of the application under Sec.14(1)(c) of the Act will not operate either as *res judicata* or as a bar under Sec.19 of the Act.

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accords regards the question of *bona fides*. the no bonafide was that apart from filing an application was to edge Sec.14 plaintiffs at any cost. I do not consider that the contention can be accepted having regard to the condition of the building. In *M/s.P.Orr. & Sons (P) Ltd. v. M/s.Associated Publishers (Madras) Ltd.*, (1990)2 M.L.J. (S.C.) 12: (1990)2 L.W.547, the Supreme Court, on the scope of Sec.14(1)(b) of the Act has held as follows:

“We accordingly hold that Sec. 14(1)(b) is satisfied only if the building is *bona fide* required by the landlord for the “immediate”, i.e., direct, sole and timely purpose of demolishing it with a view to erecting a new building on the site of the existing building. Various circumstances such as the capacity of the landlord, the size of the existing building, the demand for additional, space, the condition of the place, the economic advantage and other factors justifying investment of capital on reconstruction may be taken into account by the concerned authority in considering an application for recovery; but the essential and overriding consideration which, in the general interests of the public and for the protection of the tenants from unreasonable eviction, the legislature has in mind is the condition of the building that demands timely demolition by reason of the extent of damage to its structure making it uneconomical or unsafe to undertake repairs. While the condition of the building by itself may not necessarily establish the *bona fide* requirement under C1(b), that condition is not only one of the various circumstances which may be taken into account by the Controller, but it is the essential condition in the absence of landlord to prove that he has a *bona fide* requirement which is timely, directly and solely for the purpose of demolition of the building. The Act does not accept the requirement by the landlord as a *bona fide* requirement within the meaning of the provision unless the condition of the building, in the context of the relevant circumstances, requires demolition. These are matters which are to be proved by evidence.”

... no ...
... not be ...
... earlier ...
... dismissed. It ...
The ...
may be noted that both the ...
have found concurrently about the solvency of the ...
petitioner to demolish and reconstruct.

16. For all these reasons, I hold that the judgment of the Appellate Authority cannot be sustained on both on law and on facts. Accordingly, the same is set aside, and the order of the Rent Controller on the application under Sec.14(1)(b) of the Act is restored. The civil revision petition is allowed. However, there will be no order as to costs.

B.S. ---- Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Ramnam, J.*

C.R.P.No.1411 of 1992 21st August, 1992.

M/s.Hindustan Petroleum Corporation Limited
...Petitioner

v.
M/s.Karthikeyan Agencies represented by its
Partners ...Respondents.

Civil Procedure Code (V of 1908), O.8, Rules 10, 6, 9 and 9(2) - Civil Rules of Practice, Rule 32 - Suit instituted against four persons initially - Petitioner added as fifth defendant - Not filing any written statement in spite of grant of time - Set ex parte - Suit dismissed for default against all the defendants - Plaintiff filing application for restoration of suit - Petitioner not made party - Suit restored - Ex parte decree passed against the defendants 1 to 4 and also the petitioner - Sustainability.

The respondent instituted a suit O.S.No.143 of 1977 for declaration and for permanent injunction. Defendants 1 to 4 were originally the defendants. On 16.6.1978, it was brought to the notice of the court that the first defendant stood amalgamated with Hindustan Petroleum Corporation Limited the petitioner herein. The petitioner was impleaded as the fifth defendant. The petitioner

did not file any written statement and he was set *ex parte*. The court did not pronounce judgment against the petitioner. The respondent filed an application to restore the suit. The petitioner was not made a party to it. The suit was restored. After several adjournments, on 16.11.1989, an *ex parte* decree was passed against the petitioner as well as the other defendants. The petitioner prayed that the *ex parte* decree passed against it on 16.11.1989, be set aside. It was dismissed and an appeal against that order was also dismissed. The correctness of the order was questioned in revision.

Held, apart from Rule 32 of the Civil Rules of Practice even under O.9, Rule 9(2), Code of Civil Procedure, notice of the application should be served on the opposite party. However, what had happened in this case is that one of the opposite parties, viz. the petitioner herein was not made a party at all, with the result that was no restoration. Whatever of the suit dismissed for default against the petitioner and the subsequent proceedings taken on the footing that the suit against the petitioner had also been restored and that the petitioner had remained *ex parte* which justified the passing of an *ex parte* decree against the petitioner, are not in order. In other words, it would follow that having regard to the dismissal of the suit against the petitioner on the earlier occasion and the failure on the part of the respondent to have it restored against the petitioner also, the trial court was in error in proceeding to deal with the suit as if the suit had been restored against the petitioner also and that for the absence of the petitioner on 16.11.1989, there was justification for the passing of an *ex parte* decree against the petitioner. Inasmuch as the view above taken, there was no restoration of the suit dismissed for default against the petitioner there was no question thereafter of the passing of an *ex parte* decree against the petitioner on 16.11.1989 as if the suit against the petitioner was pending on that date. Under those circumstances, the courts below fell into an error in dismissing the application filed by the petitioner for setting aside the *ex parte* decree.

[Para 3]

Case referred to:

Narayanaswamy v. Sundari, (1980) 1 M.L.J. 278. [Para 3]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of Subordinate Judge, Sankari, dated 16.7.1991 and

made in C.M.A.No.1 of 1991 (I.A.No.2372 of 1989 in O.S.No.867 of 1982, District Munsif's Court, Tiruchengode).

R.Krishnamurthy, for K.Kumar, for Petitioner.

S.Parthasarathy, for Respondents.

The Court made the following

ORDER:- This civil revision petition has been preferred by the fifth defendant in O.S.No.143 of 1977, Sub Court, Salem, later transferred to the District Munsif's Court, Tiruchengode and renumbered as O.S.No.867 of 1982, against the orders of the Courts below rejecting the application filed by the petitioner in I.A.No.2372 of 1989 in O.S.No.867 of 1982 praying that the *ex parte* decree passed against it on 16.11.1989 should be set aside and the petitioner permitted to contest the suit.

2. Briefly stated, the circumstances giving rise to this civil revision petition are as follows: On 15.3.1977, the respondent herein instituted O.S.No.143 of 1977, Sub Court, Salem (later O.S.No.867 of 1982, District Munsif's Court, Tiruchengode), praying for the relief of declaration that the respondent was a dealer in petroleum products and for a permanent injunction restraining defendants 1 to 4 in the suit from interfering with the carrying on of the business by the respondent. After service of summons on defendants 1 to 4 in the suit, written statements on behalf of defendants 1 and 2 were filed on 29.4.1977, which was adopted by the third defendant, while, on behalf of the fourth defendant also, a written statement was filed on 5.7.1977. By a memo filed on behalf of the first defendant in the suit on 16.6.1978, it was brought to the notice of the Court that the first defendant, viz., Caltex Oil Refining (India) Ltd., stood amalgamated with Hindustan Petroleum Corporation Ltd., the petitioner herein, and the latter was the successor of the former and as such, the petitioner should be brought on record as a successor-in-interest of the first defendant in the suit, without prejudice to its right to defend the suit by continuing the defence already put forward. Consequent upon the memo so filed, on 31.7.1978, I.A.No.390 of 1978 in O.S.No.143 of 1977, Sub Court, Salem, was filed to implead the petitioner, viz., Hindustan Petroleum Corporation Ltd., as the fifth defendant in the suit and by an order dated 16.11.1979, I.A.No.390 of 1978 was allowed and the petitioner was impleaded as the fifth defendant in the suit. Thereafter, the

petitioner entered appearance through counsel and was directed on 17.7.1980 to file a statement by 25.8.1980 and subsequently, time for filing the written statement was extended upto 27.10.1980, by which time, the petitioner had not filed any written statement and that led to the petitioner being set *ex parte*. When the suit was called on 3.1.1981, it was dismissed for default against all the defendants in the suit on the counsel for the respondent herein reporting no instructions. The respondent, however, filed I.A.No.155 of 1981 in O.S.No.143 of 1977, Sub Court, Salem, which was later re-numbered as I.A.No.1993 of 1981 in O.S.No.867 of 1982, District Munsif's Court, Tiruchengode, for the restoration of the suit dismissed for default on 3.1.1981. To this application for restoration, the petitioner was not made a party and eventually, by an order dated 19.11.1982, I.A.No.1993 of 1981 was allowed and the suit was restored. Thereafter, after several adjournments, on 16.11.1989, an *ex parte* decree was passed against the petitioner as well as others. In I.A.No.2372 of 1989 in O.S.No.867 of 1982, the petitioner prayed that the *ex parte* decree passed against it on 16.11.1989 should be set aside. In the affidavit filed in support of that application, the petitioner, after referring to the posting of the suit on 7.11.1989 and its adjournment to 16.11.1989 and the filing of the application to set aside the *ex parte* order on that date, it was stated that the counsel for the respondent informed the counsel for the petitioner that he intended to file an application to amend the plaint and, therefore, counsel for the petitioner need not come to Tiruchengode and on 16.11.1989, a memo adopting the statement of the first defendant had been kept ready and further time was prayed for, but the request for time was turned down by dismissing the application filed in that regard and *ex parte* evidence was taken and the suit decreed *ex parte* on that date and that the petitioner should be given an opportunity to contest the suit, especially when the other defendants in the suit did not have any interest whatever. In the counter filed by the respondent, it was stated that nothing prevented the petitioner from appearing in Court on 16.11.1989 and the reasons given for setting aside the *ex parte* decree passed on 16.11.1989 were also not acceptable. The learned District Munsif, who heard this application, took the view that the reasons given by the petitioner for non-appearance in court on 16.11.1989 cannot be

accepted and that the failure on the part of the petitioner to take steps to rescind the *ex parte* order passed against it on 27.10.1980 established that the petitioner was indifferent to the court proceedings and, therefore, the petitioner was not entitled to any indulgence. In the view so taken, the application was dismissed. Thereupon the petitioner preferred an appeal in C.M.A.No.1 of 1991 before the Sub Court, Sankari. The learned Subordinate Judge, after referring to the provision of O.9, Rule 13, Code of Civil Procedure, held that the grounds stated in the application filed by the petitioner were not acceptable and, therefore, the learned District Munsif was right in dismissing the application filed by the petitioner. Consequently upon that, the appeal was also dismissed, the correctness of which is questioned in this civil revision petition.

3. From the orders of the courts below, it is very clear that they have omitted to bestow attention on the state of affairs as revealed by the records and had come to an erroneous conclusion. After the petitioner was impleaded and time for the filing of the written statement had been granted to it on several occasions, it was undoubtedly the duty of the petitioner to have filed a written statement either within the original time granted or within the extended time. That, however, was not done. From the certified copy of the 'B' Diary, it is seen that on 27.10.1980, an entry had been made to the effect that "written statement of the fifth respondent (the petitioner herein) with the petition not filed and trial by 8.12.1980." To the situation that obtained on 27.10.1980, viz., the non-filing of the written statement by the petitioner despite adequate time having been granted to it, the provisions of O.8, Rule 10, Code of Civil Procedure became applicable and the Court did not proceed to pronounce judgment against the petitioner, but had merely posted the suit for trial to 8.12.1980. On 8.12.1980, since both the parties were not ready, the suit was adjourned to 3.1.1981, on which date, the respondent was absent and its counsel also reported no instructions and that led to the dismissal of the suit with costs of the defendants. The dismissal so made has necessarily to be regarded as one against the petitioner as well, especially when on 27.10.1980, the Court had not proceeded to pronounce judgment against the petitioner for its failure to file a written statement, but made only an order posting the suit for trial on

8.12.1980. Subsequently, the respondent, in I.A.No.1993 of 1981, sought for and obtained a restoration of the suit dismissed for default on 3.1.1981. To this application, the petitioner was not impleaded as a party at all and the restoration of the suit as thus limited to defendants 1 to 4 in the suit and the suit had been restored by the order passed on 19.11.1982. At best, this restoration could be considered to be valid and effective only in so far as defendants 1 to 4 in the suit are concerned and not against the petitioner, as the dismissal of the suit against it had not been set aside at all. In this state of affairs, it is surprising that the trial court thereafter had posted the suit for trial even as against the petitioner herein and had also decreed the suit *ex parte* against the petitioner on 16.11.1989, when the earlier dismissal of the suit for default against the petitioner herein had not been set aside. Learned counsel for the petitioner placed strong reliance upon the decision reported in *Narayanaswamy v. Sundari*, (1980)1 M.L.J. 278. In that case, in a petition for annulment of marriage filed by the husband against the wife, the wife had been set *ex parte* and the petition was adjourned for evidence of the husband to a particular date and on his absence on that date, the petition itself was dismissed for default. An application was filed to set aside the order of dismissal for default and that was allowed even without notice to the wife, with the result that she did not have any knowledge whatever of the passing of the *ex parte* order. It was in this context that it was pointed out that though on a strict interpretation of O.9, Rule 4, Code of Civil Procedure, no notice as such is contemplated, yet, the Civil Rules of Practice provide for giving of such a notice even in interlocutory applications to the other side and no distinction is made whether the other party had earlier appeared or not. It was also further pointed out that even on the footing that the wife had earlier remained *ex parte*, after the termination of the proceedings in her favour by the dismissal of the proceedings for default, the requirement as to the service of notice as contemplated by Rule 32 of the Civil Rules of Practice in an interlocutory application of the nature under O.9, Rule 4, Code of Civil Procedure, cannot be dispensed with as an order passed on such an application would vitally affect the interests of the defendant secured under the adjudication by

1991

10th July, 1992

Sudhakaran and another

...Petitioners

The Corporation of Madras and another

...Respondents.

at
been
ex
ex parte
order. In
regard to
petitioner on
on the part of
against the
was in error in
suit as if the suit had
the petitioner also and that
for the absence of the petitioner on 16.11.1989,
there was justification for the passing of an *ex parte*
decree against the petitioner. Inasmuch as the
view above taken, there was no restoration of the
suit dismissed for default against the petitioner
there was no question thereafter of the passing of
an *ex parte* decree against the petitioner on
16.11.1989 as if the suit against the petitioner was
pending on that date. Under those circumstances,
the courts below fell into an error in dismissing the
application filed by the petitioner for setting aside
the *ex parte* decree. Consequently, the civil revision
petition is allowed and the orders of the
courts below are set aside and the *ex parte* decree
passed against the petitioner will also stand set
aside. There will be, however, no order as to costs.

B.S.

Petition allowed.

*Constitution of India (1950), Arts. 226, 14 and 16 -
Writ - If can be issued for violation of any non-
statutory direction.*

It is well-settled that any violation of any non-
statutory direction cannot be made a cause of
action to approach the High Court under Art. 226
of the Constitution unless the provisions of the
Constitution are violated especially Arts. 14 and
16 of the Constitution. [Para 7]

Case referred to:

*M/s. International Ore and Fertilisers (India) Pvt.
Ltd. v. E.S.I. Corporation, A.I.R. 1988 S.C. 78. [Para
5]*

Petition under Art. 226 of the Constitution of
India praying that in the circumstances stated
therein, and in the affidavit filed therewith the
High Court will be pleased to issue a writ of
certiorarified mandamus calling for the records on
the file of the 2nd respondent relating to the order
bearing No.M.D.C.No.C1/14058/90, dated
29.11.1990 quash the same and consequently
direct the respondents to permit the petitioners 8
to continue as Sanitary Inspectors in Division
Nos. 45 and 130 respectively award costs.

Miss.R.Vaigai, for Petitioners.

R.Swaminathan, Standing Counsel, for Respon-
dents.

The Court made the following

ORDER: The petitioners are working as Sanitary
Inspectors in the Corporation of Madras, the
respondents herein. They challenge an order of
the respondent-Corporation dated 29.11.1990 by
which they were posted exclusively to attend the
duty in the burial grounds. In the impugned order
it is stated that the petitioners are immediately
relieved from the normal divisional duties and
they should (1) supervise the work of staff posted
in the burial ground, (2) collect the details of the

and there, (3) and in a tidy manner and (4) irregularly engender discipline among the Vettiyans and to the complaints and criticism from the public.

2. The petitioners alleged in the affidavit filed in support of the writ petition that paragraph 716 of the Madras City Municipal Code (hereinafter referred to as 'the Code') deals with management of burial grounds, that paragraph 887 of the Code prescribes the duties of Sanitary Inspectors, that 20 functions are enumerated in paragraph 887 of the Code and that the petitioners have been asked to relieve other duties and that it amounts to a demotion to them. It is also alleged in the affidavit that inspecting a burial ground is one of the functions of the Sanitary Inspectors, that Sanitary Inspectors have got technical qualifications and that the impugned order passed by the respondent-Corporation in so far as it directs the petitioners to look after a burial ground, relieving from other divisional duties is too harsh. It is also alleged in the affidavit that the action of the respondent-Corporation asking the petitioners to do the functions which are really that of the peons, which is clear from what is described in paragraphs 716 of the Code and that it amounts to a demotion to the petitioners to Class IV posts whereas the petitioners are belonging to Class III. It is also alleged in the affidavit that when the Code prescribes certain conditions of service, it is not correct on the part of the Corporation to change it by the impugned order of the respondent-Corporation. It is also alleged in the affidavit that the action of the respondent-Corporation is arbitrary and violation of Art.14 of the Constitution of India, since the petitioners have been picked up when there are other Sanitary Inspectors with the respondent-Corporation.

3. Notice of motion has been ordered by this Court on 8.1.1991.

4. A counter-affidavit has been filed by the respondent-Corporation. It is stated in the counter affidavit that with a view to ameliorate the problems faced by the public in using the Corporation burial grounds particularly the problem of extraction of exorbitant amounts collected by vettiyans unauthorisedly has proposed to take remedial measures. It

by the Corporation at W in the grounds to the duties of Sanitary Inspectors. In the affidavit that Sanitary Inspectors and see to their deaths from danger the Code prescribes for burial grounds the major work Office Assistants of the burial ground and that the responsibility lies with Sanitary Inspector of that Division. A reference to para 724 of the Code has been made in the counter affidavit. It is also claimed in the counter affidavit that the impugned order has been validly passed in the interest of the public and for the proper administration of burial grounds and that the said order does not affect the interest of the petitioners in respect of their salary, allowances, cadre or benefits in services under the Corporation. It is admitted in the counter affidavit that the petitioners are Class III employees under the respondent-Corporation stating that the posting of the petitioners for exclusive supervision of burial and burning grounds does not in any way reduce their status. It is also claimed in the counter affidavit that there is no demotion in the cadre of the petitioners. It is also stated in the counter affidavit that the impugned order is not in any way punitive or working against the interest of the petitioners, and that the posting of the Sanitary Inspectors has been done only to correct the remedy for the problems faced by the public. A reference to Sec.19 (obviously a mistake of Sec.9 of the Madras City Municipal Corporation Act has been made in the counter affidavit under which the Commissioner is empowered to prescribe the duties

can have a dialogue with the association of the Sanitary Inspectors and decide about the future course of action appointing the Sanitary Inspectors permanently to supervise the burial grounds and burning grounds.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Lakshmanan, J.*

W.P.No.13173 of 1990 21st September, 1992.

P.R.Chockalingam ...*Petitioner*
v.

The Director of Tourism, Government of Tamil Nadu and others ...*Respondents.*

Constitution of India (1950), Art.16(4) - Reservations to public appointments - Only one post to be filled up - If rule of reservation can be applied.

In the selection to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and counter service, the fourth respondent was selected in preference to the petitioner though the latter was placed in the waiting list No.1 on the sole ground that the Executive Committee had decided to fill up the vacancy from backward classes. The petitioner challenged the selection.

Held: The decisions reported in *Dr.Chakradhar Paswan v. State of Bihar, A.I.R. 1988 S.C. 959* and *Dr.Rajkumar v. Gulbarga University, A.I.R. 1990 Kant. 320*, are very clear that when there is only one post, the same has to be filled up without applying the rule of reservation. Admittedly, the Executive Committee after interview had decided to fill up the post from Backward Community candidate. This is not at all permissible in law. The competent authority has decided to fill up the post only from open competition. On the sole ground, the impugned order is liable to be set aside.

[*Paras 16 and 17*]

Cases referred to:

Dr.Chakradhar Paswan v. State of Bihar, A.I.R. 1988 S.C. 959. [Para 14]

Dr.Rajkumar v. Gulbarga University, A.I.R. 1990 Kant. 320. [Para 15]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to the proceedings of Staff Selection Committee/Executive Committee consisting of respondents 1 to 3 Food Craft Institute, Tiruchirappalli, on 30.7.1990 in so far as the selection of the fourth respondent to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and counter service is concerned and quash the same and directing the Staff Selection Committee and Executive Committee, Food Craft Institute, Thuvakkudi, Tiruchi to appoint the petitioner to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and counter service in Food Craft Institute, Thuvakkudi, Tiruchirappalli.

R.Krishnamurthi, Senior Counsel, for

M.S.Kandasami, K.Sukumar and

V.G.Ravichandrababu, for Petitioner.

P.Shannugham, Additional Government Pleader, for Respondent Nos.1 and 2.

K.Sridhar, for Respondent No.3.

R.Ganesan, for Respondent No.4.

The Court made the following

ORDER:- The petitioner abovenamed has filed the writ petition for the following relief:

To issue a writ of *certiorarified mandamus*, calling for the records relating to the proceedings of the Staff Selection Committee/Executive Committee consisting of respondents 1 to 3, Food Craft Institute, Tiruchirappalli, on 30.7.1990 in so far as the selection of the 4th respondent to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service is concerned and quash the same and direct the Staff Selection Committee and Executive Committee, Food Craft Institute, Thuvakkudi, Tiruchirappalli, to appoint the petitioner to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service in Food Craft Institute, Thuvakkudi, Tiruchirappalli.

2. The petitioner, after the completion of his school studies, joined the Certificate Course of Bakery and Confectionery in the year 1983. The State Board of Technical Education and Training, Department of Technical Education, issued the certificate of Bakery and Confectionery, after the

completion of Crafts-manship Course of Institution in Bakery and Confectionery. Thereafter, the petitioner joined the three year course in Diploma in Hotel Management and Catering Technology in Bangalore. The course was for three years. After the completion of three years, examination held in May, 1986, and the petitioner was issued Diploma in Hotel Management and Catering Technology. After the completion of diploma course, the petitioner joined as Manager in the Royala Hindu Restaurant from 1986 to February, 1989. From 21.12.1989, he has been working as Assistant Food and Beverages Manager in Rajali Hotel, Tiruchirappalli.

3. After obtaining the diploma, the petitioner registered himself in the District Employment Office, Tiruchirappalli, on 27.11.1987 and his registration number is 15983 of 1987. For the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service, the 3rd respondent by his letter dated 17.5.1990, called for a list of candidates from the District Employment Office and the Employment Exchange by its letter dated 28.5.1990 sent the petitioner's name alone to the 3rd respondent. The petitioner was not called for interview for the said post for the reasons best known to the 3rd respondent. To accommodate the 4th respondent, the 3rd respondent appeared to have called for some more candidates from the District Employment Exchange along with the 4th respondent. The District Employment Exchange obliged the 3rd respondent by sending another list of candidates on 16.7.1990. It is pertinent to mention that originally the 3rd respondent called for the candidates by his letter dated 17.5.1990. On 18.5.1990, the 4th respondent registered himself with the District Employment Exchange and his registration number is 4857 of 1990, and the sequence of events in the matter of appointment of the 4th respondent clearly show that the appointment is a predetermined one and that there was no fair selection to the said post. According to the petitioner, respondents 1 to 3 are public servants and a duty is cast upon them to conduct the fair selection in the matter of appointment. Since the appointment to the post and the interview was not done in a fair manner, the petitioner has filed the above writ petition challenging the selection of the 4th respondent to the post of Assistant Lecturer-cum-Assistant Instructor on the grounds mentioned in the affidavit.

4. According to the petitioner, he is having the necessary qualification and prescribed by the norms of the selection and as a candidate he has fulfilled the qualification more than the 4th respondent. The 4th respondent on the date of selection was already in the Central Government service as Member Administrative Superintendent in the Centre for Development Telematics, Telecom Technology Centre, Government of India, Bangalore. As requested in the interview letter issued on 24.7.1990 by the 3rd respondent, the 4th respondent has not produced the no objection certificate from the authorities. As required by G.O.Ms.No.40, Employment Services Department, dated 14.3.1984, there was not even the minimum ten days for the candidates who report for the interview as disclosed in the letter dated 28.5.1990 sent by the District Employment Exchange. Thus, according to the petitioner the appointment of the 4th respondent is pre-determined one and the appointment by respondents 1 to 3 in a hurried manner would confirm that the selection was not done in a fair manner.

5. Respondents 1 and 2 have filed a counter affidavit. According to them, the Executive Committee is the competent authority for recruitment to the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service, and the Principal of the Institute, who is the Secretary to the Executive Committee, issues the appointment order for that post. The Principal and Secretary, Food Craft Institute, sent a requisition to the District Employment Exchange, Trichy, on 17.5.1990, to sponsor candidates for the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service and Assistant Lecturer-cum-Assistant Instructor, for House Keeping which were vacant on that dates. The qualifications prescribed for both the posts are as follows:

“Essential:- Three year Diploma in Hotel Management and Catering Technology - Equivalent from Government recognised Institute.

Desirable:- (1) Post Diploma in Hotel Management from recognised Institute. (2) A craft Certificate in the relevant field, i.e., in Restaurant and Counter Service.

Experience:- At least one year Teaching/Practical Experience in the relevant field in an educational Institute/Industry.”

6. Since it was difficult to get candidates with the qualification of Diploma in Hotel Management and Catering Technology, the District Employment Exchange, Tiruchirapalli, was required to circulate among other Exchange about these vacancies in order to get enough candidates for this interview and to select the right candidates for this teaching post. It was also requested to sponsor candidates for open competition comprising of all the communities. The petitioner's name was sponsored by the District Employment Exchange, Tiruchirapalli, in his letter dated 28.5.1990 for the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service. No interview was held as only one candidate was sponsored. In the Institute's letter dated 17.5.1990 addressed to the District Employment Exchange, Tiruchirapalli, it was indicated that the requisition made by the Institute for sponsoring suitable candidates may be circulated to other Employment Exchanges also in case local candidates are not available. The Assistant Director, District Employment Exchange, Tiruchirapalli, by his letter dated 28.5.1990 sponsored one candidate and again on 16.7.1990 sponsored three candidates. Later, the District Employment Officer, Technical Professional Employment Exchange, Madras by his letter dated 18.7.1990, has sponsored five candidates and again on 23.7.1990 has sponsored 14 more candidates for filling up the vacancy of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service.

7. The interview was fixed on 30.7.1990 at the Food Crafts Institute, Tiruchirapalli. The Call letters to 19 candidates, who were qualified were dispatched by speed post on 23.7.1990. The petitioner was called for interview. He attended the interview on 30.7.1990 along with eight other candidates. The Institute is not concerned regarding the dates on which the candidates would have registered their names in the Employment Exchange. In the call letter, it has also been clearly stated that the fact that she/he been called for the interview does not guarantee selection of the post. It is further stated that the selection of the 4th respondent was done in a fair manner and due opportunity was provided to all candidates who attended the interview to expose their technical knowledge and ability. All the nine candidates who attended the interview possessed the basic qualifications. The petitioner and the 4th

respondent also possessed the basic qualification. 8. Along with the vacancy of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service, one more vacancy of Assistant Lecturer-cum-Assistant Instructor, House Keeping was also to be filled up. Both the vacancies carry the same basic qualification with minimum one year experience in the relevant field with same scale of pay. Hence, the list of candidates were called for the Open Competition for the above two posts with preference for lady candidates for House Keeping. The Employment Exchange has recommended 23 candidates which included 13 Backward Classes, 7 Open Competitions and 3 Scheduled Castes for Restaurant and Counter Service and 3 candidates which included 2 Backward Classes and 1 Scheduled Caste for House Keeping. The Executive Committee, which is the competent authority to make appointment to the above posts, decided to fill up the vacancy for the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service, from Backward Class and Assistant Lecturer-cum-Assistant Instructor for House Keeping from Open Competition, preferably lady candidates according to communal rotation.

9. Both the petitioner and the 4th respondent possess the essential technical qualification and experience and based on their performance at the interview, a panel of three candidates as mentioned below was approved by the competent authority;

1. Thiru P.Prakash Kumar (B.C.) - Selected.
2. Thiru P.R.Chockalingam (W.L.) No.1
3. Thiru K.Ravi (B.C.) W.L.No.2.

The Employment Exchange, Trichy, has sponsored four candidates from Trichy and 19 candidates from Madras. Call letters were sent by speed post on 23.7.1990. The petitioner himself had received it on 24.7.1990 and he had intimated that he was willing to appear for the interview to be conducted on 30.7.1990 - *vide* his letter dated 24.7.1990. He attended the interview along with others on 30.7.1990. Hence, the question of allowing ten days time need not be considered in view of the urgency and since the Institution had reopened on 23.7.1990. Thus, it is submitted by respondents 1 and 2 that the selection of the 4th respondent was made on the basis of the performance in the interview and therefore, his appointment was made in a fair manner and that the same cannot be challenged in the writ petition.

10. The counter affidavit filed by the 3rd respondent is also on the same lines as that of respondents 1 and 2.

11. The 4th respondent has filed a counter affidavit dated 10.7.1992 and stated that he has the desirable qualification since he possesses a Crafts Certificate. He further states that the selection was based on community, that he belonged to Backward Community and that there is no bar for a B.C. community candidate being selected even against Open Competition. He also states that the selection was made by a competent committee of three officers. The selection was not tainted with any favouritism of *mala fide*. Therefore, he submits that the writ petition has no merits and hence the same is liable to be dismissed.

12. I have heard Mr.R.Krishnamurthi, learned Senior Advocate for the petitioner, Mr. P.Shanmugham, learned Additional Government Pleader for respondents 1 and 2, Mr.K.Sridhar, learned counsel for the 3rd respondent and Mr.R.Ganesan, learned counsel for the 4th respondent.

13. As could be seen from the counter affidavit filed on behalf of respondents 1 and 2, the petitioner and the 4th respondent possess the essential technical qualification and experience. It is also admitted that the Executive Committee is the competent authority to make the appointment to the post of Assistant Lecturer-cum-Assistant Instructor, and the said committee decided to fill up the vacancy for the post of Assistant Lecturer-cum-Assistant Instructor, for Restaurant and Counter Service from Backward Classes and Assistant Lecturer-cum-Assistant Instructor for House Keeping from "O.C.", preferably lady candidates according to communal rotation. It cannot be gain-said that when there is only one post, there can be no reservation at all. In this connection, two judgments can be usefully referred to, one by the Apex Court and the other by the Karnataka High Court.

14. The decision reported in *Dr.Chakradhar Paswan v. State of Bihar*, A.I.R. 1988 S.C. 959, can be usefully referred to in this context, The Supreme Court has observed as follows:

"It is quite clear after the decision in *Devadasan's case*, that no reservation could be made under Art.16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts.16(1)

and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Art.16(4) pre-supposes the availability of atleast more than one post in that cadre."

15. The next decision to be considered is the judgment of a Full Bench of Karnataka High Court reported in *Dr.Rajkumar v. Gulbarga University*, A.I.R. 1990 Karn. 320, wherein the Full Bench has observed as follows:

"The next question for consideration is, as to whether in respect of categories of Professors, Lecturers or Readers, as the case may be, if there is only one post, could there be reservation at all. As far as this aspect is concerned, the matter is no longer *res integra*. The question is concluded by the decision of the Supreme Court in the case of *Dr.Chakradhar Paswan v. State of Bihar*, A.I.R. 1988 S.C. 959. The relevant paragraph 16 of the judgment reads;

16. It is quite clear after the decision in *Devadasan's case*, that no reservation could be made under Art.16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts.16(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. As reservation which would come under Art.16(4), pre-supposes the availability of at least more than one post in that cadre."

In the above paragraph, the Supreme Court has ruled that in respect of cadres where there is only one post, it does not admit of any reservation at all."

16. The above decisions, in my view, are very clear that when there is only one post, the same has to be filled up without applying the rule of reservation.

17. Admittedly, the Executive Committee, after interview had decided to fill up the post from

Backward Community candidate. This in my view, is not at all permissible in law. The competent authority has decided to fill up the post only from Open Competition. On this sole ground, the impugned order is liable to be set aside.

18. In view of my finding on the above point, it is not necessary to go into the other points raised by the learned counsel appearing for the petitioner and the respondents.

- 19. For the foregoing reasons, I am of the view that the writ petitioner should succeed. Accordingly, the impugned proceedings dated 30.7.1990 selecting the 4th respondent for the post of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service in Food Craft Institute, Thuvakkudi, Tiruchirapalli is set aside. It is not in dispute that the 4th respondent registered himself with the Employment Exchange only on 18.5.1990 after respondents 1 and 2 requested the Employment Exchange to sponsor names for appointment as Assistant Lecturer-cum-Assistant Instructor. The 4th respondent was also in the employment of the Central Government at that time. It is also not in dispute that the writ petitioner's name has been selected and he is No.1 in the waiting list. Respondents 1 and 2 do admit that the writ petitioner possesses all the essential technical qualification and experience as required. I, therefore, direct the Executive Committee/Staff Selection Committee, Food Craft Institute, Tiruchirapalli, to consider the name of the writ petitioner for appointment of Assistant Lecturer-cum-Assistant Instructor, Restaurant and Counter Service, within one month from the date of receipt of a copy of this order, and pass orders accordingly taking into account all the observations made in this judgment. The writ petition is allowed. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.Nos.7061 to 7064 of 1986 24th August, 1992.

Meenakshi Apartments, Unit of MIG. Flats, Madurai-20 and others ...*Petitioners*
v.

The Tamil Nadu Housing Board, Madras-35

...*Respondents.*

Tamil Nadu Housing Boards Act (XVII of 1961) and Rules made thereunder - Contract between Housing Board and allottee of flat providing for recovery of difference of cost within a stipulated period - Housing Board, if entitled to fix final cost beyond that period.

This Court held in S.A.No.83 of 1982 by judgment dated 20.8.1982 that the clause fixing a period for determination of the final cost is a clause of limitation. The respondents (Tamil Nadu Housing Board and the Executive Engineer and Administrative Officer, Madurai Housing Unit) are not entitled to make any demand over and above the cost already fixed in the contract as the respondents are not entitled to fix the final cost beyond the period of limitation prescribed in the contract.

[Para 7]

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *mandamus* forbearing the respondents in all the petitions from in any manner recovering or enforcing the demand towards the alleged difference between the final cost and tentative cost of the MIG flat with respect to the members of the schedule pursuant to the impugned demand made by the 2nd respondent in all the petitions in his office letter No.R3/8770/79, dated 24.6.1986 (in W.P.No.7061 of 1986) 14.6.1986 and 24.6.1986 (in W.P.No.7062 of 1986) 24.6.1986 (in W.P.No.7063 of 1986) and 17.6.1986 (in W.P.No.7064 of 1986) respectively or in any manner increasing the cost of Flat over and above the cost mentioned in the respective allotment letter and making a demand for the same from the members of the respective petitioner Association in purported exercise of

the provisions of the Tamil Nadu Housing Board Act, 1961 and the Rules made thereunder.

E. Padmanabhan, for Petitioners.

S. Doraisami, for Respondents.

The Court made the following

ORDER:- In these writ petitions, the petitioners have prayed for issue of a writ of *mandamus* for bearing the respondents from recovering or enforcing the demand towards alleged difference by way of final cost and tentative cost of M.I.G. flats with respect to the members of the petitioner's associations whose names are set out in the schedules to the petitions. The members of the associations were allotted middle income group flats in 1979-80. With respect to the petitioner association in W.P.No.7061 of 1986 the allotment letter was issued on 23.3.1980. Tentative cost was fixed at Rs.42,200 for ground floor and first floor and Rs.40,100 for the second floor. Clause 9 of the letter which is the crucial clause reads thus:

"Final cost of the flat will be intimated within a period of 3 years. The difference of cost if any is to be paid in one lump sum or in monthly instalment from the beginning."

It is only in 1986 the respondents demanded additional payment from the petitioners on the footing that final cost is fixed at a higher rate. Difference varies from Rs.6,900 to Rs.14,300 per flat. Aggrieved by the same, the petitioners have preferred these writ petitions.

2. In a similar case, this Court held in S.A.No.83 of 1982 by judgment dated 20.8.1982 that the clause fixing a period for determination of the final cost is a clause of limitation and after the expiry of the said period it is not open to the respondents to fix the final cost. However, it was held in the case that the respondents could fix within a reasonable time that portion of the enhancement in the sale value in so far as it relates to excess compensation awarded for the land owners under the acquisition proceedings.

3. The said judgment was affirmed on appeal by the Supreme Court in C.A.No.3002 of 1983. The Apex Court has accepted the construction put upon the clause by this Court and held that after expiry of the period mentioned in the clause it is not open to the respondents to fix the final cost and thereby increase the cost payable by the allottees.

4. In W.P.Nos.4527 and 7642 etc., of 1984 *S. Ramalingam, J.*, held on 7.2.1989 that after the

expiry of the period of limitation set out in similar clauses it is not open to the respondents to increase the cost under the guise of fixing the final cost. That judgment was affirmed on appeal by a Division Bench of this Court on 16.7.1990 in W.A.Nos.460 to 464 of 1990. In W.P.No.1441 of 1989 Justice Raju has taken a similar view in his judgment dated 21.2.1992.

5. According to learned counsel for the respondents the aforesaid judgments would not apply to these cases and the matter would be governed by the judgment of Justice Raju sitting singly in W.P.Nos.9603 and 9604 of 1990. On a perusal of the said judgment, it is seen that in those cases there was no clause fixing the period of limitation. The terms of contracts were also in dispute and the learned Judge held that the remedy of the parties was to go before a civil court in a civil suit and agitate their claims. On that footing, the writ petitions were dismissed.

6. I am of the view that the judgment in W.P.Nos.9603 and 9604 of 1990 has no bearing on this case. In the present case there is a specific clause fixing a period of limitation of three years. Hence, the reasoning in that judgment will not apply and this will be governed by other judgments already referred to by me.

7. This is not case in which a direction similar to that given by Justice Balasubramanyam in S.A.No.83 of 1982 can be given. It is specifically alleged in the affidavit filed in support of the petitions that the land cost was already fixed as the acquisition proceedings were over even before 1972. In paragraph 7 of the affidavit, it is alleged that there has been no increase in land acquisition proceedings compensation after 1975. Consequently, the respondents cannot claim on the footing that they had to pay more money by way of compensation to the owners of land in the acquisition proceedings. The respondents have filed a counter affidavit only today, that is after a period of six years since the filing of the writ petition. In the long counter affidavit running to 11 pages no particulars are given with regard to necessity for increase in the final cost. Nothing has been stated in the affidavit as to how final cost is worked out by the respondents in this case. It is generally alleged that final cost is liable to differ from the initial cost on account of escalation and other charges which are increasing considerably every year and inevitable reasons like the cost of development charges,

tender excess etc. It is also stated that the delay in fixing the cost is due to administrative reasons and the sanction of the board has to be obtained for fixing the final cost. I do not accept the explanation as a proper ground for the inordinate delay in fixing the final cost. The clause in the contract prescribes a period of three years. The final cost is determined only after a period of six years in this case and communicated to the allottees. In the circumstances, I hold that the respondents are not entitled to make any demand over and above the cost already fixed in the contract as the respondents are not entitled to fix the final cost beyond the period of limitation prescribed in the contract.

8. It is stated in the counter affidavit that among the members of the petitioners' associations 33 allottees have complied with the demand issued to them and they have also remitted the amount demanded and obtained sale deeds in their favour since 5.4.1989 till date without any reservation whatsoever. It is further stated that five allottees have remitted the difference of cost and applied for issuance of sale deed and the sale deeds will be issued to them within two or three weeks depending upon the exigencies of time. A list is attached to the counter affidavit. It is seen therefrom that Nos.1 to 10 in the list relate to some of the petitioners in W.P.No.7064 of 1986; Nos.11 to 15 and 17 relate to some of the petitioners in W.P.No.7061 of 1986. Though No.16 mentions the flat No.A-12/3 one of the flats concerned in W.P.No.7061 of 1986, the name of the allottee differs. Nos.18 to 23 relate to some of the petitioners in W.P.No.7063 of 1986. Nos.28 to 31 and 33 relate to some of the petitioners in W.P.No.7062 of 1986. The flats mentioned in other numbers are not found in any of the writ petitions.

9. The copy of the counter affidavit has been served on the counsel for the petitioners only today. He is not in a position to say whether the persons who have remitted the difference as per the demands made by them have done so voluntarily without any reservation whatsoever. Assuming that the statement made in the counter affidavit is correct, I am of the view that the following course will meet the ends of justice. If the persons who have remitted the amounts demanded are taking a stand that they did not make payments voluntarily and made payments under protest and they will be entitled to the benefit of the order in these writ petitions and claim a refund of the amounts paid

by them, it is for them to agitate their rights in an appropriate proceedings in a civil suit and establish the same. With this liberty, the writ petitions are allowed in so far as the petitioners listed in the schedules to the writ petitions are concerned excepting the persons who are found in the list attached to the counter filed by the respondents today under Nos.1 to 15, 16 to 23, 28 to 31 and 33. The respondents shall not enforce their demands for any payment towards the cost, apart from the amounts already received by them from the petitioners referred to above. The respondents should execute the sale deeds to the petitioners within a reasonable time say, within three months from this date, provided other formalities required by the rules are complied with. There will be no order as to costs.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction]

Present: *Mishra and Mrs. Padmini Jesudurai, JJ.*

O.S.A.Nos.93 and 94 of 1992. *12th August, 1992.*

Radhika Konel Parekh

...Appellant

v.

Konel Parekh.

...Respondent.

(A) *Letters Patent (Madras), Clause 15 - Order passed on application for stay of proceedings - If 'judgment' - Appeal from such order, if maintainable - (Civil Procedure Code (V of 1908), Sec.10).*
 (B) *Hindu Marriage Act (XXV of 1955), Secs.13(1-A) and 26 - Suit for divorce and for declaration that she is entitled to the custody of her minor child filed by wife in Family Court, Bombay - Husband filing petition in Madras High Court seeking his appointment as guardian of the minor son and for grant of interim custody - Questions involved in both proceedings if same - Judgment of one court delivered earlier, if would operate as res judicata in the other.*
 (C) *Civil Procedure Code (V of 1908), Sec.10 - Matter directly and substantially in issue in former*

and subsequent suits' - Whether should be the same in all respects.

Respondent Konel Parekh and the appellant Radhika were married in accordance with Hindu rites on 1st April, 1990 and a male child was born to them on 30th March, 1991. On 16.12.1991 the respondent filed O.P.No.694 of 1991 in the Madras High Court seeking his appointment as the guardian of the son and also for other reliefs. He applied for a direction that he be given interim custody of the minor son in an application in that petition. The appellant stated in reply that she had moved the Family Court at Bombay seeking reliefs *inter alia* of divorce and the interim custody of the minor and restraint orders and that the Bombay Family Court had restrained appellant from removing the minor from her custody. She filed an application for stay of the proceedings in this Court. A learned single Judge was of the view that the question involved in the O.P.No.694 of 1991 and the proceedings in the Family Court at Bombay could not be the same and that therefore there could be no stay of proceedings. He rejected the request of the respondent for the interim custody of the minor, but permitted him to visit the child as frequently as he felt so with liberty to take the child for outings also. The appellant filed two appeals. The respondent contended that as an order passed as an application for stay of the proceedings under Sec.10, Civil Procedure Code was not a judgment, no appeal could be maintained against that order.

Held: Since the Supreme Court has already declared the law in *Shah Babulal Khimji v. Jayaben*, A.I.R. 1981 S.C. 1786 and the Court is obliged to follow it, it has to be held notwithstanding the judgment of the Full Bench of this Court in *Central Brokers v. Ramnarayana Podder & Company*, A.I.R. 1954 Mad. 1057 (F.B.), that the appeal is maintainable. [Para 13]

A mere glance at this provisions shows that in a suit seeking divorce, the Court can make provisions in the decree itself with respect to the custody of the child and may after the decree upon application by petition filed for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree. Thus, the prayer in the Family Court suit at Bombay for a decree cannot be equated with the decree for interim custody in

the sense of an order *pendente lite*. In most of the cases custody orders have to be made for limited purpose. No minor can be ordered to be always in custody of another, the limit being the statutory age of majority. Once however, the question of custody of a minor child is an issue on fact and law in the proceeding before the Family Court, if the same issue is brought between the same parties in another court, the judgment of one delivered earlier has to operate as *res judicata* in the other. It is not in dispute that the child is below five years. Ordinarily thus the custody has to be with the mother. The mother has accordingly prayed for a decree for such a custody in the Family Court at Bombay. The father, who is the respondent can have every say and thus can say to the court that the child's custody with the mother may not be in the interest of child. The court is constrained to observe that the suit has been filed in this Court by the respondent has brought in substantially the same questions of fact with respect to the custody of the child which have to be decided by the Family Court.

[Paras 15, 16, 22]

It is not necessary, as has been held by different High Courts and about there is a consensus of judicial opinion, that the matter directly and substantially in issue in former as well as subsequent suits, should be the same in all respects. [Para 17]

Cases referred to:

Central Brokers v. Beemnarayappa Podder and Company, A.I.R. 1954 Mad. 1057: (1954)2 M.L.J. 525: I.L.R. 1954 Mad. 1052. [Paras 5, 7, 8, 13]
Abdul Nabbi Saheb v. Ramadossmalesh, A.I.R. 1945 Mad. 371. [Para 5]
Asrumatidebi v. Surendra Deb, A.I.R. 1953 S.C. 198: (1953)1 M.L.J. 710: 1953 S.C.J. 300. 1953 S.C.R. 1159. [Paras 5, 6, 8]
Angadu Narasimhalu Chettiar v. Selvarajan, (1991)2 M.L.J. (N.R.C.) 1. [Paras 6, 7]
Govindarajulu v. Devar and Company, A.I.R. 1954 Mad. 240: (1953)2 M.L.J. 413: I.L.R. 1954 Mad. 399. [Paras 6, 7]
Shah Babulal Khimji v. Jayaben, A.I.R. 1981 S.C. 1786. [Paras 8, 9]
Pulchand Motilal v. Madhar Lall, A.I.R. 1973 Pat. 196. [Para 17]
A.C. Industries Ltd. v. Rishabh Manufacturers, A.I.R. 1972 Cal. 128. [Para 18]
 Appeal under Clause 15 of the Letters Patent against the Order of Lakshmanan, J., dated 31.3.1992 and made in the exercise of the ordinary original

civil jurisdiction of the High Court in Application Nos.6404 of 1991 and 69 of 1992 respectively in C.P.No.694 of 1991.

C.A.Sundaram, for Appellant.

R.Krishnaswami, for Respondent.

The Judgment of the Court was delivered by *Mishra, J.*: Respondent Konel Parekh and the appellant Radhika were married in accordance with Hindu rites on 1st of April, 1990 and a male child was born to them on 30th March, 1991. On 16.12.1991, however Konel filed O.P.No.694 of 1991 in this Court seeking his appointment as the guardian of the son born on 30th March, 1991, named Parthiv and also for other reliefs. He applied for a direction that he be given interim custody of Parthiv in Application No.6404 of 1991 in the said petition, O.P.No.694 of 1991. Radhika, the appellant, respondent to the notice stating *inter alia* that she had moved the Family Court at Bombay seeking reliefs *inter alia* of divorce and for the interim custody of the minor child Parthiv, maintenance and restraint orders on 6.12.1991. The Family Court at Bombay on 11.12.1991 by an order, restrained Konel from forcibly removing the child from her custody. She stated in her return that the order of restraint became necessary in view of the fact that the respondent had physically deprived her of the company of her then seven month old minor child between the period 10.11.1991 and 2.12.1991 and had in fact sought to leave the country with the minor child on the night of 2.12.1991 which the appellant with the intervention of the police and pursuant to a complaint to the police was able to stop at the last minute. She said in her return as follows:

“.....In fact, the respondent with the minor child had gone to the airport to leave the country and was stopped by the airport staff from checking in for the flight on account of the police complaint and it was only pursuant thereto that the applicant was able to recover the custody of the minor child.”

2. In his reply to the return of Radhika, Konel, however, said,

“I submit that during the period November 10, 1991 to December 2, 1991 the minor child was under the custody of the respondent herein. The events that had happened during this period have been stated by me in my statement made to the police as reply to the F.I.R. filed by the applicant.

I wish to state that on 7.11.1991 I, by chance ascertained that my wife was expecting a child. This was the second child. On Friday the 8th November, 1991 the pregnancy was confirmed and the doctor declared that the applicant was seven weeks pregnant. My wife insisted that she wanted to have an abortion as she did not want this child. I pleaded before her of the religious intention among Jains against adopting abortion. I made my earnest request before her not to kill the child in the womb. When she knew that I was against her wish, she wanted to leave for her parents' place in Bombay. Thereupon on Sunday the 10th November, 1991. I escorted her to the airport and purchased for her a round trip air ticket to Bombay and she left the child with me. I requested her to rethink her decision and stay at Madras at least for one more day on 11th November, 1991 being my birth-day. All my requests had no effect on her. As expected I was informed by my father-in-law on 16th November, 1991 that my wife had an abortion at Bombay. This act of my wife totally shattered me and I flew to Bombay on 17th November, 1991 and reached their home around 9 a.m. I was denied an audience with my wife by her parents and they told me that she is taking rest under Doctor's instructions. I did not therefore meet my wife and came back to Madras. I came to know thereafter that on 19th November, 1991 she had visited Madras and she had no decency or courtesy to inform me about her stay in Madras. Thereafter she had proceeded to Central Bank of India, Haddows Road Branch, Madras which is hardly a furlong from our house and she had operated the joint safe deposit locker and emptied the contents therein. I came to know of the incident on the afternoon of 2nd December, 1991 in front of our house and I enquired about that. On 30th November, 1991 she called me over phone and at that time I informed her that I was going to Singapore for three days' work. I asked her to return to Madras so that I could travel to Singapore leaving the child to her custody and care. She refused to return to Madras saying that she has not fully recovered from her illness. Even during her stay at Madras with me, child was looked after by the governess since she had refused to come down to Madras to take care of the child. Thereafter

I informed her that I will take the child with me to Singapore for three days along with my mother and will be back on 6th December, 1991 by the same airline. In fact I had purchased a return ticket for all of us and the return journey was also confirmed for Friday the 6th December, 1991. While so, taking advantage of the fact that I was taking the child to Singapore she made a false complaint to the police as if I am taking the child out of India for ever and she made a false complaint to the police on 2nd December, 1991 presumably under the Dowry Prohibition Act so that the police will take immediate action. The F.I.R. filed with the police is full of false statements and for the first time the case of ill-treatment by my parents and demand for jewellery and cash had been stated."

3. It has, however, transpired that Konel, who is an Indian born has, however, become a citizen of the United States of America. He intended to visit Singapore with the child and that a Police complaint was filed which stopped him from taking away the child to Singapore, according to him for a temporary period; according to Radhika with a view to taking away the child from her permanently. The filing of the case for divorce in the family Court at Bombay on 6.12.1991 and the order dated 11.12.1991 are such facts that are not in doubt, according to Konel, however, he did not know about the filing of the case in the Family Court at Bombay or any order passed in any petition that Radhika had filed in the Family Court when he moved in O.P.No.694 of 1991 or the application in Application No 6404 of 1991. Radhika moved in Application No.69 of 1992 for stay of the proceedings in this Court and both the applications; viz., Application No.6404 of 1991 filed by Konel for interim custody of the child and Application No.69 of 1992 filed by Radhika for stay of the proceedings were taken together. The learned Judge, who heard the parties, however, has ordered as follows:

"One thing not in dispute between the parties is that their child is an infant just one year old. It is really unfortunate that estrangement between spouses should have arisen within a year of birth of a child when normally they should have been happy with the child born to them to live in amity for a long and happy life. Anyway the wife has filed an application in the

Family Court"

"at Bombay for the following relief:

The petitioner therefore prays:

- "(a) that the said marriage between the petitioner and the respondent solemnized on 1.4.1990 be dissolved by a decree of divorce;
- (b) that the Hon'ble Court be pleased to declare that the petitioner is entitled to the custody of her minor child, the said Parthiv;
- (c) that the respondent be ordered and decreed to pay to the petitioner the maintenance at the rate of Rs.1,00,000 per month for herself and her minor child the said Parthiv;
- (d) that it may be declared that the petitioner is entitled to the articles of jewellery, gold and silverware ornaments and silverware;
- (e) that the respondent be ordered, and directed to pay the petitioner a sum of Rs.50,000 as and by way of costs of prosecuting this petition;
- (f) that the respondent be restrained by this Hon'ble Court from travelling abroad or leaving India without the permission of this Hon'ble court till the bearing and final disposal of the petition;
- (g) that the respondent be ordered and/or directed by this Hon'ble Court to furnish adequate security to the satisfaction of this Hon'ble Court and sufficient to meet the petitioner's claim" for alimony/pendente lite, costs that are likely to be awarded to the petitioner to meet the costs of the prosecuting of the petitioner and for her appearance in court;
- (h) that the respondent be directed to deposit his passport in court;
- (i) that the respondent be ordered and directed to return all the clothes and personal effects, ornaments and silverware of the petitioner which are in the matrimonial home;
- (j) that ad interim and interim reliefs; in terms of prayer (c) to (i) hereinabove
- (k) and for such other and further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case."

"It is significant to notice that the main relief is for divorce. Interim custody of the child is only ancillary to the main relief"

"On the other hand O.P.No.694 of 1991 filed by the husband is for being appointed as the guardian of the minor's person and property. Therefore, it is plain that the questions

involved in the O.P.No.694 of 1991 of this Court and the proceedings in the Family Court cannot be the same although there may be a little overlapping in the matter of evidence to be adduced in both. Therefore unless the matter in issue in an earlier proceeding is identically in issue in the later proceeding, there cannot be a stay of the latter proceeding. That is the principle under Sec.10, C.P.C. which whether applicable to the proceedings in question or not has to be appreciated. By application of the said principle been to these proceedings I do not see any basis for stay as prayed for by the wife. Hence Application No.69 of 1992 is dismissed. No costs."

"As regards the interim custody prayed for by the father of the child, one insurmountable difficulty which the father has got to confront is that the child is just one year old. In guardianship proceedings it is well settled law that the Court is concerned mostly for the welfare of the child which is paramount. Hence the father cannot have interim custody of the child, at any rate, at this age of the minor child. The child has to be with the mother. I am of this view not on the grounds set forth by the wife in her application for stay but on the only ground that the child being one year old it has to be with the mother."

"However the father should not be left helpless. he is equally interested in the child and bound to have affection. Therefore, it is not just to deprive him of that affection."

"Therefore, it is but proper that the father should be permitted to visit the child as frequently as he feels so at Bombay at the residence of his wife and with liberty to take the child for the outings as he desires subject to his leaving the child in the custody of the wife while returning from Bombay. This is the utmost that this Court can grant pending disposal of the main Original Petition."

4. Radhika has appealed in O.S.A.No.93 of 1992 against the order in Application No.6404 of 1991 and O.S.A.No.94 of 1992 against the order in Application No.69 of 1992.

5. Before we proceeded to hear the appeal, learned counsel for the respondent questioned the maintainability of O.S.A.No.94 of 1992 arising out of the order in Application No.69 of 1992 on the ground that an order passed on an application for

stay of the proceedings under Sec.10, C.P.C. is not a 'judgment' and thus no appeal under Clause 15 of the Letters Patent is maintainable. He relied upon a Full Bench decision of this Court in *Central Brokers v. Beemnarayappa Podder and Company*, (1954)2 M.L.J. 525: A.I.R. 1954 Mad. 1057: I.L.R. 1954 Mad. 1052 (F.B.), in which overruling an earlier judgment of this Court in *Abdul Nabbi Saheb v. Ramadosmahesh*, A.I.R. 1945 Mad. 371, the Court expressed that an order made under Sec.10, C.P.C., or any other provision of law for the stay of trial of a suit is not a judgment within the meaning of that term in Clause 15 of the Letters Patent and would, therefore, be not appealable. The Full Bench of this Court in this behalf mainly relied upon a judgment of the Supreme Court in *Asrmatidebi v. Surendra Deb*, (1953)1 M.L.J. 710: A.I.R. 1953 S.C. 198: 1953 S.C.J. 300: 1953 S.C.R. 1159, in which two tests have been laid down to find out whether an adjudication in a particular proceeding is a judgment or not; if they are so, (1) whether it terminates the suit or proceeding and (2) whether it affects the merits of the controversy between the parties in the suit itself.

6. Learned counsel for the respondent has cited, however, another judgment of this Court in *Angadu Narasimhalu Chettiar v. Selvarajan*, (1991)2 M.L.J. (NRC.) 1 (D.B.), in which an order of transfer of a suit from one court to another was sought to be challenged and in which case reliance was placed upon the judgment of the Supreme Court in *Asrmatidebi v. Surendra Deb*, (1953)1 M.L.J. 710: A.I.R. 1953 S.C. 198. 1953 S.C.J. 300: 1953 S.C.R. 1159. In that case, the Division Bench observed,

"In yet another decision *Govindarajulu v. Devar and Company*, (1953)2 M.L.J. 413: A.I.R. 1954 Mad. 240: I.L.R. 1954 Mad. 399, Rajamannar, C.J., and Venkatarama Aiyer, J., had to consider the maintainability of an appeal under Clause 15 of the Letters Patent against an order transferring a suit from one court to another. While holding that the appeal so preferred was incompetent the Division Bench pointed out that the appeal purporting to be under Clause 15 of the Letters Patent was directed against an order of the learned Judge transferring a suit and that according to the decision of the Supreme Court referred to earlier such an order transferring a suit from

one Court to another, is not a judgment within the meaning of Clause 15 of the Letters Patent. Therefore, it is held that the order of the learned Judge neither affects the merits of the controversy between the parties nor does it put an end to or terminate or dispose of the suit on any other ground but merely transfers the suit now pending before one court to another Court and such an order cannot by any stretch of imagination be said to be a judgment within Clause 15 of the Letters Patent."

7. The decision in the case of *Govindarajulu v. Devar and Company*, (1953)2 M.L.J. 413: A.I.R. 1954 Mad. 240: I.L.R. 1954 Mad. 399, or in *Angadu Narasimhalu Chettiar v. Selvarajan*, (1991)2 M.L.J. (NRC.) 1 (D.B.), in which it has been held that an order transferring a suit from one court to another is not a judgment within the meaning of Clause 15 of the Letters Patent, stands on a different footing and distinguishable from the Full Bench Judgment in the case of *Central Brokers v. Beeminarayappa Podder and Company*, (1954)2 M.L.J. 525: A.I.R. 1954 Mad. 1057: I.L.R. 1954 Mad. 1052 (F.B.), in which it has been held that an order made under Sec.10, C.P.C. or any other provision of law for the stay of trial of a suit is not a judgment within the meaning of that term in Clause 15 of the Letter Patent and would, therefore, be not appealable. *Govindarajulu v. Devar and Company*, (1953)2 M.L.J. 413: A.I.R. 1954 Mad. 240: I.L.R. 1954 Mad. 399 and *Angadu Narasimhalu Chettiar v. Selvarajan*, (1991)2 M.L.J. (NRC.) 1 (D.B.), are distinguishable for the reason that there may not be any occasion, in the case of an order to transfer a suit or refuse to transfer a suit from one Court to another, for a judgment a suit from one Court to another, for a judgment at interlocutory stage which will be an order of moment or effecting any party.

8. We are, however, spared of any exercise of distinguishing the Full Bench judgment which, on the face of it, cannot be distinguished from the facts of the instant case or of recording any difference of opinion and a reference thus to a larger bench or request to the Chief Justice for such an order for the reason of a Judgment of the Supreme Court in the case of *Shah Babulal Khimji v. Jayaben*, A.I.R. 1981 S.C. 1786, in which this aspect of the matter has been fully gone into and it is stated in no uncertain terms that an order staying or refusing to stay a suit under Sec.10, C.P.C. is

appealable under Clause 15 of the Letter Patent. There is, however, no reference in this judgment of the Supreme Court to the Full Bench judgment of this Court in the case of *Central Brokers v. Beeminarayappa Podder & Company*, (1954)2 M.L.J. 525: A.I.R. 1954 Mad. 1057: I.L.R. 1954 Mad. 1052 (F.B.), but the case of *Asrumatidebi v. Surendra Deb*, (1953)1 M.L.J. 710: 1953 S.C.J. 300: A.I.R. 1953 S.C. 198: 1953 S.C.R. 1159, which has been relied upon by the Full Bench of this Court as stating the law on the subject, has been referred to and the Supreme Court has, said as follows:

"This Court also has incidentally gone into the interpretation of the word 'judgment' and has made certain observations but seems to have decided the cases before it on the peculiar facts of each case without settling the conflict or the controversy resulting from the divergent views of the High Courts. This Court, however, has expressed a solemn desired and a pious wish that the controversy and the conflict between the various decisions of the High Courts has to be settled once for all some time or the other. In this connection, in *Asrumatidebi v. Surendra Deb*, (1953)1 M.L.J. 710: A.I.R. 1953 S.C. 198: 1953 S.C.J. 300: 1953 S.C.R. 1159, this Court observed as follows:

"In view of this wide divergence of judicial opinion, it may be necessary for this Court at some time or other to examine carefully the principles upon which the different views mentioned above purport to be based and attempt to determine with so much definiteness as possible the true meaning and scope of the word 'judgment' as it occurs in Clause 15 of the Letter Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of the other High Courts. We are, however, relieved from embarking on such enquiry in the present case as we are satisfied that in none of the views referred to above could an order of the character which we have before us, be regarded as a 'judgment' within the meaning of Clause 15 of the Letters Patent."

9. After referring however to the various other judgments of the Supreme Court and analysing the entire ambit of the scheme of the Letters Patent and the provisions of the Code of Civil Procedure, both old and new, the Supreme Court in *Shah Babulal Khimji v. Jayaben*, A.I.R. 1981 S.C.

1786, has stated as follows:

"Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by Sub-sec.(2) of Sec.2 cannot be physically imported into the definition of the word 'judgment' as used in Clause 15 of the Letters Patent because the Letters Patent has advisedly not used the term 'order' or 'decree' anywhere. The intention, therefore of the givers of the Letters Patent was that the word 'judgment' should receive much wider and more liberal interpretation than the word 'Judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) *A final judgment*-A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) *A preliminary judgment*-This kind of a judgment may take two forms (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a

judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench. (b) another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relation to maintainability of the suit, e.g., bar of jurisdiction, *res judicata*, a manifest defect in the suit, absence of notice under Sec.80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment, so as to be appealable to a larger Bench.

(3) *Intermediary or interlocutory judgment*-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of O.43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by O.43, Rule 1, but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under O.37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a

similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the trial Judge passes an order setting aside an *ex parte* decree against the defendant, which is not appealable under any of the clauses of O.43, Rule 1 though an order rejecting an application to set aside the decree passed *ex parte* falls within O.43, Rule 1, Clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the *ex parte* decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the *ex parte* decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench."

10. After stating as above the Supreme Court has pointed out that "in the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final

judgment passed by the trial Judge. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate Court against the final judgment."

11. After stating some more examples the Supreme Court has said,

"Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the trial Judge amounts to a judgment within the meaning of the letters patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments;

- (1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and take away a vested right of limitation or any other valuable right accrued to the defendant.
- (2) An order rejecting the plaint,
- (3) An order refusing leave to defend the suit in an action under O.37, Code of Civil Procedure,
- (4) An order rescinding leave of the trial judge granted by him under Clause 12 of the Letters Patent,
- (5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Sec.80, bar against competency of the suit against the defendant even though the suit is kept alive."
- (6) An order rejecting an application for a judgment on admission under O.12, Rule 6.
- (7) An order refusing to add necessary parties in a suit under Sec.92 of the Code of Civil Procedure.
- (8) An order varying or amending a decree,
- (9) An order refusing leave to sue *in forma pauperis*,
- (10) An order granting review;
- (11) An order allowing withdrawal of the suit with liberty to file a fresh one,
- (12) An order holding that the defendants are not agriculturists within the meaning of the

special law,

(13) An order staying or refusing to stay a suit under Sec.10 of the Code of Civil Procedure,

(14) An order granting or refusing to stay execution of the decree,

(15) An order deciding payment of court-fees against the plaintiff.”

Item No.13 is an order staying or refusing to stay a suit under Sec.10, C.P.C., the order impugned in the instant appeal.

12. Addressing itself to a question as to the maintainability of an appeal falling outside the scope of Sec.39(1) of the Arbitration Act, a Full Bench of this Court in *Loyal Textile Mills Ltd., Madras v. Allenberg Cotton Company, etc., Tennessee, United States of America represented by its Chairman, O.S.A.No.103 of 1989, judgment dated 3 10.1991*, has gone into some details of the law on the subject and has said as follows:

“In the context of the origin of the letters patent appellate power of this Court and the scope and ambit of the appeal against a judgment on the Original Side of the Court, we have no hesitation in holding that, if all the conditions for an appeal against a judgment under Clause 15 of the Letters Patent are satisfied and when there is no specific bar, merely because some other law is providing appeals against certain types of orders and says that against the other orders, there shall be no appeal to a Court, it cannot be inferred that, even if it is appealable under clause 15 of the Letters Patent, since it is not appealable under Sec.39(1) of the Arbitration Act, 1940, there shall be no appeal.”

In coming to the above conclusion the Full Bench adverted to almost every aspect of the law on the subject and noticed that, “there has been unanimity among the Chartered High Courts that the word “judgment” in Clause 15 embraces not only judgments given in the exercise of jurisdictions specifically mentioned in the letters patent but also in the exercise of jurisdictions not so mentioned” and that, “Clause 15, Letters Patent of the Chartered High Courts gives a right of appeal from the judgment within the meaning of that term as used in that clause of a single judge of the High Court to a Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercised by the single judge while passing his judgment provided

an appeal is not barred by any statute (for example, Sec.100-A of the Code of Civil Procedure, 1908) and provided the conditions laid down by Clause 15 itself are fulfilled.

13. Since the Supreme Court has already declared the law and we are obliged to follow it, we have to hold notwithstanding the judgment of the Full Bench of this Court in *Central Brokers v. Ramnarayana Podder and Company, A.I.R. 1954 Mad. 1057 (F.B.)*, that the appeal is maintainable.

14. The learned single Judge has said that the question involved in the O.P.No.694 of 1991 of this Court and the proceedings in the Family Court cannot be the same although there may be a little overlapping in the matter of evidence to be adduced in both. We have, however, noticed that Radhika has moved the Family Court at Bombay in a suit for divorce which is under Sec.13(1A) of the Hindu Marriage Act, 1955 and a declaration that she is entitled to the custody of her minor child. The Hindu Marriage Act, 1955 has got a salutary provision in Sec.26 thereof which reads as follows:

“In any proceeding under this act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.”

15. A mere glance at this provisions shows that in a suit seeking divorce, the court can make provisions in the decree itself with respect to the custody of the child and may after the decree upon application by petition filed for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree. Thus, the prayer in the Family Court suit at Bombay for a decree cannot be equated with the decree for interim custody in

the sense of an order *pendente lite*.

16. In most of the cases custody orders have to be made for limited purpose. No minor can be ordered to be always in custody of another, the limit being the statutory age of majority. Once however, the question of custody of a minor child is an issue on fact and law in the proceeding before the Family Court, if the same issue is brought between the same parties in another court, the judgment of one delivered earlier has to operate as *res judicata* in the other.

17. It is not necessary, as has been held by different High Courts and about there is a consensus of judicial opinion, that the matter directly and substantially in issue in former as well as subsequent suits, should be the same in all respects. After referring to quite a few decisions on the subject cited at the Bar a learned single Judge of the Patna High Court in *Pulchand Moulal v. Madhar Lall*, A.I.R. 1973 Pat. 196, has said,

"I do not propose to deal with these cases because, while they are undoubtedly instructive, they do no more than illustrate the true scope of Sec.10 of the Code. In my opinion, therefore, it will be more profitable to examine the requirements of Sec.10, the provisions of which are really not in doubt. Under this section, the Court is prohibited from proceeding with the trial of a suit where two conditions exist, namely, (i) where there is a previously instituted suit between the same parties and (ii) where the matter directly and substantially in issue in both the suits is the same. The first of these requirements of Sec.10 can present no difficulty, and, for determining whether the second one exists or not, the court has to direct its attention to the pleadings of both the suits and to determine what is the matter directly and substantially in issue in the two suits. Having ascertained this, the Court has further to consider whether or not the matter directly and substantially in issue in both the suits is the same. The test to be applied for this purpose is not whether the cause of action or the reliefs claimed in both the suits are the same, nor whether one of the issues arising in both of them is the same. The test is whether the decision of the matter directly and substantially arising in the former suit will decide not merely that suit, but will also operate as *res judicata* in the subsequent suit between the

same parties. It will be noticed that the expression 'directly and substantially in issue', which has been employed in Sec.10, is also to be found in Sec.11 of the Code. While Sec.10 relates to *res subjudice* that is, a matter which is pending a judicial adjudication, Sec.11 relates to *res judicata*, that is to say, a matter already adjudicated upon by a competent Court. Whereas Sec.10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit, Sec.11 bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a former suit. The object of both the sections is similar, namely, to protect the parties from being vexed twice, for the trial of the same cause and to achieve the public policy that there should be an end of litigation. Therefore, one of the objects of Sec.10 is to prevent competent courts of concurrent jurisdiction from having to try parallel suits in respect of the same matter in issue, and thereby to pave the way for the application of the rule of *res judicata* contained in the next following section. So, what the Court has really to see is if the decision of the matter directly and substantially in issue in the former suit will or will not lead to the decision of the matter directly and substantially in issue in the subsequent suit, and if it is satisfied that it will, then it must stay the trial of the subsequent suit and await the decision in the former suit."

18. A similar view is also taken by a bench of the Calcutta High Court in *A.C. Industrial Ltd. v. Rishabab Manufacturers*, A.I.R. 1972 Cal. 128, wherein it has said,

"The matter for determination in the case of an application for stay under Sec.10 is not what the basis of the claim in the two suits is but what is the matter in issue in the two suits. The two different basis of claim, namely, one based on a contract and the other on a tort would not make the matters in issue in the two suits different merely on that ground. If a claim based on a contract in one suit, is sought to be avoided and repelled on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming damages on the basis of a fraudulent misrepresentation with regard to the same contract, the issues nevertheless in

the two suits would be substantially the same, even though the basis of the claim in the two suits are altogether different."

19. There is a special Act called the Hindu Minority and Guardianship Act (XXXII of 1956) which in Sec.4(a) defines a 'minor' to mean a person who has not completed the age of eighteen years and in Sec.4(b) a 'guardian' to mean a person having the care of the person of a minor or of his property or of both his person and property and includes-(i) a natural guardian, (ii) a guardian appointed by the Will of the minor's father or mother, (iii) a guardian appointed or declared by a Court, and (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards; and in Sec.4(c) 'natural guardian' to mean any of the guardians sanctioned in Sec.6, namely, in respect of the minor's property, in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; in the case of an illegitimate boy or an illegitimate unmarried girl-the mother and after her, the father and in the case of a married girl-the husband. The powers of the natural guardian are circumscribed by the provisions in Sec.8 of the said Act which besides other things, states that the Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the Court under Sub-sec.(2) in all respects as if it were an application for obtaining the permission of the Court under Sec.29 of the Act (VIII of 1890) and in particular-proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Sec.4-A thereof; and the Court shall observe the procedure and have the powers specified in Sub-secs.(2), (3) and (4) of Sec.31 of that Act and that an appeal shall lie from an order of the Court refusing permission to the natural guardian to do any of the acts mentioned in Sub-sec.(2) of this Section to the Court to which appeals ordinarily lie from the decisions of that Court.

20. The provisions in the Guardians and Wards Act, however, show that the natural guardian needs no order by the court for exercising the powers of a natural guardian and that in case a ward is found leaving or removed from the custody of the guardian the power is given to the Court to make suitable orders. Sec.25(1) of this Act reads as follows:

"If a ward leaves or is removed from the

custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order of his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

21. We do not propose, since we are not disposing of O.P.No.694 of 1991, to say anything on the question as to why then the respondent has filed a petition for a declaration that he is the guardian when in the Bombay case it is clearly stated that he is the father of the child and a prayer has been made for the custody of the child by the appellant Radhika, his wife if not for the purpose of getting some order for the custody of the child, a matter which is directly and substantially in issue in the Family Court at Bombay.

22. It is not in dispute that the child is below five years. Ordinarily thus the custody has to be with the mother. The mother has accordingly prayed for a decree for such a custody in the Family Court at Bombay. The father, who is the respondent can have every say and thus can say to the Court that the child's custody with the mother may not be in the interest of child. We are constrained to observe that the suit has been filed in this Court by the respondent has brought in substantially the same questions of fact with respect to the custody of the child which have to be decided by the Family Court. We are not, therefore, in agreement with the view expressed by the learned single judge that the questions involved in O.P.No.694 of 1991 in this Court and the proceedings in the Family Court cannot be the same although there may be a little overlapping in the matter of evidence to be adduced in both.

23. Since we are of opinion that the suit in this Court should be stayed until the disposal of the issue as to the custody of the child in the Family Court at Bombay we have no hesitation in holding that any direction on the application of the respondent-husband as to the right of the respondent visiting the child or to take away the child as long as he desired for the outings subject to his leaving the child in the custody of the wife while returning from Bombay will not be justifiable. We have no reason to think that the Family Court where the issue is pending shall not exercise its judicial discretion properly and shall not thus bestow all relevant considerations to the rights of

the respondent-husband vis-a-vis that of the wife (appellant) as well as their liabilities and responsibility. It shall always be open to any of the parties including the respondent to move for appropriate directions before the Family Court where the suit for divorce in which a decree for custody of the child is sought for is pending.

24. In the result both the appeals are allowed and the impugned orders are set aside. Application No.69 of 1992 is allowed and O.P.No.694 of 1991 is stayed until the disposal of the suit in the Family Court at Bombay, viz., M.J. petition No.A-1744 of 1991. In so far as the relief as to the custody of the child is concerned Application No.6404 of 1991 is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

B.S. ---- *Appeals allowed Application and petition ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No.10018 of 1992 7th August, 1992.

L.Subbian ...Petitioner
v.

The Deputy Commissioner of Labour,
Coimbatore and another ...Respondents.

Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Secs.4(1)(a), 5 and 41(2) - Act, if applicable to person employed in a position of management?

The petitioner who was employed as a supervisor for more than 35 years in the second respondent-company drawing a salary of Rs.2,075 per mensem was discharged from service by oral order on 1.11.1988. In spite of his demand for restoration of services, the second respondent was not inclined to do so. The petitioner filed an appeal under Sec.41(2) of the Tamil Nadu Shops and Establishments Act to the first respondent. Holding that the Act did not apply to a person employed in a

position of management, the first respondent dismissed the appeal. He filed a petition for the issue of a writ of *certiorarified mandamus* to quash the orders of termination.

Sec.4(1)(a) of the Tamil Nadu Shops and Establishments Act provides that nothing contained in Act shall apply only to the persons employed in any establishment in a position of management. But Sec.5 thereof empowers the Government to issue a notification applying all or any of the provisions of the Act to any class of persons or establishments mentioned in Sec.4 of the Act, other than those mentioned in Clauses (e) and (f) of Sub-sec.(1). Thus, with regard to Sec.4(1)(a) of the Act, the Government is entitled to issue a notification to the effect that the Act will apply to persons covered by the said sub-section. The Government has issued a notification G.O.Ms.No.4074, Industrial Labour and Housing (Labour), dated 5th October, 1966 by exercising the powers conferred under Sec.5 of the Act, applying all the provisions of the Act to the clause of persons mentioned in Clause (a) of sub-section (1) of Sec.4. Thus, the Act applied to all persons who are employed in any establishment in a position of management. Hence, the Act will apply to the petitioner also, though he is employed as a supervisor, in a position of management. Hence, the first respondent is clearly wrong in dismissing the appeal of the petitioner on that ground.

[Paras 4 and 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records for the concerned records pertaining to the first respondent TNSE No.1/89 quash the order dated 20.4.1992 and consequently direct the first respondent to dispose of the appeal in TNSE No.1/89 on its merits in accordance with law.

K.Chandru, for Petitioner.

T.S.Gopalan, for Respondents

The Court made the following

ORDER: The writ petition is taken up with the consent of the parties. Mr.T.S.Gopalan has stated that he has filed vakalat today for the second respondent.

2. The prayer in the writ petition is to issue a *certiorarified mandamus* calling for the concerned records of the first respondent in TNSE Case No.1

of 1989 and quash the order made therein with a consequential direction to the first respondent to dispose of the appeal on merits. The petitioner was employed for more than 35 years in the second respondent-company as a Supervisor drawing a salary of Rs 2,075 per mensem. On 1.11.1988 the second respondent stated that the management had changed hands and the services of the petitioner were no longer required. The petitioner protested stating that he was entitled to continue in service till attained the age of 58 years. But his services were terminated by oral orders from 1.11.1988. Against the oral order of termination, the petitioner sent a letter on 2.12.1988 and demanded restoration of services. The second respondent sent a letter stating that further time was required to send a reply. Subsequently, the petitioner received a lawyer's notice dated 6.1.1989 to which he sent a reply on 1.8.1989. As the second respondent was not inclined to restore the petitioner to service, the petitioner filed an appeal to the first Respondent, as he is competent authority to hear an appeal under Sec.41(2) of the Tamil Nadu Shops and Establishments Act, 1947.

3. The appeal was contested on several grounds. One of the same was that the appeal was filed out of time. The first respondent passed an order in which he has discussed at length the question of condonation of delay, but he has not given a definite finding as to whether the delay is condoned. However, he proceeded to hold that a person employed in a position of management in any establishment, is exempted from the purview of the Act by virtue of Sec.4(1)(a) of the Tamil Nadu Shops and Establishments Act. Thus, holding that the Act will not apply to the petitioner herein, he dismissed the appeal. Aggrieved by the same, the petitioner has preferred this writ petition.

4. The view taken by the first respondent that the Act will not apply to the petitioner is clearly erroneous. Sec.4(1)(a) of the Tamil Nadu Shops and Establishments Act provides that nothing contained in the Act shall apply to the persons employed in any establishment in a position of management. But, Sec.5 thereof empowers the Government to issue a notification applying all or any of the provisions of the Act to any class of persons or establishments mentioned in Sec.4 of the Act, other than those mentioned in clauses (c) and (f) of Sub-sec.(1). Thus, with regard to

Sec.4(1)(a) of the Act, the Government is entitled to issue a notification to the effect that the Act will apply to persons covered by the said sub-section 5. The Government has issued a notification G.O.Ms.No.4074, Industries, Labour and Housing (Labour), dated 5th October, 1966 by exercising the powers conferred under Sec.5 of the Act, applying all the provisions of the Act to the class of persons mentioned in clause (a) of Sub-sec.(1) of Sec.4. Thus, the Act applied to all persons who are employed in any establishment in a position of management. Hence, the Act will apply to the petitioner also, though he is employed as a Supervisor, in a position of management. Hence, the first respondent is clearly wrong in dismissing the appeal of the petitioner on that ground.

6. In the result, the order of the first respondent in TNSE Case No.1 of 1989 dated 20.4.1992 is quashed and the matter is remanded to the file of the first respondent for fresh disposal in accordance with law. As the first respondent has not decided any of the questions including the question of limitation raised before him by the parties he shall consider the entire appeal and decide all the questions raised by the parties, in accordance with law.

7. The writ petition is allowed accordingly. There will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Maruthamuthu, J.

C.R.P.No.3072 of 1991

7th August, 1992

Sectharaman
v.

...Petitioner

Vaduvambal

...Respondent.

Hindu Marriage Act (XXV of 1955), Secs.27 and 28(1) and (2) - Civil Procedure Code (V of 1908), Sec.105(1) - Petition by wife under Sec.27 of Hindu Marriage Act for return of jewellery - Dismissed - Appeal against dismissal, if can be maintained.

Sec.105 of the Code of Civil Procedure makes it clear that the respondent cannot prefer an appeal

against the order passed in I.A.No.184 of 1989. The order against which the respondent seeks to prefer appeal is not one passed under the Civil Procedure Code, but under Sec.27 of the Hindu Marriage Act. In view of Sec.28(1) of the Hindu Marriage Act, it can be stated that the decree passed by the trial court for dissolution of marriage under Sec.3 is a decree which is appealable, but it cannot be so in the case of the order passed under Sec.27 of the Hindu Marriage Act in I.A.No.184 of 1989. The said order is only an order passed in an interim application and not decree. A combined reading of Sec.28(1)(2) makes it abundantly clear that appeals can be only from orders of permanent nature under Secs.25 and 26. Since the order passed in I.A.No.184 of 1989 for return of the jewels is an interim order and not of a permanent nature as contemplated under Sec.28, it has to be said that the respondent is not entitled to maintain an appeal against the said order.

[Para 5]

Cases referred to:

Gurbaksh Singh v. Taran Jit, A.I.R. 1977 H.P. 66. [Para 6]

Dhani Rani v. Sushila, A.I.R. 1977 H.P. 83. [Para 6]

Narain Singh v. Rukmani, A.I.R. 1977 H.P. 93. [Para 6]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the District Court, South Arcot District at Cuddalore, dated 3.10.1991 and made in C.M.A.No.29 of 1990.

V.Prabhakar, for Petitioner.

R.Yashodhavaradhan, for Respondent.

The Court made the following

ORDER: The revision petitioner herein is the husband and the respondent herein is his wife. The revision petitioner filed the petition H.M.O.P.No.83 of 1987 under Sec.13(1)(b) of the Hindu Marriage Act (hereinafter referred to as 'the Act'), praying for a decree for divorce against the respondent. The revision petitioner alleged in his petition that the marriage between him and the respondent took place at Panruti on 19.8.1983 and the respondent was not ordinarily and continuously living with the revision petitioner subsequent to the marriage and had chosen to live with her parents after deserting the revision petitioner and that the panchayat convened for the purpose of settlement became in vain. The revision petitioner has added that he filed H.M.O.P.No.667 of 1985 for restitution of conjugal rights and

obtained an *ex parte* decree on 23.4.1987 and that the even thereafter the respondent had refused to go and live with the revision petitioner. After exhausting the steps to get at the respondent, the revision petitioner hastened to file the petition for divorce. This was resisted by the respondent. Of course, she admitted her marriage with the revision petitioner as true and valid, but she all that the revision petitioner had treated her with cruelty by compelling her to get Sridhana from her parents' house quite often. She contended that she was deserted by the revision petitioner in June, 1984. She however stated that she was willing to go and live with the revision petitioner, when the revision petitioner filed H.M.O.P.No.667 of 1985. She finally contended that there is no reason for granting a decree of divorce against her. Pending enquiry on the original petition, the respondent wife filed I.A.No.184 of 1989 under Sec.27 of the Act praying for a direction to the revision petitioner to return the gold jewels mentioned in the petition of the respondent. She alleged therein that the revision petitioner has married a second wife by name Gunabushani and that she is wearing the gold necklace of the respondent, weighing 40 grams, which is not to the liking of the respondent, stated that of the various items of jewellery, a gold coin weighing one sovereign, presented to her as 'Scer' during the first Deepavali, is with the revision petitioner. This was opposed by the revision petitioner stating that he is not in possession of any gold jewels belonging to the respondent. He also denied the allegation that he has married a second wife by name Gunabushani.

2. After enquiry of the main original petition and the interlocutory application, the learned Subordinate Judge, Cuddalore, granted a decree of divorce on the ground that the respondent deserted the revision petitioner and allowed the original petition. As regards the return of the jewels, the learned Subordinate Judge, Cuddalore, rejected the claim of the wife/respondent. Aggrieved by the said order of the learned Subordinate Judge, Cuddalore, the respondent herein preferred C.M.A.No.29 of 1990 as a single appeal, before the District Judge, South Arcot at Cuddalore. On the objection raised on behalf of the revision petitioner that no single appeal can be maintained on two orders passed by the Sub Court in O.P. and I.A., and that appeal could be filed on

the orders, in I.A. The learned District Judge, South Arcot at Cuddalore.

"The prayer in the memo of appeal is for accepting this appeal and the petition for return of jewel in I.A.No.184 of 1989. Therefore, no separate appeal is necessary for I.A.No.184 of 1989. Appeal is maintainable for both orders....."

Now, the revision petitioner has come forward with the present Civil Revision Petition challenging the correctness of the said order of the learned District Judge, South Arcot at Cuddalore. He would reiterate his contention that no single appeal as C.M.A.No.29 of 1990 is maintainable for two orders passed by the Subordinate Judge. On two different subjects and that though appeal can lie as against the order passed in H.M.O.P.No.83 of 1987, no appeal can be maintained with regard to the order passed in I.A.No.184 of 1989, which is an order passed under Sec.27 of the Act. The learned Counsel for the revision petitioner contended that if at all, a revision alone can lie as against the order passed in I.A.No.184 of 1989 and that as the same has not been filed by the respondent so far, her claim for the return of the jewels asked for in I.A.No.184 of 1989 and rejected by the Subordinate Judge cannot be gone into by the lower appellate court.

3. On a consideration of the respective claims and contentions, I am afraid I may have to agree with the contentions raised on behalf of the petitioner. No doubt, the petitioner has filed a petition under Sec.13(1)(i-b) of the Hindu Marriage Act seeking a decree of divorce against the respondent and in the course of the same proceedings, the respondent has preferred an application I.A.No.184 of 1989 purporting the same as one under Sec.27 of the Hindu Marriage Act praying for the return of the gold jewels mentioned in the said application to her in the event of grant of a decree of divorce. A casual scrutiny of the said application I.A.No.184 of 1989 shows that it is very difficult to hold that it is an application to come within the ambit of Sec.27 of the Hindu Marriage Act. Sec.27 of the Act runs as follows:

"In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife."

It only means and implies that in respect of any property presented at or about the time of marriage which may belong jointly to both the spouses can be claimed under Sec.27. In respect of other properties which do not belong to both the parties or which were not given to them at or about the time of marriage, any dispute with reference to such property must be settled in the ordinary court of the country and cannot be a matter for provision in the decree in the matrimonial proceeding. In fact, this is the objection raised on behalf of the petitioner. Learned counsel for the petitioner submitted that in as much as the gold jewels in respect of which an order is sought for by the respondent, have not been alleged to be those presented at or about the time of marriage, belonging to both of them, the application I.A.No.184 of 1989 is not maintainable and even the provision of law quoted as Sec.27 of the Hindu Marriage Act is misconceived. According to it to file a suit for recovery of gold jewels. It may be noted here that the respondent alleges in her application that only a gold coin (one sovereign) was presented to her as 'seer' during first Deepavali and that the rest of the gold jewels, gold necklace weighing 40 grams and gold ring of half a sovereign merely belong to the respondent. She has not clearly alleged that those jewels were presented to her and the petitioner at or about the time of marriage.

4. Learned counsel for the respondent will not be right in invoking Sec.105(1) and (2), C.P.C. which is as follows:

"105. *Other Orders:* (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Subsec.(1), where any party aggrieved by an order of remand from which an appeal, lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Nor he will be entitled to rely on O.43, Rule 1-A, C.P.C. either, which is as follows:

"1-A. *Right to challenge non-appealable orders in appeal against decrees:* (1) Where any order is made under this Code against a party and

thereupon any judgment is pronounced against such party and a decree is drawn up, such party, may in an appeal against the decree contend that such order should not have been made and the judgment should not have been pronounced."

The first part of Sec.105(1) reiterates that no appeal lies from any order unless such right is expressly given by the Code, but even if an interlocutory order be appealable, a party is not bound to prefer an appeal at once, and under the second part when he appeals against the decree after final decision he can make any error, defect or irregularity in the order affecting the decision of the case, a ground of objection in the appeal. The provision under O.43, Rule 1-A has been newly inserted in the Code. This rule makes an express provision to clarify the position consequent on the abolition of the right of appeal on order under O.8, Rule 10, O.10, Rule 4 and O.16, Rule 20, C.P.C., that in an appeal from the decrees passed as a result of the orders party can take the same point as he could have taken in appeal under those orders in order to avoid doubts which may arise, because the judgment pronounced will be regarded as final in the appeal against the decree. However, Sec.105 makes it sufficiently clear that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, could be challenged in an appeal from the final decree or order. Here, the point is whether the respondent against whom an order has been passed by the trial court in I.A.No.184 of 1989 in respect of the return of the jewellery, is entitled to prefer an appeal along with the Judgment of the trial court delivered in respect of the dissolution of marriage. The above provisions of the Code of Civil Procedure makes it clear that the respondent cannot prefer an appeal against the order passed in I.A.No.184 of 1989. The order against which the respondent seeks to prefer appeal is not one passed under the Civil Procedure Code, but under Sec.27 of the Hindu Marriage Act.

5. The next point to be considered is whether there is provision in the Hindu Marriage Act for preferring an appeal against the order passed in I.A.No.184 of 1989. Sec.28 of the Act will be relevant and it is as follows:

"28. *Appeals from decree and orders:* (1) All decrees made by the court in any proceeding

under this Act shall, subject to the provisions of sub-Sec.(3) be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under Sec.25 or Sec.26 shall, subject to the provisions of Sub-sec.(3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decision of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."

In view of Sec.28(1) of the Hindu Marriage Act, it can be stated that the decree passed by the trial court for dissolution of marriage under Sec.3 is a decree which is appealable, but it cannot be so in the case of the order passed under Sec.27 of the Hindu Marriage Act in I.A.No.184 of 1989. The said order is only an order passed in an interim application and not decree. A combined reading of Sec.28(1) and (2) makes it abundantly clear that appeals can be only from orders of permanent nature under Secs.25 and 26. Since the order passed in I.A.No.184 of 1989 for return of the jewels is an interim order and not of a permanent nature as contemplated under Sec.28, it has to be said that the respondent is not entitled to maintain an appeal against the said order.

6. In *Gurbaksh Singh v. Taranjit*, A.I.R. 1977 H.P. 66, it has been observed as follows:

"A bare perusal of Sec.28 as amended would show that it makes only the decrees made by the court in any proceedings under this Act appealable. There is no mention of the orders as it stood under the old unamended Sec.28."

Similar view has been expressed in *Dhani Ram v. Sushila*, A.I.R. 1977 H.P. 83, which is as follows:

"The decrees are order mentioned in Sec.28 of the Hindu Marriage Act, which provides for appeals are the decrees and orders specifically referred to by the Act itself. Certain other orders, it was held, were also appealable. Those are orders made under the Code of Civil

Procedure by virtue of Sec.21 of the Hindu Marriage Act. Those orders are appealable if they have been made appealable expressly under the Code itself. No other order made in the course of trying in a petition under the Hindu Marriage Act is appealable. The order impugned in this appeal is an order staying the proceedings in the divorce petition until the application under Sec.24 of the Act is disposed of. No appeal lies against such an order."

In *Narain Singh v. Rukmani*, A.I.R. 1977 H.P. 93, it has been observed as follows: (Headnote).

"Under the amended Sec.28, an appeal is provided against those orders only which are made under Secs.25 and 26 of the Act; provided they are not interim orders. No appeal, therefore is contemplated under the amended law against an order under Sec.24 of the Act. What has not been expressly included in the new section must be implied to have been excluded. Therefore, no appeal lies now against an order under Sec.24."

It may be noted here that Sec.28 of the Act does not include Sec.24 with regard to the filing of appeal. Sec.24 deals with maintenance to be awarded *pendente lite* and expenses of proceedings.

7. Considering all aspects, I hold that the respondent is not entitled to prefer appeal against the order passed in I.A.No.184 of 1989 and that the appeal filed in the District Court, South Arcot at Cuddalore in C.M.A.No.29 of 1990 must be deemed to relate to the decree of divorce. The learned District Judge shall treat the said appeal accordingly and dispose of it expeditiously in accordance with law. The civil revision petition is allowed. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present:- K.S.Bakthavatsalam, J.

W.P.No.13380 of 1992 4th September, 1992.

D.S.Ravindradoss

...Petitioner

v.

The Government of Tamil Nadu, represented by its Secretary to Government, Health, Indian Medicine Homopathy and Family Welfare Department and others ... Respondents.

(A) *Constitution of India (1950), Art.226 - Natural justice - Principles of - Nature of.*

It is well settled that principles of natural justice cannot be put into straight jacket formula and principle is flexible. It varies from case to case and depends upon the facts and circumstances of each case, nature of right which may be affected.

[Para 7]

(B) *Constitution of India (1950), Art.226 - Writ petition under - If can be maintained by an unregistered association.*

It has been held by this Court repeatedly that an unregistered association cannot maintain a writ petition.

[Para 7]

(C) *Constitution of India (1950), Art.226 - Public interest litigation - Maintainability of - Conditions for.*

To entertain a petition as a 'public interest litigation', there should be a breach of public duty or violation of some provisions of the Constitution. The weapon of 'public interest litigation' as a safeguard must be utilised and invoked by the court with great deal of circumspection and caution. While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that the weapon under Art.226 of the Constitution should not be misused or permitted to be misused. This Court has to protect the society from the so-called 'protectors'.

[Paras 10 and 11]

Case referred to:

Shri Sachidanand Pandey v. State of West Bengal, A.I.R. 1987 S.C. 1109. [Para 10]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the

High Court will be pleased to issue a writ of *certiorari* calling upon the production of the order relating to the notice undated made in DIPR/MS/92 Ex.T., passed by the Government of Tamil Nadu represented by the 1st Respondent and quash the same.

S.Senthilnathan, for Petitioner

The Court made the following

ORDER: The prayer in the writ petition is as follows:

“.....to issue a writ or order or direction and in particular a writ of *certiorari* calling upon the production of the order relating to the notice undated made in DIPR/MS/92 Ext. passed by the Government of Tamil Nadu represented by the 1st respondent, quash the same and pass.....”

2. The petitioner is the father of a student studying in II year M.B.B.S. in the third respondent college. Obviously, the petitioner has admitted his daughter when the college was under the control of the Government.

3. Originally the third respondent college was run by a Trust and it was taken over by the then Government in 1989. This was challenged by the Trust before this Court. This Court dismissed the writ petition, upholding the takeover of the third respondent college by the Government. However, this Court directed the Government to pay compensation to the trust within a particular period. On appeal, a Division Bench of this Court consisting of Venkataswami and Abdul Hadi, JJ. reversed the order of this Court and upheld the contentions of the Management that the take-over of the college itself is bad. The result is the college run by the Trust, which is called Sri Ramachandra Medical College has to be handed over to the Trust. That judgment has become final. At this stage, the petitioner has come-up to this Court stating that as a parent he would prefer his daughter to study in a Government Medical College, since the Government Medical Colleges are attached to General Hospitals where students can gain more knowledge and experience.

4. To continue the narration after the order of the Division Bench of this Court, it is alleged that Government of Tamil Nadu decided to handover the said college to the third respondent and it was a rude shock to the student community as well as the parents and the students of the said college started agitation against the handing over of the

college to the Trust. It is alleged in the affidavit that supporting the agitation by the students of Sri Ramachandra Medical College, medical students all over Tamil Nadu commenced agitation protesting the decision of the Government and demanding the take over by appropriate action. It is also alleged that the police was let loose to suppress the students and the agitators. In view of that the parents of the students of Sri Ramachandra Medical College have formed an Association by name Sri Ramachandra Medical College Parent's Association and the petitioner alleged that he is the Convenor of the said Association. However, it is not a registered Association.

5. At this stage, it is alleged that the Government is resorting to various measures to suppress, defeat and divide the agitating students and one of the methods adopted by the Government according to the petitioner is an announcement made by the Minister for Health in newspapers to the effect that the parents had discussed the matter with the Government and some of them wanted their wards to be transferred to Government Medical College from the third respondent college and the Government has consented. As such an announcement has been made in newspapers that students who jointed the said college in 1990-91 and 1991-92 should give written requisition to the second respondent before 4.9.1992 for such transfer. The application forms will be available at the office of the second respondent. The petitioner alleges that the announcement made by the Minister for Health as published in the newspapers is illegal, *mala fide* and arbitrary. It is also alleged that this action is against all canons of natural justice and the Notification seeking requisition from the students for transfer from the said Sri Ramachandra Medical College to Government Medical Colleges is contrary to the Indian Medical Council (Amendment) Ordinance, 1992. It is alleged that such transfer cannot be done without the prior approval of the Medical Council of India. It is also stated in the affidavit that the impugned notice has been issued to defeat the agitation of the students and parents. It is also stated in the affidavit that only a very few parents were compelled to go for talks and the decision of the Government was thrust upon them and out of 200 parents/guardians, 170 persons are with the petitioner. It is also alleged that the decision of the Government is *mala fide* and the Government is very keen

only in breaking the unity and agitation of the students and parents. Just to confuse and divide the students, the Government has come forward with this offer. It is also alleged that the Government has not at all passed any Government Order in this respect and even the impugned notice does not contain the date of issue of the same. It is also stated that the impugned notice is a public announcement made in newspapers.

6. With these allegations, the petitioner has come up to this Court with the above said prayer. Mr.S.Senthilnathan, learned counsel for the petitioner strenuously contends that the petitioner is very much interested in his daughter studying in Sri Ramachandra Medical College, but that college should continue to be a Government college. The learned counsel further states that the notice issued by Minister concerned is not correct as the parents of the students did not meet the Minister concerned and it is a *mala fide* exercise of power just to defeat the parents and students of the college not to get into the agitation or continue the agitation. That apart, as per the recent Ordinance issued by the Government of India, consent of the Medical Council is necessary for starting Medical College or increasing these and as such, the learned counsel placing reliance upon this Ordinance contends that the announcement made by the Minister concerned is impossible as no permission of the Medical Council has been obtained by the Government of Tamil Nadu and as such the announcement itself is *mala fide*. That apart, the learned counsel states that this writ petition has been filed in the interests of the students community who are studying in Sri Ramachandra Medical College and on behalf of the parents of the students who are studying in the third respondent college.

7. I have given my careful consideration to the arguments of Mr.Senthilnathan, learned counsel for the petitioner. I may say immediately that I am not convinced that this is not a matter to be entertained in a writ petition by exercising discretionary jurisdiction under Art.226 of the Constitution. It is true that the third respondent college was managed by the Government when the petitioner's daughter was admitted into the college. However, it seems the college has been handed over to the Trust again by the present Government when a Division Bench of this Court has held that the taking over of the college by the

Government is bad in law. The result is the order of the Division Bench of this Court has got to be obeyed by the State Government and what all the State Government has done is the implementation of the order passed by the Division Bench of this Court. As I have already stated that it is nowhere alleged in the affidavit that any appeal has been filed against the order of the Division Bench except a statement made before this Court by the learned counsel that an appeal is being filed before the Apex Court of the land against the order of the Division Bench of this Court, Maybe to, As it is the order of the Division Bench of this Court is binding on me, which has held that the taking over of the college by the Government in 1989 is bad in law, and as such the Government has got to comply with the order of the Division Bench of this Court, which the Government it seems has now complied with by handing over the college to the Trust, that cannot be a subject-matter before this Court, and if any order is passed by this Court, it will amount to reviewing of the order of the Division Bench of this Court. It cannot be done by this Court. The notice which is shown before me, is an announcement made by the Minister for Health in the interests of the students and parents as I can see from the notice. If the students or parents are aggrieved that the college has been handed over to a private Management and if they want to continue their studies they are given an option to join in a Government Medical College and if they want to continue in the same college, i.e. Sri Ramachandra Medical College they would pay only the fees applicable in other Government Colleges and this has been accepted by the Management. As such, the Government has come out with a Notification just to sort out the issue by way of compromise that such of those medical students, who joined Sri Ramachandra Medical College in 1990-91 and 1991-92 may give it in writing to the second respondent before 4.9.1992 their application seeking such transfer to Government Medical Colleges. Similarly, students in other medical colleges, who seek transfer to Sri Ramachandra Medical College may also apply to the second respondent. It is made clear in the announcement itself that the requests would be processed as per the guidelines of Medical Council of India. So, from the notice it is very clear that the Government in the interests of the student community has come out with this statement, in my view

correctly, that if they want to continue their studies in a private college, they need not pay extra fees to the management. So also if the students do not want to continue their studies in the private college, they can get themselves transferred to any Government Medical College. In my view, this statement cannot be said to be *mala fide* or arbitrary. I am unable to accept what Mr.S.Senthilnathan means that principles of natural justice has been violated. It is well settled that principles of natural justice cannot be put into straight jacket formula and principle is flexible. It varies from case to case and depends upon the facts and circumstances of each case, nature of right which may be affected. Here is a case where in the matter of taking over of a college by private management, an amicable solution has been given by the State Government and it is for the petitioner either to accept it or reject it. I do not think that it can give rise to a cause of action to come before this Court, especially by invoking the extraordinary jurisdiction of this Court under Art.226 of the Constitution. It is true that right to education is held to be a fundamental right. But I do not think that this fundamental right can be stretched to the extent as a right to study in a private college or Government college. So, on the simple ground that the petitioner has no *locus standi* in the sense that he has no right to invoke the extraordinary jurisdiction of this Court, the writ petition shall stand dismissed. That apart, the petitioner alleges in the affidavit that the parents have formed an Association and it is an unregistered association, but it has been held by this Court repeatedly that an unregistered association cannot maintain a writ petition.

8. At any rate, since I take the view that this is not a matter to be sorted out in the writ petition and this Court cannot be used so as to come to the aid of the petitioner when the Government has issued a Notification in newspapers with regard to some solution to sort out the agitation. This Court sitting under Art.226 of the Constitution, in my view, should see the interests of the students community as well as the management, to whom the college has been handed over in pursuance of the order of the Division Bench of this Court. To strike a balance, in my view, the Government has taken a right decision by publishing a notice in the newspapers. The contention that this method adopted by the Government is to break the unity of the students and to suppress the agitation of the

students and parents, is not appealing to me. This is not a place where such contentions have got to be placed and surely not in a writ court.

9. The Notification which has been published in the newspapers, which is attacked in this writ petition, in my view, do not compel anybody to resort to any method. Any student can act voluntarily according to the Notification. So I am not able to accept the contention that the students and parents are coerced on giving consent for transfer etc. and such vague allegations cannot be countenanced.

10. There is an allegation made in the affidavit filed in support of the writ petition that the writ petition is to be treated as 'public interest litigation'. It is true that Art.226 of the Constitution of India is wide enough to enable this Court to issue a writ for any purpose and it is not confined to enforcement of Fundamental Rights. It has been held by the apex Court of the land in *Shri Sachidanand Pandey and another v. The State of West Bengal*, A.I.R. 1987 S.C. 1109, by Khalid, J. as follows:

".....It is only when courts are apprised of gross violation of fundamental rights by a ground or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to talk in. It is necessary to have some self imposed restraint on public interest litigants."

On the facts and circumstances of the case on hand, I am of the opinion that this is not a writ petition filed to see enforcement of any public duty and observance of any constitutional or legal provision. To entertain a petition as a 'public interest litigation', there should be a breach of public duty or violation of some provisions of the Constitution. In my view, none is present here. As Khalid, J. has put it in the abovementioned case, such cases are filed without any rhyme or reasons. To quote the words of Khalid, J. in the abovementioned case, it runs thus. (at p. 1134)

"...Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among public. They must be above suspicions. See the facts of this case and the end result...."

So I am of the view that this writ petition cannot be entertained as 'public interest litigation' and accordingly it has to fail."

11. Moreover, in my view of the weapon of 'public interest litigation' as a safeguard must be utilised and invoked by the Court with great deal of circumspection and caution. While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that the weapon under Art.226 of the Constitution should not be misused or permitted to be misused. This Court has to protect the society from the so-called 'protectors'. As such, I am of the view that this writ petition is legally devoid of any merit or principles of public interest and public protection. Such writ petitions will certainly create bottlenecks in courts, which is an abuse of process of this Court. In view of that, this writ petition shall stand dismissed.

12. If any extension is asked for by any of the students or parents with regard to the cut-off date fixed in the Notification, I am sure that the State Government will consider it in the proper perspective.

B.S. --- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

A.S.No.198 of 1982 9th April, 1992.

Munuswami Chetty (Died) and others
...Petitioners
v.
Commissioner, H.R. & C.E. (Admn.), Madras and others
...Respondents.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.6(11) - Hereditary trusteeship - Title to - If can be acquired by

prescription in the absence of any trustee against whom adverse possession could be claimed - Hereditary trustees - Kinds of.

The plaintiffs filed a petition before the Deputy Commissioner, H.R. & C.E. (Admn.) for declaration that they were the hereditary trustees of the suit temple. The prayer was negatived and their appeal before the Commissioner also failed. They then filed a suit under Sec.70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, before the Sub-court, Tiruvallur. It was dismissed. In appeal, it was contended that since the plaintiffs' family alone was in management of the temple from 1938, they should be declared the hereditary trustees and that at any rate they perfected title to the office by prescription. It was countered by the respondents with the objection that since there was no properly constituted trustee of the temple, there was no question of any prescriptive title.

Held:- In view of the observations in *Kameswara Rao v. Somanna, A.I.R. 1955 A.P. 212*, and other cases the objection of the respondents was valid and there is no scope for any prescriptive title to the plaintiffs in the present case with reference to the trusteeship of the temple. [Para 7]

There are three kinds of hereditary trustees as per the definition of that term found in Sec.6(11) of the Act. 1. A trustee, succession to whose office devolves by hereditary right. 2. A trustee, succession to whose office is regulated by usage. 3. A trustee, succession to whose office is specifically provided for by the founder. [Para 8]

Cases referred to:

Deputy Commissioner, H.R. & C.E., Board v. Sidhivmayaga Mudaliar, (1971) 1 M.L.J. 422. [Paras 7 and 8]

Kameswara Rao v. Somanna, A.I.R. 1955 A.P. 212. [Para 7]

Palaniyandi Malayarayan v. Vadamalali Vidayan, 29 M.L.J. 685; A.I.R. 1916 Mad. 1001; 2 L.W. 723. [Para 7]

Manickam Pillai v. Thanikachallam Pillai, A.I.R. 1917 Mad. 706(1)(B). [Para 7]

Seeni Kutti v. Kunhi Pathumma, 33 M.L.J. 320; I.L.R. 40 Mad. 1040; A.I.R. 1919 Mad. 972. [Para 7]

Sambudamurthi Mudaliar v. State of Madras, (1970) 2 M.L.J. (S.C.) 5. [Para 8]

In re. Hindu Women's Right to Property Act, 1941, 1941 F.L.J. 1: (1941) 2 M.L.J. 12; 1941 F.C.R. 12. [Para 8]

Sri Mahant Paramananda Das Goswami v. Radhakrishna Das, (1926)51 M.L.J. 258. [Paras 8 and 9]

Commissioner, H.R. & C.E. v. Maliga and Shop Varthagar Sangam, (1976)1 M.L.J. 17. [Para 9]

Subramania Pillai v. Trustees, Temple Group, (1981)2 M.L.J. 77. [Para 11]

Executive Officer, Arulnighu Ranganathaswami Devasthanam v. H.H. Srivan Setagopa Sri Vedantha Desika Yathindra Mahadesigan, (1989)1 L.W. 361. [Para 14]

State of Maharashtra v. Sh. Chandra Kant, A.I.R. 1977 S.C. 148; (1977)1 S.C.R. 993. [Para 14]

S.M. Chinna Kandar v. Commissioner, H.R. & C.E., I.L.R. (1980)2 Mad. 213. [Para 14]

Commissioner, H.R. & C.E. v. Kacherichamy, (1981)2 M.L.J. 375. [Para 14]

Lakshmana Shah v. Commissioner, H.R. & C.E., (1971)2 M.L.J. 495. [Para 14]

Dhian Singh Sobha Singh v. The Union of India, A.I.R. 1958 S.C. 274; 1958 S.C.R. 781. [Para 14]

Commissioner, H.R. & C.E. v. P. Kannappan Naicker, (1989) T.L.N.J. 232. [Para 14]

T. Viswanatha Rao, for Appellant.

Bhaskaran, A.G.P., for Respondent No.1.

T.L. Ram Mohan for *M/s. M. Subramanian Rao*, for Respondents.

The Court delivered the following

JUDGMENT: The unsuccessful plaintiffs, ten in number, are the appellants. Having initially failed before the authorities under the Hindu Religious and Charitable Endowments Act, 1959, (hereinafter referred to as 'the Act'), in their O.A.No.20 of 1969 on the file of the Deputy Commissioner, H.R. & C.E. (Admn.) Department and the subsequent appeal, A.P.No.56 of 1975, on the file of the Commissioner, H.R. & C.E. (Admn.) Department, they filed O.S.No.61 of 1979 on the file of the Sub Court, Tiruvallur, to set aside the order in A.P.No.56 of 1975 and consequently to allow their petition, O.A.No.20 of 1969. The said suit filed under Sec.70 of the Act was dismissed and hence this appeal.

2. The abovesaid authorities negated the plaintiff's prayer for declaration that they are the hereditary trustees of the suit temple. According to the plaint, suit temple was built by the father of plaintiffs 1 and 2 with the funds supplied by the family of all plaintiffs in the year 1921, all of them hail from a common ancestor and they and their predecessors alone have been the hereditary

trustees of the suit temple all along for over five decades. They also pleaded that they have perfected their right to be such hereditary trustees by continuous, uninterrupted and open enjoyment thereof adverse to the interest of any other person.

3. The first defendant, who died pending the suit and whose legal heirs are defendants 3 to 9, filed a written statement repudiating the claim of the plaintiffs. According to him, the management of the temple was with the elders of the village representing various castes, with the consent of the villagers. The second defendant Commissioner of the Department, filed a written statement also stating that the suit temple has been managed by the villagers and that the claim of the plaintiff was untenable.

4. The court below has held that the plaintiffs are not the hereditary trustees and that the abovesaid order of the Commissioner, H.R. & C.E. is not liable to set aside, but it did not go into the question of the plaintiff's claim of title to the office by adverse possession.

5. The court below also found that the allegation that the suit temple was constructed by the ancestors of the plaintiffs is not proved. Against this finding there is no attack by the learned counsel for the appellants, but he only made before me two submissions. The first one is that it is in evidence that right from 1938, the plaintiffs family was alone in management of the suit temple and so they should be declared hereditary trustees as defined under Sec.6(11) of the Act. His second submission is that at any rate the plaintiffs have perfected title to the said office by prescription. In this appeal I have to consider these two submissions only.

6. The said claim of the learned counsel for the appellants is strongly rebutted by both the learned counsel for the first respondent/Commissioner and for the other respondents the legal representatives of the deceased first defendant.

7. Let me first of all dispose of the question of title by adverse possession. No doubt, as pointed out by the learned counsel for the appellants, this Court held in *Deputy Commissioner, H.R. & C.E., Board v. Sidhivmayaga Mudahar*, (1971)1 M.L.J. 422, that even the office of hereditary trusteeship could be acquired by prescription. But the learned counsel for the respondents 2 to 8 relied on *Kameswara Rao v. Somanna*, A.I.R. 1955 A.P. 212, to contend that unless there is a rightful claimant to the office,

no person can set up title by adverse possession and the question of adverse possession would not arise at all in such a case. According to the learned counsel for respondents 2 to 8, in the present case though the villagers had the right to elect the trustees for the temple, it is not shown by the plaintiffs that there was any trustee or trustees elected or nominated at any point of time by the villagers, against whom adverse possession could be claimed by the plaintiffs. The relevant passage in *Kameswara Rao v. Somanna*, A.I.R. 1955 A.P. 212, runs as follows:-

"The learned Advocate for the respondents relied on *Palaniyandi Malavarayan v. Vad-amalali Vidayan*, 29 M.L.J. 685: A.I.R. 1916 Mad. 1001: 2 L.W. 723. The headnote sets out the legal position correctly and is in the following terms; 'The right to trusteeship of a temple cannot be acquired by adverse possession so long as there is no lawful trustee who could claim to recover the office from the person who claims to hold it adversely to him' "

.....

This decision was followed in *Manickam Pillai v. Thanikachallam Pillai*, A.I.R. 1917 Mad. 706(1)(B). The relevant observations are as follows:

'Since however there were no properly constituted trustees of the plaintiff temple there was no person with knowledge of the acts of the defendants or capable of taking proceedings necessary for the protection of the suit property and therefore, possession was not adverse until the appointment of trustees in 1900'

In *Seeni Kuttu v. Kunhi Pathumma*, 33 M.L.J. 320: I.L.R. 40 Mad. 1040: A.I.R. 1919 Mad. 972 (F.B.) at pages 984-985 (C), Srinivasa Iyengar, J. followed the two decisions referred to above."

In view of the observations, I think there is no scope for any prescriptive title to the plaintiffs in the present case with reference to the trusteeship of the temple.

8. Coming to the other question, it has to be seen whether the plaintiffs could be termed 'hereditary trustees' of the suit temple as per the definition of that term found in Sec.6(11) of the Act. Sec.6(11) of the Act runs as follows:

"Hereditary trustee' means the trustee of a religious institution, the succession to whose office devolves by hereditary right or is

regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force."

So there are three kinds of hereditary trustees as per the definition;

1. A trustee, succession to whose office devolves by hereditary right.
2. A trustee, succession to whose office is regulated by usage.
3. A trustee, succession to whose office is specifically provided for by the founder.

Admittedly, in the present case, the last category will not apply, because first of all there is no evidence as to who actually founded the suit temple and whether there was any specific provision made by the founder relating to the trusteeship. Regarding the second category, viz., a trustee, 'succession to whose office is regulated by usage', it has been held by the Supreme Court in *Sambudamurthi Mudaliar v. State of Madras*, (1970) 2 M.L.J. (S.C.) 5, as follows:

"The phrase 'regulated by usage' in Sec.6(9) of the Act must be construed along with the phrase 'succession to this office' and when so construed that part of the definition would only apply where the ordinary rules of succession under the Hindu Law are modified by usage and succession has to be determined in accordance with the *modified rules*. The word 'succession' in relation to property and rights and interests in property generally implies 'passing of an interest from one person to another' (*vide: In re. Hindu Women's Right to Property Act, 1941*, 1941 F.L.J. 1: (1941) 2 M.L.J. 12: 1941 F.C.R. 12) (*emphasis supplied*), (Sec.6(9) above referred to is of the old Act corresponding to the present 6(11) of the Act.)

Now, in the present case, there is no plea in the plaint that the succession to the office is regulated by usage. No doubt there is such a plea in the application, O.A.No.20 of 1969, before the Deputy Commissioner, as follows:

"...Office of the trusteeship is regulated by usage, that is the eldest male member of the family to hold office and in that the first petitioner has been holding the office for over 40 years."

Thus the regulation by usage is only regarding who actually among the members of the plaintiffs family is to hold office. If that is so, it is not known first of all how all the plaintiffs claimed in the present suit

that all of them are hereditary trustees. Any way only to the extent that the elder male member could hold the trusteeship, there is a 'modified rule'. If at all, only the first plaintiff, who was the first petitioner in O.A.No.20 of 1969, can claim the hereditary trusteeship. But I find from the evidence of P.W.1, the first plaintiff himself that there was another person called Elumalai Chettiar, elder to the first plaintiff. If that is so, the first plaintiffs also cannot claim the hereditary trusteeship. The above said Elumalai Chettiar's name is no doubt mentioned as one of the nine trustees along with the first plaintiff, of the suit temple in Ex.A-3, the invitation for Kumbabishekam for this temple sent in the year 1938. But P.W.1 admitted as follows:-

“எக். ஏ.3. கும்பாபிஷேக பத்திரிகையில் 9 பேரி செட்டியார்களும் தேவாலய தர்மகர்த்தாக்கள் என்று போட்டிருப்பது தவறு”

Further P.W.1 also admitted as follows:

“தாவா கோவில் கிராமத்தைச் சேர்ந்த கோவில், அந்த அம்மன் கிராம தேவதை. அது பொதுவான கோவில், எங்கள் குடும்பத்துக்குச் சொந்தமான கோவில் அல்ல.

தாவா கோவில் இடிந்து போனபின் ஊரார் சரீர் ஒத்தாசை செய்து நாங்கள் பணம் போட்டு புதுப்பித்து கட்டினோம்.

334ம் நம்பர் பட்டாவில் கண்ட 1 ஏக்கர் 24 செண்டுக்கு இப்போது 8 வருஷமாகத்தான் 1ம் பிரதிவாதி கிஸ்தி செலுத்தி வந்தார். அதற்கு முன்பு லிங்கப்ப முதலி தான் அந்த பட்டாவுக்கு கிஸ்தி செலுத்தி வந்தார். 1917ம் வருடம் அம்மயப்ப முதலி தாவா கோயிலுக்கு அர்ச்சகராக இருந்தார். எனக்கு தெரிந்து 10 வருஷமாக இருந்தார். அவர் இறந்த பின் 1927ம் வருஷமிருந்து அவர் மகன் லிங்கப்ப முதலி 1942ம் வருஷம் அர்ச்சகராக இருந்தார்..... தாவா கோவிலில் எல்லோருக்கும் பாதியதை உண்டு. ஏக்.ஏ.3 பத்திரிக்கை போட்டதிலிருந்து ஊரிலுள்ளவர்கள் கலாட்டா செய்து தகராறு செய்ய ஆரம்பித்தார்கள்.

(emphasis supplied). (The abovesaid 1.24 acres one of the two landed properties of the suit temple is admittedly not with the plaintiffs all along; nor have they taken any steps to recover the same from the first defendant.) In the light of the above

admission, it is clear that the plaintiffs can lay no claim to hereditary trusteeship of the first or second type above stated.

Further, in the above said connection, I may also point out the following observations in the decision reported in *Deputy Commissioner, H.R. & C.E., Board v. Siddhivinayaga Mudaliar, (1971)1 M.L.J. 422*, (above referred to):

“The distinction between custom and usage as brought out in this decision has been clearly expressed in the following passage at page 15 of “Hindu Law” by N.R.Raghavachariar, 5th Edn.

Though usage and custom are often used as convertible terms, the antiquity, the uniformity and the notoriety which are required in the case of a custom are not necessary in proving a valid usage. It is sufficient if it is shown that the usage is so well-known and acquiesced in that it may be reasonably presumed to have been tacitly imported by the parties into their transactions.”

In the light of the above referred to evidence in the present case, and alleged usage cannot also be reasonably presumed to have been tacitly imported by the parties into their transactions. Therefore also the plaintiffs cannot claim to come under the above-referred to second type of hereditary trusteeship defined under Sec.6(11) of the Act. Further, though in the temple was only with Beri Chetty community to which the plaintiffs belong, it was not so stated in the plaint at all. Further P.W.1 admitted that it was not so stated in O.A.No.20 of 1969 proceedings. All these clearly show that the plaintiffs have taken out different stands at different times regarding their claim to hereditary trusteeship.

9. In this connection, I must point out the following passage from *Sri Mahant Paramananda Das Goswami v. Radhakrishna Das, (1926)51 M.L.J. 258*, which is also quoted with implied approval in the above-referred to in *Sumbudamurthi Mudaliar v. State of Madras, (1970)2 M.L.J. 58, (S.C)*

“Hereditary succession is succession by the heir to the deceased under the law, the office must be transmitted to the successor according to some definite rules for descent which by their own force designate the person to succeed.” (emphasis supplied).

Further in *Commissioner, H.R. & C.E. v. Maligai and Shop Varthagar Sangam, (1976)1 M.L.J. 17,*

also, I find the following passage:

“The usage’ can have relevancy, meaning and significance only if a *particular method of succession has been proved* to be in existence over a long period during which more than one succession had been taken place.” (*emphasis supplied*)

But the plaintiffs as stated above is not having any specific case of such ‘definite rules of descent’ or ‘particular method of succession’. So also the plaintiffs cannot claim to be ‘hereditary trustees’ under the abovesaid Sec.6(11) of the Act either of the second or first type stated above.

10. No doubt, the learned counsel for the appellants brought to my notice the following features of the case; (1) In Ex.A-44, survey register of the suit temple properties, the first plaintiff is described as Dharmakarthā. The said document is signed and approved by the officers of the H.R. & C.E. Department. (2) An admission by D.W.1, the only witness examined on the side of the defendants is as follows:

— “1938ம் வருடம் லிங்கப்ப முதலி கோவிலைப் பூட்டி சாவியை பி.டபிள்யூ.1 இடம் ஒப்படைத்தார். அப்போதிருந்து சாவி அவரிடம்தான் இருக்கிறது. அதைப் பற்றி 1ம் பிரதி வாதியோ, மற்றவர்களோ எந்த தகராறும் செய்யவில்லை. பி.டபிள்யூ.1 கதவைத் திறந்து கோயில் விளக்கு ஏற்றுவார். அவர் விளக்கு ஏற்றுவதை நான் பார்த்து இருக்கிறேன்.

(3) The plaintiffs have examined three elderly persons in the village as P.Ws.2 to 4. They all support the case of the plaintiffs. P.W.2 is aged about 85, P.W.3, is aged 90 and P.W.4 is aged 65. (4) Right from 1947 to 1971 the appellants alone have paid kist in relation to one of the suit temple properties, as borne out by Exs.A-4 to A-42, the kist receipts. (5) As per Ex.A-49, photo, there is an inscription in the temple that a portion of the temple was constructed by Ramasami Chetty of the plaintiffs’ family.

11. Learned counsel for the appellants also relied on *Subramania Pillai v. Trustees, Temple Group*, (1981) 2 M.L.J. 77. There, after referring to several decisions, the Division Bench has observed that when members of a particular family alone were exercising rights of trusteeship, they would be ‘hereditary trustees’ under the abovesaid Sec.6(11) of the Act, that it is not necessary that the trusteeship should develop from father to son and so on and that as regards the person to act as trustee at any particular point of time, it would be open to

the family to decide the matter as and when the question arises. Despite all these, I find the following features referred to by the learned counsel for the first respondent, apart from all that I have pointed out earlier; in Ex.B-53, the order in A.P.No.56 of 1975 passed by the Commissioner, H.R. & C.E. Department, it is observed that the appellants filed earlier O.S.No.129 of 1965 to get a declaration that they are the hereditary trustees of the suit temple and the said suit was dismissed and their subsequent appeal in A.S.No.323 of 1966 was also dismissed. No doubt, in this connection, the learned counsel for the appellants pointed out that in view of Sec.108 of the Act, the decisions in O.S.No.129 of 1965 and A.S.No.323 of 1966 are without jurisdiction, since the abovesaid declaration could be got only from the relevant authorities and not from a civil court. The said Sec.108 of the Act no doubt runs as follows:

“108. *Bar of suits in respect of Administration or Management of Religious Institutions, etc.*: No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act.”

Sec.63(b) of the Act reads as follows:

“*Deputy Commissioner to decide certain disputes and matters*: Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters;

(a)

(b) Whether a trustee holds or held office as a hereditary trustee.”

Therefore, according to the learned counsel for the appellants, the civil court has no jurisdiction in the above matter and the abovesaid dismissal of the suit and the appeal can have no effect. He also pointed out that there is no reference to the abovesaid decisions in O.S.No.129 of 1965 and A.S.No.323 of 1966 in the written statement of the Commissioner in the suit.

12. But the judgments in O.S.No.129 of 1965 and A.S.No.323 of 1966 have not been exhibited in this proceeding and it cannot be said definitely why the said suit and the appeal were dismissed. So in the absence of those documents (judgment copies), it

will not proper for me to infer that the abovesaid suit and appeal are without jurisdiction, particularly when the plaintiffs have chosen to suppress the same in their plaint. If really they were without jurisdiction, the plaintiffs would have certainly referred to them and stated so in the plaint.

13. That apart, learned counsel for the first respondent/Commissioner brought to my notice another important admission by P.W.1, the first plaintiff in his deposition before the Deputy Commissioner in the abovesaid proceeding, O.A.No.20 of 1969 itself. (The said deposition is marked as Ex.B-2 in the suit). A portion of the said deposition is as follows:

"I belong to Beri Chetty community Kandappa Chetty is a Vaniya Chetty. There was no dispute about the honours. There was a dispute in 1938 about honours and there was panchayat on it and Ex.A-21 is the findings of the Panchayat. *Kandappa Chetty was also in Management of the suit temple then.*" (emphasis supplied)

Ex.A-21, referred to in the passage quoted above, is the same as Ex.A-46, dated 24.12.1943 marked in the suit. It is the decision given by the panchayatdars when there was some dispute regarding temple honours in the suit temple between the first plaintiff and the above referred to Kandappa Chetty. In the abovesaid passage P.W.1 himself has admitted that Kandappa Chetty was also in management of the suit temple then. In the abovesaid context, the term 'then' therein should be taken as the period around the year '1943'.

14. Learned counsel for the first respondent/Commissioner also argued that without notice under Sec.80, Code of Civil Procedure the present suit filed is not maintainable and for this he relied on *Executive Officer, Arulmighu Ranganathaswami Devasthanam v. H.H. Srivan Satagopa Sri Vedantha Desika Yathindra Mahadesigan and others*, (1989)1 L.W. 361 and also *State of Maharashtra v. Sh. Chandra Kant*, A.I.R. 1977 S.C. 148: (1977)1 S.C.R. 993. But the judgment reported in *Executive Officer, Arulmighu Ranganathaswami Devasthanam v. H.H. Srivan Satagopa Sri Vedantha Desika Yathindra Mahadesigan and others*, (1989)1 L.W. 361, has been set aside by the Supreme Court in *H.H. Srivan Satagopa Sri Vedantha Desika Yathindra Mahadesigan and others*, (1991)2 L.W. 599, wherein the Supreme Court has allowed the matter to be gone into on merits, despite the fact that

the abovesaid Sec.80, C.P.C. notice was not there. That apart the learned counsel for the appellants relied on several earlier decisions of this Court like *S.N.Chinna Kandar v. Commissioner, H.R. & C.E.*, I.L.R. (1980)2 Mad. 213, *Commissioner, H.R. & C.E. v. Kacherichamy*, (1981)2 M.L.J. 375, *Lakshmana Shah v. Commissioner, H.R. & C.E.*, (1971)2 M.L.J. 495, wherein it was held differently from the decision reported in *Executive Officer, Arulmighu Ranganathaswami Devasthanam v. H.H. Srivan Satagopa Sri Vedantha Desika Yathindra Mahadesigan and others*, (1989)1 L.W. 361, holding that for the statutory suit under Sec.70 of the Act, notice under Sec.80, C.P.C. is not required. So far as *State of Maharashtra v. Sh. Chandra Kant*, A.I.R. 1977 S.C. 148. (1977)1 S.C.R. 993, is concerned, that arises under M.P. Public Trusts Act, 1951 and there appears to be some differences between the relevant provisions in the said Act and Hindu Religious and Charitable Endowments Act, 1959, and so I am unable to follow the said decision. All these apart, the learned counsel for the appellants also pointed out that there could be waiver of notice required under Sec.80, C.P.C. and in that connection he relied on *Dhian Singh Sobha Singh v. The Union of India*, A.I.R. 1958 S.C. 274: 1958 S.C.R. 781 and *Commissioner, H.R. & C.E. v. P.Kanniappan Naicker*, (1989) T L.N.J. 232. This claim of waiver is submitted on the ground that in the written statement of the first respondent/Commissioner, the abovesaid notice question was not at all raised. In view of the abovesaid decisions, I hold that the suit is maintainable.

15. Yet, in view of my earlier mentioned conclusions, there is no merit in this appeal and hence it is dismissed. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

Appeal No.255 of 1981

24th April, 1992.

M.Govindarajan and others ...Appellants
v.

**The Indian Overseas Bank, Pondicherry by its
Accountant** ...Respondent.

Benami Transactions (Prohibition) Act (XLV of 1988), Secs.2(a), 3, 4 and 7(1) - Sham and nominal transactions - If hit by Act - Parties if prohibited from contending that transaction is sham and no title passes under it.

Per Ramam, J. (on behalf of himself and Somasundaram, J.) on reference by Bellie, J.: Sham and nominal transactions would not be covered by the provisions of the Benami Transactions (Prohibition) Act, 1988 and so it is open to the parties to contend that a transaction is sham and nominal and no title passes under it. [Para 9]

Kathoom Bivi Animal v. S.Mohamad alias Sheikh Mohamad, (1990)1 L.W. 284: (1990)2 M.L.J. 42, Overruled.

Ouseph Chacko v. Raman Nair, A.I.R. 1989 Ker. 317, Relied on.

The definition of 'benami transaction' in Sec.2(a) of the Act contemplates only real transaction when A sells property to B who pays consideration, but the document mentions X as the purchaser, while the real purchaser in this genuine sale is only B, X being the benamidar. There is an operative transfer resulting in the vesting of title in the transferee, though the consideration is provided by another and it is only this kind of transaction, which has been contemplated and also included in the definition of 'benami transaction' under Sec.2(a) of the Act. Thus in Secs.2, 3 and 4 of the Act there is absolutely no indication that sham and nominal transactions also were intended to be included within the definition of 'benami transactions' under the provisions of the Act. [Para 6]

The definition of 'benami transactions' in Sec.2(a) has to be read into Sec.4 of the Act also, while interpreting the words 'property held benami' and so read, only transactions answering the definition of a 'benami transaction' under Sec.2(a) of

the Act, pursuant to which property is held benami, would be affected by Sec.4 of the Act. Sec.4 cannot be so interpreted as to include sham and nominal transactions, which are outside the scope of 'benami transaction' as defined by Sec.2(a) of the Act. [Para 9]

Similarly, the repeal by Sec.7(1) of the Benami Transactions (Prohibition) Act, of Sec.81 of the Indian Trusts Act, 1882, does not in any manner alter this position. The repeal by itself, would be of no avail to bring within the provisions of the Act, sham and nominal transactions. [Para 9]

Cases referred to:

Kathoom Bivi Animal v. S.Mohamad alias Sheikh Mohamad, (1990)1 L.W. 284: (1990)2 M.L.J. 42. [Paras 7,8 and 9]

Ouseph Chacko v. Raman Nair, A.I.R. 1989 Ker. 317. [Paras 10 and 8]

Meenakshi Mills Ltd. v. Commissioner of I.T., Madras (1957)1 M.L.J. 1: A.I.R. 1957 S.C. 49. [Para 3]

Bhim Singh v. Kan Singh, A.I.R. 1980 S.C. 727. [Para 3]

Appeal against the decree of the Court of the Subordinate Judge, Karaikal, dated 17.1.1981 in O.S.No.17 of 1979.

K.Yamunan, for Appellants.

V.Narayanaswami, for Respondent.

The Court made the following

ORDER: The two defendants against whom the suit has been decreed is the appellants. The plaintiffs-Indian Overseas Bank, Pondicherry, got a money decree against the second defendant-Ramaswamy Mudaliar on 18.9.1975 by a Judgment of the High Court, for a sum of Rs.33,893. In execution of that decree in E.P.No.45 of 1976 the plaintiff attached the suit property-a house belonging to the second defendant on 24.10.1976. In the meanwhile, after filing of the suit on 19.11.1964, the second defendant on 21.11.1964 executed a sale deed in respect of the suit property in favour of the first defendant-his brother in law. First defendant filed a claim petition on the basis of the said sale deed, the certified copy of which is Ex.B-1 and claim petition was allowed on 16.11.1977. The plaintiff filed the present suit for setting aside that claim order, pleading that the alleged sale deed executed by the second defendant in favour of the first defendant is a benami transaction and only the second defendant was the owner in spite of the sale deed.

2. The suit was resisted by the defendants contending

inter alia that the sale deed is true and genuine one and not a benami transaction as alleged and the suit is barred by limitation.

3. The learned trial Subordinate Judge who tried the suit accepted the plea of the plaintiff that the sale deed Ex.B-1 is benami and the title vests with the second defendant in spite of the sale deed. He further held that the suit is not barred by limitation. He answered the other issues raised in the suit also in favour of the plaintiff. In the result he decreed the suit as prayed for.

4. Mr.K. Yamunan, learned counsel for the appellant-defendants argued that

(i) the finding of the trial court that Ex.B-1 sale deed is a benami one and no title has passed under it contrary to the evidence and erroneous;

(ii) the sale deed in question comes within the mischief of Benami Transactions (Prohibition) Act, 1988 and therefore, the plaintiff cannot plead that the sale deed is a benami one; and

(iii) the finding of the trial Court that the suit is not barred by limitation is incorrect.

5. Though the plaintiff has pleaded that Ex.B-1 sale deed is a benami transaction, on a careful reading of the case in the plaint, the real case appears to be that Ex.B-1 sale deed is a sham and nominal one executed for the purpose of defeating the plaintiff from recovery of the amount due by the second defendant to them. As stated above, Ex.B-1 sale deed is executed by the second defendant in favour of the first defendant, which according to the plaintiff is not a valid one but fictitious with an anterior motive. Therefore the transaction according to the plaintiff is sham and nominal and not a benami transaction since in the case of a benami transaction one person passes consideration for the sale and gets the sale deed in the name of another person. Be that as it may, the question is, did the second defendant execute the sale deed Ex.B-1 in favour of the first defendant without any intention of passing title to the first defendant and with ulterior motive of secreting the property from the creditors (plaintiff).

[After discussing the facts His Lordship proceeded:]
6. As regards the plea of limitation, it is contended that in view of Art.2265 of the French Civil Code, the suit is barred by limitation. The said Art.2265 reads thus:

"A person who acquires an immovable in good faith and under an instrument which is on the

face of it capable of giving a title, obtains a title by prescription to the land in ten years and district of the Court of Appeal, in which the owner lives is the same district as that in which the land lies, and in 20 years if the true owner lives outside such district."

A close reading of the Article shows that the condition prescribed for application of the Limitation in this Article is that the person must acquire the property in good faith. But as found above, Ex.B-1 sale deed is a sham ad nominal, and therefore the transaction is *mala fide*. Hence the trial court has rightly held that the suit is not barred by limitation.

7. The next contention of Mr.Yamunan is that in view of the Benami Transactions (Prohibition) Act, 1988, it is not open to the plaintiff to take the plea that Ex.B-1 is a sham and nominal sale. He submits that as per this Act it is not open to take a plea that a sale deed is sham and nominal, and no suit can be filed on such a plea. In support of this contention the learned counsel relies on a decision of a single Judge of this Court in *Kathoom Bivi Ammal v. S.Mohamad alias Sheik Mohamad*, (1990)1 L.W. 284; (1990)2 M.L.J. 284, wherein it has been held to the effect that a plea that a transaction is sham and nominal cannot be taken since such a transaction is hit by the Benami Transactions (Prohibition) Act. This view has been arrived at mainly on the ground that Sec.7 of the Act declares that Sec.81 and Sec.82 of the Indian Trusts Act, 1882 along with some other provisions have been repealed.

8. Sec.81 of the Indian Trusts Act, 1882 is as follows:-

"Where the owner of property transfers or bequeaths and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

And Sec.82 of the Indian Trusts Act reads thus:

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

A reading of Sec.82 shows that it relates to benami transaction and therefore we are not concerned with that Sec.81 relates to sham and nominal transactions. A reading of this only conveys the meaning that in a sham and nominal transaction the transferee or legatee must hold such property for the benefit of the owner or his legal representative. In other words this section creates a statutory obligation on the part of the transferee or the legatee towards the transferor or the testator or his legal representative. So such a statutory obligation is removed when this section is repealed. This does not mean that a sham and nominal transaction itself is prohibited or it is not open for anyone to make a plea that a transaction is sham and nominal.

9. From the title of the Benami Transactions (Prohibition) Act, 1988 itself it could be seen that what is prohibited under the Act is benami transactions and not any other transactions like sham and nominal transactions. The benami transaction has been defined in Sec.2(a) of the Act as meaning, 'any transaction in which property is transferred to one person for a consideration paid or provided by any other person'. Certainly a sham and nominal transaction does not come within the meaning of this definition. Therefore with great respect I am unable to agree with the decision of the learned single Judge of this Court in the case referred to above the sham and nominal transactions are also hit by the Benami Transactions (Prohibition) Act.

10. This view of mine is supported by a decision of the Kerala High Court in *Ouseph Chacko v. Raman Nair Raghavan Nair*, A.I.R. 1989 Ker. 317, wherein it has been held that,

"A right under the general law for a declaration from a Court of law that a transaction is fictitious, sham or nominal and that it has not been acted upon and was never intended to be acted, is not taken away by the Benami Transactions (Prohibition) Act. That right survives."

In this view of mine, I think it would be necessary and appropriate to refer the matter to a Division Bench on the point where the Benami Transactions (Prohibition) Act prohibits sham and nominal transactions also and it is not open to contend that a transaction is sham and nominal and no title passed under it.

11. Hence, the office will place the matter before my Lord the Chief Justice for necessary orders for

posting the matter before a Division Bench. After a decision on this point, the matter will be placed before me for final disposal of the appeal.

This appeal having posted for answering a reference, before The Honourable Mr. Justice Ratnam and The Honourable Mr. Justice Somasundaram, on Monday, the 1st day, Tuesday the 2nd day, Monday the 15th day, Tuesday the 16th days of April 1991, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the suit and upon hearing the arguments of Mr. K. Yamunan, Advocate for the appellants and of Mr. V. Narayanaswami, Advocate for the respondent and having stood over for consideration till Tuesday the 11th day of June, 1991,

The Order of the Court was made by

Ratnam, J.:

"Whether the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) prohibits sham and nominal transactions also and it is not open to contend that a transaction is sham and nominal and no title passed under it."

is the question that has been referred to us for decision.

2. Inasmuch as the reference has arisen in the course of the hearing of an appeal, which still awaits consideration and disposal at the hands of the learned single Judge who made the reference, we have refrained from referring to the factual background giving rise to the pending appeal with a view to enable the learned Judge to further deal with the matter in the light of the answer to the reference and on the facts as may be found on the evidence.

3. The answer to the question referred would depend upon the types of transactions comprehended within the expression "benami transactions" and the scope of the impact of the provisions of the Benami Transactions (Prohibition) Act, 1988 (45 of 1988) (hereinafter referred to as 'the Act') and its fore-runner the Benami Transactions (Prohibition of the Right to Recover Property Ordinance, 1988) (Ordinance No.2 of 1988) (hereinafter referred to as 'the Ordinance'), on such transactions. Whatever views might have been earlier entertained with regard to the types of transactions, which could be called "benami transactions", considerable light had been thrown on the types of transactions, which can be appropriately comprehended within the expression

"benami" by two decisions of the Supreme Court in *Meenakshi Mills Ltd. v. Commissioner of I.T., Madras (1957) 1 M.L.J. 1: A.I.R. 1957 S.C. 49* and *Bhim Singh v. Kan Singh, A.I.R. 1980 S.C. 727*. In the first decision, viz., *Meenakshi Mills Ltd. v. Commissioner of I.T., Madras, (1957) 1 M.L.J. 1: A.I.R. 1957 S.C. 49*, though arising under the provisions of the Income Tax Act, 1922, the Supreme Court had to deal with the question, whether certain intermediaries of the assessee-company, were benamidars for the assessee. In that connection, Venkatarama Ayyar, J., speaking for the court, clearly set out the types of the transactions comprehended by the word 'benami', in the following terms:-

".....it is necessary to note that the word 'benami' is used to denote two classes of transactions, which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B, but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter, there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration, but whether any consideration was paid....."

Again, in *Bhim Singh v. Kan Singh, A.I.R. 1980 S.C. 727*, the Supreme Court dealt with the kinds of benami transactions generally recognized in this country. In that context, the Supreme Court

observed at page 732 as follows:

".....Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money, but in the name of another person, without any intention to benefit such other person, the transaction is called benami. In that case, the transferee, holds the property for the benefit of the person, who has contributed the purchase money, and he is the real owner. The second case, which is loosely termed as a benami transaction, is a case, where a person who is the owner of the property, executes a conveyance in favour of another, without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in one fact that whereas in the former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor, notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person, who has contributed the purchase money in the former case and not the intention of the person, who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognized in Sec.82 of the Indian Trusts Act, 1882, which provides that where property is transferred to one person, for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration....."

From the aforesaid decisions of the Supreme Court it is clear that the two types of transactions, which can be regarded as 'benami' are

- (i) where a person buys property with his own funds or money, but in the name of another

without any intention to benefit such other person; and

(ii) where a person executes a conveyance in favour of another, without any intention to transfer the beneficial interest in the property to that person.

The first type of transaction, according to the Supreme Court, is, without doubt, a benami transaction. However, the second type of transaction, which is only a transaction as such in name and not in reality, is also, in a loose and erroneous sense, called a benami.

4. It is in the aforesaid conceptual background relating to benami transactions, the provisions of the Ordinance and the Act, have to be examined to ascertain whether benami transactions, strictly so called or even otherwise loosely called so, had been dealt with, under its respective provisions. The provisions of the Ordinance may first be taken up for consideration. The object of the Ordinance was to prohibit the right to recover property held benami and for matters connected therewith or incidental thereto. Sec.2(1) of the Ordinance prohibited the enforcement of any right in respect of any property held benami, in a suit, claim or action at the instance of a real owner or on his behalf, against the benamidar or any other person. Under Sec.2(2) of the Ordinance, in a suit, claim or action, by or on behalf of a person claiming to be the owner of the property, though held benami, no defence based on benami, could be raised by the real owner, against the person in whose name the property is held or any other person. Sec.2(3) of the Ordinance provided for exceptions, in relation to the applicability of Sec.2(1) and (2) of the Ordinance in the two specified cases enumerated thereunder. Sec.3 of the Ordinance contained a provision to the effect that nothing therein shall affect the provisions of Sec.53 of the Transfer of Property Act, 1882 (4 of 1882) or any law relating to transfers for an illegal purpose. Under Sec.4(1) of the Ordinance, Sec.82 of the Indian Trusts Act, 1882 (2 of 1882), Sec.66 of the Code of Civil Procedure, 1908 (5 of 1908) and Sec.281-A of the Income Tax Act, 1961 (43 of 1961) were repealed. Sec.4(2) of the Ordinance declared that nothing in Sub-sec.(1) of Sec.4 of the Ordinance, shall affect the continued operation of Sec.281-A of the Income Tax Act, 1961, in so far as the State of Jammu and Kashmir is concerned. Though the provisions of the Ordinance, under

Sec.1(3) thereof, came into force on 19.5.1988, the Law Commission was requested to take up the provisions of the Ordinance for detailed examination and give its considered views, so that on the basis of the recommendations of the Law Commission, the Ordinance could be replaced by an appropriate act. In its One Hundred Thirtieth Report on Benami Transactions, the Law Commission had made some recommendations and purporting to incorporate those recommendations, as could be seen from the Statement of Objects and Reasons, the Benami Transactions (Prohibition) Act, 1988 came to be passed repealing the Ordinance. The objects of the Act are wider than the objects of the Ordinance and are two fold, viz., (i) to prohibit benami transactions; and (ii) to prohibit the right to recover property held benami. Secs.3, 5 and 8 of the Act came into force on 6.9.1988 and its other provisions were deemed to have come into force on 19.5.1988, when the repealed Ordinance was promulgated. Consistent with one of the objects of the Act, viz., prohibition of benami transactions, it became necessary in the Act, to define a 'benami' transaction. Sec.2(a) of the Act defines a 'benami transaction' as meaning any transaction, in which property is transferred to one person, for a consideration paid or provided by another person. 'Property' has been defined under Sec.2(c) of the Act, as meaning property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property. Sec.3(1) of the Act prohibited a person from entering into any 'benami' transaction. Under Sec.3(2) of the Act, the purchase of property by a person in the name of his wife or unmarried daughter was taken outside the operation of Sec.3(1) of the Act and a presumption had also been enacted in that such property so purchased shall be presumed, unless the contrary is proved, to be for the benefit of the wife or the unmarried daughter. Sec.3(3) of the Act makes the entering into benami transaction, a punishable offence with imprisonment for a term, which may extend to three years or with fine or with both and under Sec.3(4) of the Act, such an offence, notwithstanding anything contained in the Code of Criminal Procedure, 1973, is declared to be non-cognizable and bailable. Sec.4 of the Act prohibited the right to recover property held benami and this is couched in language identical to that found in Sec.2 of the Ordinance. Sec.5 of the Act

provides for acquisition of properties held benami by such authority, and in such manner and after following such procedure, as may be prescribed, and no amount shall be payable for the acquisition of any property. Sec.6 of the Act corresponds to Sec.3 of the Ordinance. Sec.7(1) of the Act provides for repeal of Secs.81, 82 and 94 of the Indian Trusts Act, 1882, Sec.66 of the Code of Civil Procedure, 1908 and Sec.281-A of the Income Tax Act, 1961. Sec.7(2) of the Act corresponds to Sec.4(2) of the Ordinance. Sec.8 of the Act provides for the making of the Rules for carrying out the objects and purposes of the Act. Under Sec.9(1) of the Act, the Ordinance has been repealed and Sec.9(2) of the Act saves the Acts, done or action taken under the Ordinance, as having been done or taken under the corresponding provisions of the Act.

5. On a close scrutiny and comparison of the provisions of the Ordinance and the Act, it is at once seen that the object of the Act is wider, viz., to prohibit benami transactions and also to interdict the right to recover property held benami. The prohibition of 'benami transaction' was not in contemplation of the Ordinance at all. The provision for prohibition of benami transaction under Sec.3 of the Act necessitated a definition of benami transaction and Sec.2(a) of the Act provided that unless the context otherwise requires, 'benami transaction' means a transaction in which property is transferred to one person for a consideration paid or provided by another person. The definition of 'benami transaction' under Sec.2(a) of the Act, is nothing but a reproduction of the opening part of Sec.82 of the Indian Trusts Act, 1882. There is no indication in the definition under Sec.2(a) of the Act that the other type of benami transaction, loosely so called, according to the Supreme Court, was even contemplated. Besides, in furtherance of the objects of the Act, Sec.3(1) of the Act prohibited the entering into of a benami transaction as defined in the act, subject to the exception contained in Sec.3(2) of the Act and had made it a non-cognizable and bailable offence punishable with imprisonment for three years or with fine or with both. Likewise, consistent with the other object of the Act to interdict the right to recover property held benami, the ostensible title has been declared to be indefeasible either by way of action or even defence. This prohibition under Sec.4 of the Act has been made

applicable with reference to property held benami. The expression 'held benami' connotes the state of holding property as a result of and referable to a benami transaction and defined in Sec.2(a) of the Act. The repeal of Secs.82 and 94 of the Indian Trusts Act, 1882, would appear to indicate that such a repeal was called for, in view of the provisions made in the Act, with reference to matters, which fell under those provisions of the Indian Trusts Act, 1882. The definition of a 'benami transaction' based on the opening words of Sec.82 of the Indian Trusts Act, 1882, has been already referred to. Regarding the latter part of Sec.82 of the Indian Trusts Act, 1882, in view of the interdict on the right to recover property provided under Sec.4 of the Act and the enactment of a presumption, though rebuttable under Sec.3(2) of the Act, the retention of that part of Sec.82 of the Indian Trusts Act, 1882, had become unnecessary. Thus, by the combined operation of Secs.2(a) and 4 of the Act, Sec.82 of the Indian Trusts Act, 1882 has been rendered wholly unnecessary and that is the reason why, under Sec.7(1) of the Act, Sec.82 of the Indian Trusts Act, 1882 has been repealed. Likewise, even as regards Sec.94 of the Indian Trusts Act, 1882, in view of Sec.4 of the Act, that section has been rendered unnecessary and that accounts for the repeal of Sec.94 of the Indian Trusts Act, 1882. In other words, the repeal of Secs.82 and 94 of the Indian Trusts Act, 1882 had been done under Sec.7(1) of the Act, as provision has been made already in the Act, to deal with matters, which had already been dealt with under Secs.82 and 94 of the Indian Trusts Act, 1882. However, with reference to Sec.81 occurring in Chapter IX of the Indian Trusts Act, 1882, relating to certain obligations in the nature of trust, it appears to us that a situation contemplated by that provision, is not covered by the definition in Sec.2(a) of the Act and it is, therefore, not possible to infer from the repeal of Sec.81 of the Indian Trusts Act, 1882, provided under Sec.7(1) of the Act, that even transfers not at all intended to dispose of the beneficial interest, were also contemplated, as cases falling under the provisions of the Act. At best, the repeal of Sec.81 of the Indian Trusts Act, 1882 by Sec.7(1) of the Act, may discharge the transferee or the legatee from the obligation of holding the property for the benefit of the owner, but that cannot be pressed into service to include transactions, only in name and not in reality, also,

as falling within the provisions of the Act. Thus, released from an obligation in the nature of a trust under Sec.81 of the Indian Trusts Act, 1882, it may be still open to a person to contend that notwithstanding the execution of a document, it is only a transaction in name and not in reality and in fact not acted upon and remained only as a transaction on paper without divesting any right of the transferor and without in any manner being affected by the provisions of the Act.

6. Learned counsel for the appellants first contended that the avowed object of the Act is to do away with benami transactions, inclusive of sham and nominal transactions, which have also been understood as belonging to the category of benami transactions, though in a loose sense. On the other hand, learned counsel for the respondent submitted that the definition of 'benami transaction' in the Act does not purport to cover sham and nominal transactions, as ordinarily understood and, therefore, the definition cannot be extended or expanded to include other types of transactions, not at all contemplated by the definition, as transactions dealt with by the Act. The definition of 'benami transaction' has already been referred to and it takes in only one kind of transaction, in which the property is transferred to one person, for consideration paid or provided by another person. In other words, the only transaction recognised as a 'benami transaction' under the definition in the Act is the first category of transactions referred to by the Supreme Court in the decisions already noticed. The definition contemplates only real transaction when A sells property to B who pays consideration, but the document mentions X as the purchaser, while the real purchaser in this genuine sale is only B, X being the benamidar. There is an operative transfer resulting in the vesting of title in the transferee, though the consideration is provided by another and it is only this kind of transaction, which has been contemplated and also included in the definition of 'benami transaction' under Sec.2(a) of the Act. Thus, in Secs.2, 3 and 4 of the Act, there is absolutely no indication that sham and nominal transactions also were intended to be included within the definition of 'benami transaction' and dealt with under the provisions of the Act. This contention of learned counsel for the appellants has, therefore, to be rejected.

7. Learned counsel for the appellants next

contended that the words 'benami' and 'held benami' occurring in Secs.3 and 4 of the Act have to be read differently and that while it may be that the definition of 'benami transaction' occurring in Sec.2(a) of the Act may apply to Sec.3 of the Act, it may not apply to Sec.4 of the Act, as the expression 'benami transaction' does not occur therein, but only the words 'held benami' have been used. It has earlier been noticed that the twin objects of the Act are to prohibit benami transactions and also the establishment of rights over property held benami, either on a cause of action or defence, based on benami. The prohibition of benami transactions is sought to be achieved by preventing persons from entering into such transactions and making it a punishable offence, except in cases provided for under Sec.3(2) of the Act. The prohibition contained in Sec.4 of the Act is aimed at securing the other object of the Act, viz., to put an end to the right to recover property held benami and to vest the title to the property in the benamidar or the ostensible owner. In other words, in order to accomplish the twin objects earlier referred, provision has been made in the Act to prohibit the entering into of benami transactions and also to put an end to the right of a person claiming to be the real owner, either on a cause of action or by way of defence, and it is with reference to the latter class of cases, the words used are 'held benami'. Those words would mean the state of holding property, as a result of entering into a benami transaction or pursuant to such a transaction and necessarily, the definition of a 'benami transaction' found in Sec.2(a) of the Act, has to be read into and applied in interpreting the words 'property held benami' occurring in Sec.4 of the Act. In view of that, this argument of learned counsel for the appellants also cannot be accepted.

8. Learned counsel for the appellants next contended that there was no reason to confine the operation of the provisions of the Act only to those transactions falling under Sec.2 (a) of the Act and further that the repeal of Sec.81 of the Indian Trusts Act, 1882, also indicated that sham and nominal transactions, were also intended to be brought under the operation of the provisions of the Act. Reference was also made in this connection to the decision in *Kathoom Bivi Ammal v. S.Mohamad alias Sheik Mohamad*, (1990)1 L.W. 284. On the other hand, learned counsel for the respondent submitted that the provisions of the

Act, as they are found, have to be interpreted and given effect to and in view of the definition under Sec.2(a) of the Act relating to 'benami transaction', its scope cannot be widened to include sham and nominal transactions also and that the repeal of Sec.81 of the Indian Trusts Act, 1882 would not in any manner affect the position at all, as the effect of such repeal, would only be to release the sham and nominal transaction from the scope of the obligation arising under Sec.81 of the Indian Trusts Act, 1882, but nevertheless leaving it open to the parties to contend that the transaction is a sham and a nominal one and has been entered into only in name and not in reality. Strong reliance in this connection was also placed by learned counsel for the respondent upon the decision reported in *Ouseph Chacko v. Raman Nair Raghavan Nair*, A.I.R. 1989 Ker. 317. In addition, learned counsel for the respondent also attempted to characterise certain observations occurring in *Kathoom Bivi Ammal v. S.Mohamad alias Sheik Mohamad*, (1990)1 L.W. 284, as obiter.

9. On a careful consideration of the rival submissions, we find it difficult to accept the contention of learned counsel for the appellants. When the expression 'benami transaction' has been defined in the Act, the expression 'property held benami' has to be interpreted in the light of the definition occurring in the Act relating to a benami transaction and also as referable to property held, as a result of or attributable to, such a transaction. In the absence of a benami transaction preceding, it is difficult to conceive of the holding of any property benami. Necessarily, therefore, the definition of 'benami transactions' in Sec.2(a) has to be read into Sec.4 of the Act also, while interpreting the words 'property held benami' and so read, only transactions answering the definition of a 'benami transaction' under Sec.2(a) of the Act, pursuant to which property is held benami, would be affected by Sec.4 of the Act. Sec.4 of the act cannot be so interpreted as to include sham and nominal transactions, which are outside the scope of 'benami transaction' as defined by Sec.2(a) of the Act. Similarly, the repeal of Sec.81 of the Indian Trusts Act, 1882, does not in any manner assist the appellants, as pointed out earlier. A situation contemplated under Sec.81 of the Indian Trusts Act, 1882, in so far as we have been able to ascertain from the provisions of the Act, has not been provided for, while provision has been made, as pointed out

earlier, with reference to matters falling under Secs.82 and 94 of the Indian Trusts Act, 1882. In other words, it looks as though Sec.81 of the Indian Trusts Act, 1882 has been repealed, but that would have only the effect of releasing the property from the obligation of being held in accordance with Sec.81 of the Indian Trusts Act, 1882. The decision in *Kathoom Bivi Ammal v. S.Mohamad alias Sheik Mohamad*, (1990)1 L.W. 284; (1990)2 M.L.J. 42, proceeded to hold that the repeal of Sec.81 of the Indian Trusts Act, 1882, by Sec.7(1) of the Act, would suffice to include sham and nominal transactions also within the scope of the provisions of the Act. It is difficult to persuade ourselves to the line of reasoning adopted in that decision. Further, it is seen that apart from the repeal of Secs.81 and 82 of the Indian Trusts Act, 1882, no other has aspect has been adverted to and examined and on a careful consideration of the scope and ambit of the provisions of the Ordinance and the Act, we have earlier pointed out that the repeal of Sec.81 of the Indian Trusts Act, 1882 by itself, would be of no avail to bring within the provisions of the Act, sham and nominal transactions. We, therefore, hold that the decision in *Kathoom Bivi Ammal v. S.Mohamad alias Sheik Mohamad*, (1990)1 L.W. 284, in so far as it held that sham and nominal transactions are also covered by the provisions of the Act, is not correct. It is seen that in *Ouseph Chacko v. Raman Nair*, A.I.R. 1989 Ker. 317, the view has been expressed that a sham and nominal transaction is not a benami transaction and Sec.4 of the Act would not apply. We find on a careful consideration of the reasoning in that decision that it accords generally with the view we have earlier expressed on all the aspects relating to the exclusion of sham and nominal transactions from the scope of the provisions of the Act and we hold that decision has laid down the law correctly. Though learned counsel for the respondent submitted that the provisions of the Act would be inapplicable to the decree-holder/respondent, who had attached the property in execution of the decree, adverse to the interest of the judgment-debtor, we do not express any opinion thereon, as that aspect of the matter would be totally outside the scope of the reference. We, therefore, hold that sham and nominal transactions would not be covered by the provisions of the Act and that it is open to the parties to contend that a transaction is sham and nominal

and no title passed under it. We answer the reference made to us accordingly.

This appeal coming on for hearing on this day after the reference being answered by the Honourable Mr. Justice Ratnam and The Honourable Mr. Justice Somasundaram, upon perusing the grounds of appeal, the judgment papers in the suit, and upon hearing the arguments of Mr. K. Yamunan, Advocate for the appellants and of Mr. V. Narayanaswami, Advocate for the Respondent.

The Court delivered the following

JUDGMENT: In answer to the reference made to the Division Bench on the point whether sham and nominal documents are also covered by the Benami Transactions (Prohibition) Act, the Division Bench which heard the reference answered it in the negative. All other points in the appeal have already been decided. The final judgment that would follow is dismissal of the appeal. Accordingly the appeal is dismissed. There will be no order as to costs.

V.K. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present:- *Somasundaram, J.*

W.P.Nos.17663 and 18628 of 1991 139, 1067, 1176, 1177, 1587, 3098, 3099, 4048, 5245, 5572, 6160 and 7435 of 1992
4th September, 1992.

G.Suseela and others ...*Petitioners*
v.

State of Tamil Nadu and others ...*Respondents.*

Constitution of India (1950), Art.226 - Relief - Subsequent events - Court, if can take note of to grant relief.

In view of the position of law enunciated in *Director of School Education v. G.Gunaraj*, 1991 Writ L.R. 94, the High Court taking note of the events that have taken place during the pendency of the proceedings can mould and grant appropriate reliefs to which the petitioners are entitled to. [Para 11]

Cases referred to:

Director of School Education v. G.Gunaraj, 1991 Writ L.R. 94. [Para 10]

Deepak Saibal v. Punjab University, A.I.R. 1989 S.C. 903. [Para 12]

Aja Hasia v. Khalid Mujib, A.I.R. 1981 S.C. 487: (1981)1 Lab.L.J. 103: (1981)1 S.C.C. 732. [Para 12]

Vinaj Rampal v. State of J.& K., A.I.R. 1983 S.C. 1199. [Para 12]

Punjab Engineering College v. Sanjay Gulati, A.I.R. 1983 S.C. 580: (1983)3 S.C.C. 517: (1983)2 S.C.J. 26. [Para 13].

Madras Port Trust v. Hymanshaw International, A.I.R. 1979 S.C. 1144. [Para 9].

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue a writ of *mandamus*, (1) directing the first respondent to consider the representations of the petitioners dated 11.11.1991 and to allot seats for the petitioners in the I year M.B.B.S., Course for the academic year 1991-92 as per the directions of the Division Bench of this Court in W.A.No.1004 of 1991 etc. dated 29.10.1991 (W.P.No.17663 of 1991) etc.

N.R.Chandran, Senior Counsel, for *S.Natarajan*, *Mrs.Vijayakumari Natarajan*, *K.Mohanram*, *R.Subramaniam*, *P.Shannmugam*, *M.Shakir Ali*, *D.Jermiah*, *N.Ganapathy*, *S.Viswanathan*, *Mrs.Nalini Chidambaram* Senior Counsel for *S.Silambanan* and *B.Sai Chandravadhan*, for Petitioners.
M.Veluswamy, for Respondent No.1.

P.Balasubramaniam, Government Advocate, for Respondent Nos.2 to 4.

The Court made the following

ORDER: These writ petitions are filed for the issue of a writ of *mandamus* directing the respondents herein to allot seats for the petitioners for the first year M.B.B.S., Course for the academic year 1991-92 in pursuance to the judgment in W.A.No.1004 of 1991 dated 29.10.1991. As the point involved in all these writ petitions is one and the same, they are disposed of by this common order. For the sake of convenience, the respondents are referred to in this order as per their nomenclature given in W.P.No.4048 of 1992.

2. To understand the point involved in these writ petitions, it is sufficient if we notice the facts averred in the affidavit filed in support of

W.P.No.4048 of 1992, which are to the following effect; The petitioners are aspirants for admission to the first year M.B.B.S., Course of study of the Tamil Nadu Dr.M.G.R. Medical University for the academic year 1991-92. They all studied higher secondary courses (plus two courses). In G.O.Ms.No.381, Education, dated 20.2.1980 read with G.L.No.63484/IV/80-2, Education, dated 30.12.1980, the Government issued orders that private candidates appearing for higher secondary examination should not be allowed to re-appear in the subjects which they have already passed. Subsequently, the Government in G.O.Ms.No.1457, Education Department, dated 7.10.1989 directed that the candidates who studied higher secondary courses be allowed to improve their performance in the subjects in which they have passed in the higher secondary courses examination two times and the higher marks obtained in each subject will be the qualifying mark in the higher secondary course. The petitioners appeared for regular appearance of the higher secondary course examination in March, 1990 and on the basis of G.O.No.1457, dated 7.10.1989, they also appeared in September, 1991. and in March, 1992. When the applications were called for the year 1991-92 Entrance Examinations for Medicine, the petitioners applied on the basis of the higher marks obtained after the two improvement examinations taken by them. The prospectus for the admission to the M.B.B.S./B.D.S./B.Pharm Courses, issued by the Government Medical Colleges in Tamil Nadu for 1991-92 stated that the improvement marks obtained in the first appearance only in the qualifying examination will be considered for selection. The prospectus referred above was issued by the Government Medical College in Tamil Nadu on the basis of G.O.Ms.No.811, Health and Family Welfare Department, dated 3.6.1991, stating that only the first improvement mark will be taken into consideration for medical selection. In those circumstances, the petitioners and other filed W.P.No.9489 of 1991 etc., batch challenging G.O.Ms.No.811, Health and Family Welfare Department, dated 3.6.1991. The above batch of writ petitions were dismissed by a learned single Judge of this Court. As against the order of the learned single Judge, the petitioners and others filed W.A.No.1004 of 1991 etc., batch a Division Bench of this Court by its judgment dated 29.10.1991, while allowing the W.A.No.1004/91 etc., batch

held as follows:

"It is thus clear that the impugned Government Order G.O.Ms.No.811, Health and Family Welfare Department, dated 3.6.1991, which has got a tendency of entering into the field occupied by Sec.35 read with Sec.43 and Sec.44 of the Act 37 of 1987, is *ultra vires* the Act and beyond the executive power of the State Government. The same for the said reason is fit to be quashed. It is obvious that the conditions to the said effect in the prospectus for medical selection are invalid for the said reasons and are also liable to be quashed."

However, since Dr.M.G.R. Medical University, the 4th respondent in W.P.No.4048 of 1992 was not a party to the above writ appeals, the appellants in the writ appeals were permitted by the Division Bench to represent their case to the competent university body or authority. The Division Bench further held that if the students who obtained lesser marks than the petitioners who were appellants in the writ appeals, have been admitted, the competent university or authority shall be obliged to consider the petitioner's case for admission to the M.B.B.S. course for the year 1991-92. Thereafter, on 11.11.1991, the petitioners made the representation to the 4th respondent university praying for allotment of seats in medical course since the marks obtained by them are more than cut-off marks. Copies of the representations were also sent to the Director of Medical Education, Co-ordination Committee, The Secretary, Health Department and also to the Chancellor of Tamil Nadu Dr.M.G.R. University. Since no reply was received from the 4th respondent, the petitioners sent a registered letter through their advocate on 11.12.1991 to consider their applications as per the pronouncement of the Division Bench in W.A.No.1004 of 1991 batch and to allot seats for the first year M.B.B.S. Course in the year 1991-92. Then the petitioners also filed W.P.No.17663 of 1991 before this Court to issue a writ of *mandamus* directing the 4th respondent university to consider the representations of the petitioners dated 11.11.1991 and to allot seats for the academic year 1991-92 as per the directions of the Division Bench in W.A.No.1004 of 1991 etc., batch. The above writ petition was admitted on 17.12.1991. In the meantime, the petitioners received a communication from the 4th respondent University on 19.12.1991 as a reply to the

petitioner's representations stating as follows:

"I am by direction to state that all the Medical Colleges/Institutions affiliated to this University are under the Management of the Government/Private Trust/Societies and responsibility of admitting students to the medical courses of studies rests with the management of the respective colleges/Institutions. Hence your representation seeking admission to I-M.B.B.S. course in pursuance to the orders of the High Court in W.A.No.1004 of 1991 etc., has been forwarded to the Government, of Tamil Nadu which is the management of the Government Medical Colleges for action in accordance with law."

Thereafter some of the petitioners filed contempt petitions in 24/92, 72/92 and 73/92 against the Vice-Chancellor of the 4th respondent University and notice was ordered by the Division Bench of this Court in the contempt applications to the Vice Chancellor of the 4th respondent University. The Vice-Chancellor of the 4th respondent University filed a counter in the contempt applications. In the said counter filed by the 4th respondent University, it has taken the stand that all the medical colleges affiliated to the university are under the management of the Government and Private Trusts/Societies and the admission of students for the first year M.B.B.S. course rests with the management of the said colleges and that the university is not making any admission of students to the medical courses in any college. In view of the counter filed by the 4th respondent university, the Division Bench of this Court dismissed the contempt petitions on 6.3.1992 observing that if there is any grievance to the petitioners, they may agitate the same in appropriate proceedings. In the above circumstances, in view of the fact that the allotment of seats to the first year M.B.B.S. Course are to be made by the Government, the petitioners filed the present W.P.No.4048 of 1992 for the issue of a writ of *mandamus* directing the respondents to allot seats to the petitioners for the first year M.B.B.S. course for the academic year 1991-92. The other writ petitions were also filed under similar circumstances seeking similar relief.

3. The respondents 1 to 3 filed a common counter affidavit in all these writ petitions contending that the writ petitions are liable to be dismissed on the ground of laches. It is further contended that in all these cases, the respective petitioners seek for

the issue of a writ of *mandamus* directing the respondents to admit them in the medical courses for the year 1991-92 and in as much as the said academic year is over, no relief can be granted to the petitioners. In para 5 of the counter affidavit the respondents 1 to 3 further contended as follows:

"Based on the judgment, the writ appellants approached the University, As the University does not own any medical colleges, forwarded their application to Government for necessary action. Since the judgment of the Division Bench had taken away the power of selection of candidates for admission to First year M.B.B.S. course, the Government was not also in a position to do anything on this."

4. The 4th respondent university filed a common counter affidavit contending that since the 4th respondent university does not own any medical college or institution and all the medical colleges Institutions affiliated to the 4th respondent university are under the management of the Government/Private trust/society and the admission of students are dealt with by the management of the respective colleges, the university is not making admission of students to the medical courses in any medical college. The 4th respondent in the counter affidavit further contended that as the 4th respondent university is not running any medical college, the selection and admission of students to medical colleges do not come in its purview.

5. The learned counsel appearing for the petitioners in all these cases vehemently contended that the Division Bench of this Court in W.A.No.1004 of 1991 etc., batch while declaring the G.O.Ms.No.811, Health and Family Welfare, dated 3.6.1991 is *ultra vires* the Act 37 of 1987 and quashing the said G.O. permitted the petitioners to represent their case to the competent university body or authority; that the Division Bench further held that in case it is found that the petitioners are otherwise qualified and students who obtained lesser marks than the petitioners have been admitted to the M.B.B.S. course 1991-92, the Competent university body or authority shall be obliged to consider the case of the petitioners for admission; and that in view of the Division Bench judgment in W.A.No.1004 of 1991 etc., batch the marks obtained by the petitioners in the second improvement examination must be taken into consideration and if so taken into account, the marks

obtained by the petitioners are above the cut-off marks fixed for selection for the M.B.B.S. course for the year 1991-92. The learned counsel for the petitioners further contended that in as much as the respondents 1 to 3 are parties to the judgment in W.A.No.1004 of 1991 batch, they cannot take the stand that the judgment in W.A.No.1004 of 1991 etc., batch is not binding on them, particularly when the 4th respondent University had forwarded the representations of the petitioners to the 1st respondents and when the 4th respondent is also willing to approve the increased number of seats to accommodate the petitioners in the first year M.B.B.S. course. The learned counsel for the petitioners again submitted that even though the academic year 1991-92 is over, in view of the fact that the petitioners were wrongly denied admission to the M.B.B.S. course for 1991-92, by applying the invalid G.O.Ms.No.811 and in view of the judgment of the Division Bench of this Court in W.A.No.1004 of 1991 etc., batch which has become final, the respondents should be directed to admit the petitioners to the first year M.B.B.S. course for the current academic year 1992-93, if necessary by increasing the number of seats. There is merit in the contention of the learned counsel for the petitioners.

6. The Division Bench of this Court in W.A.No.1004 of 1992 batch speaking through Mishra, J., while quashing G.O.Ms.No.811, Health and Family Welfare Department, dated 3.6.1991 and the conditions in the prospectus for medical selection for the year 1991-92 as *ultra vires* of the Act 37 of 1987 issued the following directions.

"In the instant case, however, we are not in a position to issue any *mandamus* or direction to the University for, the University is not a party respondent in the writ petitions or the appeals. It will, however, be open to the writ petitioners/appellants to represent their case before the competent university Body of Authority and in case it is found that they are otherwise qualified and students who obtained lesser marks than the writ petitioners/appellants have been admitted (inclusive of the improvement marks of the petitioners/appellants) they shall be obliged to consider their case for admission."

The judgment in W.A.No.1004 of 1991 batch was delivered on 29.10.1991. On 11.11.1991, the petitioners made the representations to the 4th

respondent University and prayed for allotment of seats in the first year M.B.B.S. course for the year 1991-92, as they have obtained more than the cut-off marks. The copies of the representations were also sent to the Director of Medical Education, Co-ordination Committee, the Secretary, Health Department who are respondents 1 to 3 in W.A.No.4048 of 1992. On 11.12.1991, the petitioners also sent a registered letter through their advocate to the 4th respondent university requesting the 4th respondent to consider their representations as per the bench judgment and allot seats for the first year M.B.B.S. course for the year 1991-92. On 19.12.1991, the 4th respondent sent a reply to the petitioners' representation stating that their representations seeking admission to first year M.B.B.S. course have been forwarded to the Government of Tamil Nadu. On 10.2.1992, the 4th respondent University had also passed a resolution to the following effect:

Resolved to inform the Government as follows:

This University does not own any Medical College or Institution. All the Medical Colleges/Institutions affiliated to this University are under the management of the Government/Private Trust/Societies and the responsibility of admitting of students to the medical courses of studies rests with the management of the respective colleges/institutions. The provisions in the Statutes/regulations prescribed by the University regarding admission of student to Medical courses under the powers vested by the Tamil Nadu Dr.M.G.R. Medical University, Madras Act, 1987 (Tamil Nadu Act 37 of 1987) have to be followed by the managements of the medical colleges/institutions. The regulations of this University in this regard prescribe only the minimum eligibility for admission to the M.B.B.S. Course, which is checked by the University at the time of registration of the candidate with the University for the respective courses. The University is not making admission of students to Medical courses of students in any college. Hence all the representations received from the Writ Appellant and others in pursuance to the orders of the High Court in W.A.No.1004 of 1991 etc., may be forwarded to the Government for disposal and a reply given to the petitioners on the above lines."

Thereafter, some of the petitioners filed Contempt Petitions No.24 of 1992 etc. before the Division Bench. It is useful here to refer certain averments in the counter affidavit filed by the 4th respondent University in the Contempt Petition No.24 of 1992 etc. In para 3 of the counter affidavit filed in the contempt petition the 4th respondent has stated that after receiving the representation from the petitioners, the University had written to the Government on 5.12.1991 to instruct the Director of the Medical Education, the second respondent herein to withheld the admission of candidates from the waiting list to the first year M.B.B.S. course for 1991-92 until further reference from the medical University in this regard. The Vice Chancellor of the 4th respondent University in paras.7 and 8 of the counter affidavit in the contempt petitions has further stated as follows:

"The particulars regarding petitioners/appellants and others, in pursuance to the orders of the High Court in W.A.No.1004 of 1991 etc., had been sent to the Government for necessary action and it has also been mentioned in that letter that if the writ appellants are eligible for admission to the Medical Course with reference to the eligibility criteria prescribed by the University and secured the aggregate marks above the level of cut off marks and if candidates who had secured lesser marks than these writ appellants had been admitted to the course in the process of selection by the Selection Committee under the control of Director of Medical Education, the writ appellants who have got favourable orders from the High Court may be admitted to the M.B.B.S. course provided the order of High Court are not agitated upon by the Government in the appellate Court. The Director of Medical Education has to apply to this University, after obtaining sanction of the Government for regularising the excess admissions if any. The Government has also been requested to intimate the follow up action taken by the Government in this regard. The action taken by the University in this regard was intimated to the individuals separately. The Secretary, Selection Committee for M.B.B.S. course, Madras in his letter dated 14.2.1992 has now sent the details called for in this University's letter dated 27.11.1991 and 5.12.1991."

The 4th respondent University both in the counter affidavit filed in the contempt petition as well as in the common counter affidavit filed in these writ petitions has taken the stand that all the medical colleges affiliated to the 4th respondent University are in the management of the Government and private trusts/Societies and the University is nothing to do with the admission of students for the first year M.B.B.S. course in the medical colleges. In these circumstances, the 4th respondent has taken all the reasonable steps to see that the direction given by the Division Bench of this Court in W.A.No.1004 of 1991 batch is complied with. on 19.12.1991, the 4th respondent has also sent a reply to the petitioners informing them the actual position and also informing the petitioners that their representations have been forwarded to the Government for disposal. Again on 10.2.1991 the 4th respondent University had also passed a resolution of forward the representations of the petitioners to the Government. Again on 19.12.1991 the Vice Chancellor of the 4th respondent University addressed a D.O. Letter No.31734/AC-II (1/91) to the first respondent and para 5 of the said D.O.Letter reads thus:

"In these circumstances, particulars regarding petitioners/appellants and others in pursuance to the orders of the High Court in W.A.No.1004 of 1991 etc., are forwarded to the Government for necessary action. (Vide Annexure). If the writ appellants are eligible for admission to the Medical Course with reference to the eligibility criteria prescribed by the University and secured the aggregate marks above the level of cut off marks and if candidates who had secured lesser marks than these writ appellants, have been admitted to the courses in the process of selection by the Selection Committee under the control of the Director of Medical Education, the writ appellants who have got favourable orders from the High Court may be admitted to the M.B.B.S. course and allocated to the Medical Colleges wherever possible provided the orders of High Court are not agitated upon by the Government in the appellate court. The Director of Medical Education has to apply to this University, after obtaining sanction of the Government, for regularising the excess admissions if any. The follow-up action taken by the Government may be intimated to this University."

Para 5 of the D.O. letter referred above clearly shows that the Vice Chancellor of the 4th respondent University has recommended to the first respondent the case of the petitioners for admission to the first year M.B.B.S. course. In the said D.O. letter, it is also stated that the Director of Medical Education has to apply to the University, after obtaining sanction of the Government, for regularising the excess admissions if any. In view of the above stand taken by the 4th respondent University, we have to examine the question whether the respondents 1 to 3 are justified in taking the stand in para 5 of the counter affidavit that the Government is not in a position to do anything in the matter of admitting the petitioners to the M.B.B.S. course for 1991-92 on the ground that the judgment of the Division Bench W.A.No.1004 of 1991 etc., had taken away its power of selection of candidates for admission to first year M.B.B.S. course. I may straight away say that the respondents 1 to 3 are not at all justified in taking such a stand. I have extracted the relevant portion of the judgment of the Division Bench in W.A.No.1004 of 1991 etc., batch in the earlier portion of this order. I have carefully gone through the judgment of the Division Bench in W.A.No.1004 of 1991 etc., batch. There is nothing in the judgment of the Division Bench of this Court to show that it has taken away the power of the Government admit students to M.B.B.S. course. All that the Division Bench has stated in the judgment in W.A.No.1004 of 1991 etc., batch is that G.O.No.811, dated 3.6.1991 is *ultra vires* of Act 37 of 1987 and that it is invalid and consequently quashed the said G.O. By no stretch of imagination, it can be said that the Division Bench Judgment in W.A.No.1004 of 1992 etc., batch has taken away the power of the Government to admit the students to M.B.B.S. course. It is seen from the common counter affidavit filed by the 4th respondent in these writ petitions and also from the resolution of the 4th respondent University dated 10.2.1992 that all the Medical Colleges/Institutions affiliated to the 4th respondent University are under the management of the Government/Private Trusts/Societies and that the responsibility of admitting the students to the medical courses rests with the management of the respective colleges/institutions. This position is not denied by the respondents 1 to 3 either in the counter affidavit or even before me, in the course of arguments. Therefore, there is no difficulty in

holding that all medical colleges are under the management of the Government/Private Trust/Societies and that the responsibility of admitting the students to the medical courses rests with the Government. This position was not brought to the notice of the Division Bench of this Court when it disposed of W.A.No.1004 of 1991 etc., batch either at the time when the Division Bench pronounced the judgment in the W.A.No.1004 of 1991 etc., batch or immediately thereafter. If it had been brought to the notice of the Division Bench that the 4th respondent has nothing to do with the admission to the medical courses and only the Government is entrusted with the responsibility of admitting students to the medical courses, I am inclined to think that the Division Bench would have certainly granted reliefs to the petitioners in W.A.No.1004 of 1991 batch itself. For some reason or other, the real position with regard to the management of the medical colleges was not brought to the notice of the Division Bench when it disposed of the writ appeals in W.A.No.1004 of 1991 etc., Batch.

7. It must be remembered that respondents 1 to 3 are parties to writ appeals in W.A.No.1004 of 1991 etc., batch and that the said judgment of the Division Bench has become final, and it is binding on the respondents 1 to 3. Therefore, it is the duty of the respondents 1 to 3 also to see that the directions given by the Division Bench in W.A.No.1004 of 1991 etc., batch are complied with, particularly when the 4th respondent university had forwarded the representations of the petitioners to the first respondent and when the 4th respondent is also willing to grant permission for increasing the number of seats in the medical colleges to accommodate the petitioners. The direction issued by the Division Bench in W.A.No.1004 of 1991 etc., batch is that it is open to the petitioners to represent their case before the competent university body or authority and in case it is found that the petitioners otherwise qualified and the students who obtained lesser marks than the petitioners have been admitted in the medical course for the year 1991-92, the competent university body or authority shall be obliged to consider the case of the petitioners for admission. The direction given by this Court in W.A.No.1004 of 1991 etc., batch to the petitioners is to approach the competent University body or the competent authority. From the materials on record, it transpires that the

competent authority to deal with the question of admission to M.B.B.S. course is the Government. When the petitioners sent representations to the 4th respondent, they sent copies of the representations to the respondents 1 to 3. The 4th respondent passed a resolution dated 10.2.1992 stating that the representations received from the petitioners in pursuance to the judgment in W.A.No.1004 of 1991 etc., batch may be forwarded to the Government for disposal. On 19.12.1991, the Vice-Chancellor of the 4th respondent University also wrote a D.O. letter to the first respondent stating that the particulars regarding the petitioners in pursuance of the judgment in W.A.No.1004 of 1991 etc., batch have been forwarded to the Government for necessary action. Thus, when the representations of the petitioners were placed before the first respondent by the 4th respondent, the Government being the competent authority to admit the students to M.B.B.S. course, ought to have respected the judgment of the Division Bench in W.A.No.1004 of 1991 etc., batch particularly when the Government represented by respondents 1 to 3 are parties to the said judgment, in the writ appeals. In these circumstances, the respondents ought to have granted relief to the petitioners particularly when the respondents 1 to 3 by applying the invalid G.O.811 have denied the petitioners admission to the M.B.B.S. course. It is not the case of the respondents that the marks obtained by the petitioners is less than the cut-off marks prescribed for medical admission in the year 1991-92.

8. Mr.P.Balasubramaniam, the learned Additional Government Pleader contended in the first place that these writ petitions relate to admission to M.B.B.S. course for the academic year 1991-92 and that the writ petitions are liable to be dismissed on the ground of laches. There is no substance in this contention of the learned Additional Government Pleader. The various proceedings initiated by the petitioners from 24.6.1991, namely from the time when the prospectus from medical admission for 1991-92 was issued, by filing writ petitions and writ appeals referred to above and the representations made by the petitioners to the respondents will clearly go to show that the petitioners are diligently prosecuting the matter throughout and it cannot be said that the petitioners are guilty of laches.

9. The next contention of the learned Additional

Government Pleader is that in all these cases the petitioners seek for the issue of writ of *mandamus* for directing the respondents to admit them in the medical courses for the year 1991-92 and in as much as the said academic year 1991-92 is over the writ petitions have become infructuous and the petitioners are not entitled to any relief. I am unable to accept the above contention of the learned Additional Government Pleader. It must be remembered the matter is pending before this Court from 1991. On 8.8.1991, the writ petitions were filed by the petitioners challenging the G.O.Ms.No.811. When the writ petitions were dismissed, they filed W.A.No.1004 of 1991 etc., batch. On 29.10.1991 the writ appeals were allowed. Again on 17.12.1991 first of these W.P.No.17663 of 1991 has been filed and thereafter the other writ petitions have been filed in February and March, 1992, and they are pending before this Court since then. The 4th respondent filed a counter in these writ petitions in March 1992, whereas the respondents 1 to 3 filed counter affidavit in this batch of writ petitions only on 17.8.1992 and only thereafter the respondents 1 to 3 were ready to get on with these writ petitions. On 16.4.1992 as the present writ petitions could not be disposed of immediately, the learned single Judge of this Court in W.M.P.No.189 of 1992 etc., batch directed the respondents to keep seats reserved for the petitioners in the first M.B.B.S. course for the academic year 1991-92. From the above facts, it is clear that this matter is pending before this Court from 8.8.1991 and the petitioners cannot be made to suffer on account of the delay in disposing of the writ petitions. The maxim is an act of court shall prejudice no man (*actus curiae neminem gravabit*). Therefore, the petitioners cannot be denied the relief of the ground that of the academic year 1991-92 is over, particularly when they are in no way responsible for the delay. Further, it is not denied by the respondents that the marks obtained by the petitioners in all these cases are above the cut-off marks fixed for medical admission for the year 1991-92. Again the technical plea of laches and the plea that the academic year 1991-92 is over are not available to the respondents to defeat the rights of the petitioners to get admission to the medical course in view of the decision of the Supreme Court reported in *Madras Port Trust v. Hymanshaw International*, (A.I.R. 1979 S.C. 1144). In view of the above

discussions, it has to be held that the respondents 1 to 3 are bound to comply with the directions given by the Division Bench of this Court in W.A.No.1004 of 1991 etc., batch and admit the petitioners to the first year M.B.B.S. course.

10. Now, let us examine what is the nature of relief that can be granted to the petitioners who are 19 in number, in exercise of the writ powers under Art.226 of the Constitution. As pointed out by the Division Bench of this Court in *Director of School Education v. G.Gunaraj*, 1991 Writ L.R. 94, this Court while exercising the writ powers, is not scuttled down to the exact prayer projected in the writ petition. The Division Bench further observed as follows:-

"This Court can always take note of subsequent events for the purpose of giving complete, effective and appropriate reliefs to the parties. The facts exposed and the points involved and resolved, can certainly guide the court to give the appropriate reliefs to the parties. The jurisdiction of this Court under Art.226 is invoked only in furtherance of justice."

11. In view of the above position of law, this Court taking note of the events that have taken place during the pendency of the proceedings, can mould and grant appropriate reliefs to which the petitioners are entitled to. In the above circumstances, I am inclined to think that it will be no answer to say that since the academic year 1991-92 is over, the petitioners cannot be granted any relief in these writ petitions. Therefore, the proper course open to this Court is to direct the respondents to admit the petitioners to the first M.B.B.S. course for the academic year 1992-93 as it is represented that though the admissions for 92-93 are over, the instructions for the first M.B.B.S. Course have not yet commenced.

12. Equally, it is no answer to say that all the seats fixed for the first M.B.B.S. course for the academic year 1992-93 have been filled up. The seats that will be allotted to the petitioners pursuant to the order in these writ petitions for the academic year 1992-93 will be in addition to the normal in-take of the students for the various medical colleges for the academic year 1992-93. The Supreme Court has made similar directions in cases of admissions to the colleges in the following decisions:

(1) *Deepak Saibal v. Punjab University*, A.I.R. 1989 S.C. 903, (2) *Aja Hasia v. Khalid Mujib*,

A.I.R. 1981 S.C. 487; (1981)1 Lab.L.J. 103; (1981)1 S.C.C. 732, (3) *Vinaj Rampal v. State of J.& K.*, A.I.R. 1983 S.C. 1199.

It must be also remembered that these are all exceptional cases where this kind of directions have to be given because earlier the petitioners were wrongly denied admission applying the invalid G.O.No.811. In fact the 4th respondent is inclined to grant permission for increasing the number of seats to accommodate the petitioners. 13. Mr.P.Balasubramaniām, the learned Additional Government Pleader further submitted that the seats cannot be increased for the academic year 1992-93 since the State Government cannot meet additional expenses which will be caused by increasing the number of seats and that the Indian Medical Council will not sanction additional seats. I am unable to accept this contention of the learned Additional Government Pleader. In the first place, the respondents 1 to 3 have not raised such a plea in the counter affidavit filed in these writ petitions. In *Punjab Engineering College v. Sanjay Gulati*, A.I.R. 1983 S.C. 580; (1983)3 S.C.C. 517; (1983)2 S.C.J. 26, the Supreme Court frowned upon a similar contention raised before it in the following terms:

"It is strange in all such cases, the authorities who make admissions by ignoring the rules of admissions contend that the seats cannot correspondingly be increased, since the State Government cannot meet the..... additional expenditure which will be caused by increasing the number of seats or that the institution will not be able to cope up with the additional influx of students. An additional plea available in regard to Medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission. Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made."

14. In the present case, admittedly the petitioners who have obtained more marks than the cut off marks for the year 1991-92 were wrongly denied admission to the first year M.B.B.S. course applying the invalid G.O.811 and the wrong done to the deserving students who ought to have been

admitted to the Medical course in the year 1991-92, has to be rectified by directing the respondents to comply with the directions given by the Division Bench of this Court in W.A.No.1004 of 1991 etc., batch and admit them to the first year M.B.B.S. course for the year 1992-93. As pointed out by the Supreme Court, the best solution is to direct the respondent to increase the strength of the seats to accommodate the petitioners in this batch of writ petitions who are 19 in number

15. It must be mentioned that the petitioner in W.P.No.7435 of 1992 approached this Court for the first time now seeking the issue of writ of *mandamus* for directing the respondent to admit him in the first year M.B.B.S. course. He has not earlier filed a writ petition or writ appeal as in the case of the other petitioners in this batch. However, it must be pointed out that the Division Bench Judgment in W.A.No.1004 of 1991 etc., batch declares that G.O.Ms.No.811 is invalid and directed the appellants therein to approach the competent authority for necessary relief. Since the Division Bench Judgment in W.A.No.1004 of 1991 etc., batch declared that G.O.811 is invalid, the petitioner in W.P.No.7435 of 1992 has also taken advantage of the Division Bench Judgment and submitted representations to the 4th respondent along with the other petitioners requesting the 4th respondent to consider his case for admission to first year M.B.B.S. course on the basis of the marks obtained in the second improvement examination and on the ground that he has obtained marks above the cut-off marks fixed for the year 1991-92. His representation was also forwarded by the 4th respondent to the respondents 1 to 3. In these circumstances, I am inclined to hold that the petitioner in W.P.No.7435 of 1992 also is entitled to get admission to the first year M.B.B.S. course for the year 1992-93.

16. In the result, there will be a direction in these writ petitions to the respondents to provide seats to the petitioners in all these writ petitions in the first year M.B.B.S. course for the current academic year 1992-93 within two weeks from today, if necessary by increasing the number of seats by 19. The 4th respondent is directed to give the necessary permission for the additional seats to accommodate the petitioners. I don't think it is an impossibility for the respondents 1 to 3 to increase the seats, since it is represented that in the past seats were increased on the directions issued by

this Court. Consequently, all the writ petitions are allowed and the respondents are directed to admit the petitioners in these writ petitions in the first year M.B.B.S. course for the current academic year 1992-93, within two weeks from today, if necessary by increasing the number of seats by 19. No costs.

B.S. ---- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: A.R. Lakshmanan, J.

W.M.P.Nos.9519, 11856, 15082 and 15083 of 1992
in W.P.No.6640 of 1992 *3rd August, 1992.*

M/s. Varalakshmi Chemind Pvt. Ltd. ...Petitioner v.

The Commissioner of Prohibition and Excise, Madras and others *...Respondents.*

Evidence Act (I of 1872), Sec.115 - State Government allotting rectified spirit to petitioner company - Petitioner putting up plant and machinery at a huge cost - Commissioner of Prohibition allotting denatured spirit with 5% ether instead of rectified spirit - Legality - Government if estopped.

It is seen from the impugned proceedings that in view of the decision of the Government in G.O.(D) No.188, P and E III Department, dated 30.3.1991, the 50,000 litres of denatured spirit with 5% ether has been allotted to the petitioner company for trial run of the plant to manufacture solvent ether and ethylene ether and other chemicals. It is pertinent to note that the 1st respondent has failed to note that the Government in their letter dated 12.5.1991 issued after G.O.Ms.No.188, P and E III Department, dated 13.3.1991 has directed the petitioner company to commence the production positively before June, 1992, to enable them to have the allotment of industrial alcohol as per G.O.Ms.No.87, P and E III Department, dated 5.2.1982. There was no reference to G.O.Ms.No.188, P and E III Department, dated 13.3.1991 or modification of the allotment of denatured spirit

instead of rectified spirit. The 1st respondent, contrary to the orders of the Government had directed that denatured spirit, with 5% ether alone will be supplied to the petitioner company for trial run. The above decision of the first respondent made in the impugned proceedings is not sustainable in law. The plant which has been put up by the petitioner company is designed to have only rectified spirit as the raw material. Such a substitution of raw material will adversely affect the production, ability, capacity and viability of the plant. It is seen from the G.O.Ms.No.188 Home, P and E III Department, dated 13.3.1991, that the Government have clearly indicated that if any industry persists in the allocation of rectified spirit alone, the same alone could be allotted enforcing stringent formalities. When the policy decision of the Government is unambiguous, the first respondent, without any authority or power, has chosen to order that denatured spirit of 5,000 litres with 5% ether would be allotted to the petitioner for trial run. The first respondent failed to notice that only after G.O.Ms.No.188 Home, P and E III Department, dated 13.3.1991 was issued, the Secretary, P and E Department issued the letter dated 12.6.1991 directing the petitioner to commence production on or before June, 1992 and if they failed to do so, the allotment of 12 million litres of industrial alcohol by the Government as per G.O.Ms.No.87, P and E III Department, dated 5.2.1982 would be cancelled. When the Government have not imposed any condition and in the letter only allotment of industrial alcohol has been indicated, the 1st respondent has no authority to allot denatured spirit instead of rectified spirit. Without affording any opportunity to the petitioner company, the first respondent has arbitrarily ordered in the impugned proceedings that denatured spirit of 50,000 litres will be allotted to the petitioner company for trial run. The order of the 1st respondent is erroneous and improper. Another important thing which the Government have failed to see is that the Petitioner Company has designed the plant and machinery to have only rectified spirit as the raw material to manufacture ether anesthetic products classified under Indian Pharmacopoeia. According to the writ petitioner if denatured spirit with 5% ether is used as the basic raw material, then the design and the storage facilities have to be modified accordingly incurring considerable expenditure. It is also stated that

transporting and storing of denatured spirit with 5% ether denaturant is hazardous and is security risk and that the present fabricated structures are not fit to store and the plant is not capable to process the denatured spirit. When the present design of the plant and machinery cannot have denatured spirit as the raw material and only with the modification the same can be done, the Government is not entitled to modify its earlier order and insist upon the supply of denatured spirit. The court, is, therefore, of the view that the Government is estopped from imposing such unreasonable condition on the petitioner.

[Paras 15, 17, 18 and 19]

S.Govind Swaminathan, Senior Advocate for *N.S.Sivam*, *G.Anbumani* and *C.R.Prakash*, for Petitioner.

M.A.Sadanand, Government Pleader, assisted by *P.Shanmugham*, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- The petitioner abovenamed has filed the main writ petition to issue a writ of *certiorari* by calling for the records from the 1st respondent culminated in Proceedings Rc.No.D2/12184/91-15, dated 29.4.1992 and quash the same. While admitting the writ petition, this Court in W.M.P.No.9519 of 1992 issued interim directions to the 1st respondent to allot 50,000 litres of rectified spirit without any further delay to the petitioner company to have the trial run of their plant and machinery become operational by June, 1992, as ordered by the Government in Letter No.6979/P and E III/91-2, dated 12.6.1991, pending disposal of the writ petition. The petitioner has filed W.M.P.No.11856 of 1992 to clarify the order dated 5.5.1992 in W.M.P.No.9519 of 1992 and this Court on 29.6.1992 clarified the same. The respondents have filed W.M.P.Nos.15082 and 15083 of 1992 to vacate the interim direction and also the clarification issued by this Court in W.M.P.Nos.9519 and 11856 of 1992.

2. I have heard Mr.S.Govind Swaminathan, learned Senior Counsel for the petitioner and Mr. M.A.Sadanand, learned Government Pleader for the respondents.

3. The petitioner company was incorporated in the year 1982. The object of the company is to produce, manufacture, purchase, sell and generally to deal with ethyl alcohol, ether solvent, ether anesthetic grade and other alcohol based

chemicals. The manufacture of the above ether anesthetic products is mainly based on industrial alcohol, commonly known as rectified spirit available in the State distilleries in large surplus more than the use and consumption in the State. Since industrial alcohol is regulated by the Tamil Nadu Rectified Spirit Rules, 1959, necessary allotments of the same as raw material have to be made by the Government to the industrial concerns that manufacture products based on industrial alcohol. The petitioner company applied to the State Government for allotment of industrial alcohol and the Government after due consideration, issued G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982, permitting the request of the petitioner-company to establish an alcohol based industry in the North Arcot District. The Government has allotted 12 million litres of alcohol per annum to the petitioner company for the manufacture of ether anesthetic products. The only condition imposed in the order was the availability of the alcohol in each year in the State. The petitioner company took steps to put up the plant and machinery at a cost of Rs.1 crore. The Indian Bank has also sanctioned a term loan of Rs.15 lakhs. The petitioner also secured other loans in the local market and has put up the plant and machinery at a cost of Rs.1.25 crores. According to the petitioner, the plant is now ready for trial and to commence production.

4. On 1.1.1990, the 1st respondent issued a notice to the petitioner informing that the Government in G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982 had ordered committing to supply 12 million litres of rectified spirit and even after lapse of eight years, the petitioner had not commenced production and that therefore, the petitioner company should show cause to the Government why the allotment of rectified spirit ordered by the Government should not be withdrawn. On receipt of the above notice, the petitioner submitted to the 3rd respondent that they had put up the plant and machinery and because of administrative delay in getting the electricity and clearance of pollution control, the early commencement of production had become delayed, and considering the steps taken by the petitioner, the Government should withdraw the notice issued by the 1st respondent. The Government after due consideration of the above representation, by letter No.6979/P & E (III) Department, dated 12.6.1991

informed the petitioner that the request of the petitioner has been considered and that Government grants time till June, 1992, to commence production, and if production is not commenced by the end of June, 1992, the allotment issued by the Government in G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982, would be cancelled. According to the petitioner, all the governmental agencies have completed their formalities and the petitioner company is ready to operate the plant and commence production. The petitioner also on 12.12.1991 informed the Industries Commissioner and Director of Industries and Commerce, Madras, that their plant is ready for operation and the Department could depute its officers for inspection. The Department after due inspection has informed the Government that necessary industrial alcohol can be allotted to the petitioner company to have the trial run.

5. While so, the petitioner company has received the proceedings Rc.No.D2/12184/91-15, dated 29.4.1992 of the 1st respondent stating that 50,000 litres of denatured spirit with 5% ether would be allotted to the petitioner company from M/s. E.I.D. Parry (India) Ltd., Nellikuppam, for trial run for five days and the petitioner with the allotted denatured spirit shall have the trial run. The above proceedings of the 1st respondent is impugned in the present writ petition. The 1st respondent has stated in the impugned proceedings that in view of the decision of the Government G.O.Ms.No.188, P and E (III) Department, dated 30.3.1991, the 50,000 litres of denatured spirit with 5% ether has been allotted to the petitioner company for the trial run of the plant to manufacture solvent ether and theyene ether and other chemicals.

6. According to the petitioner, the decision of the 1st respondent made in the impugned proceedings is not sustainable in law. In November, 1990, the 1st respondent proposed to the Government that instead of rectified spirit, denatured spirit could be allotted to various manufacturers of ether solvent. The Government also convened a meeting of the various users of the rectified spirit and ascertained their views about the change of policy proposed by the 1st respondent to allot denatured spirit instead of rectified spirit. The participants submitted to the Government that such change would adversely affect their production. After due consideration, the Government issued G.O.Ms. No.188 Home, P and E (III) Department, dated

13.3.1991 indicating the decision of the Government concerning the proposal of the 1st respondent. The petitioner has designed the plant and machinery to have only the rectified spirit as the raw material to manufacture ether anesthetic products, classified under Indian Pharmacopoeia and that the design of the plant and machinery cannot have denatured spirit as the raw material. Thus, the petitioner has filed the above writ petition to call for the records of the 1st respondent culminated in the impugned proceedings dated 29.4.1992 and quash the same.

7. As stated above, the petitioner has filed W.M.P.No.9519 of 1992 for an interim direction to the 1st respondent to allot 50,000 litres of rectified spirit without any further delay to the petitioner company to have the trial run of their plant and machinery, so that the plant and machinery become operational by June, 1992, as ordered by the Government in their letter dated 12.6.1991. S.Govindaswami, J., granted interim direction on 5.5.1992. For clarification of the said order, the petitioner has filed W.M.P.No.11856 of 1992. The reason for filing the clarification petition has been clearly explained in paragraph 3 of the affidavit filed in support of that petition. It is stated therein that the respondents have wilfully and want only disobeyed the orders of this Court dated 5.5.1992 in W.M.P.No.9519 of 1992. S.Govindaswami, J., on 29.6.1992 has clarified his earlier order dated 5.5.1992, as under:

"It is a sorry state of affairs to come to know that in spite of this Court passing an order directing the authority to pass orders as expeditiously as possible, the Government has not passed any order for the reason that the Court has not fixed any time limit for effecting compliance. Once a direction is issued, the Government is directed to comply with, and failure to do so will amount to Contempt of Court. However, by way of indulgence, instead of issuing notice of contempt, this Court gives direction to the respondent to effect supply as directed in a period of two weeks from the date of receipt of this order. The directions are expected to be complied with and a report to that effect may be submitted to this Court. Accordingly, the petition is ordered. It is represented by the learned counsel appearing on behalf of the petitioner that the petitioner should commence the trial run on or before

30.6.1992 and in view of the fact that the respondents have not effected supply of rectified spirit, the petitioner could not commence the trial run on or before 30.6.1992. Time to commence trial run shall be extended by four weeks from the date of supply, and thereafter by four weeks for commercial run. The authority shall either on receipt of the copy of the order from the Court or from the parties effect supply within two weeks therefrom. Accordingly the petition is ordered."

8. The respondents have filed W.A.No.826 of 1992 alleging that the order dated 5.5.1992 was clarified by the order dated 29.6.1992 without giving any opportunity to the State to file the counter or to refute the contentions made by the writ petitioner. The Division Bench consisting of the Hon'ble the Chief Justice and K.Venkataswami, J., by order dated 22.7.1992 disposed of the writ appeal by giving the following direction:

"In view of this submission, we dispose of the appeal with a direction to the learned single Judge to hear the parties on the application by the Government Pleader for vacating the interim order if so filed. The impugned order dated 29.6.1992 shall remain in abeyance for ten days. In case the Government Pleader does not take steps in that regard within a period of ten days, the order passed to-day keeping the impugned order in abeyance shall automatically stand vacated. The writ appeal is disposed of accordingly. However, there shall be no order as to costs."

9. W.M.P.Nos.15083 and 15082 of 1992 were filed by the State to respectively vacate the order dated 5.5.1992 in W.M.P.No.9519 of 1992 and the order dated 29.6.1992 in W.M.P.No.11856 of 1992. All the above W.M.Ps. came up for hearing before me as directed by the Division Bench in the above writ appeal.

10. Mr.M.A.Sadanand, learned Government Pleader submits that from 21.2.1991 to 11.6.1991, the petitioner company was not having any assurance or commitment from the Government for the supply of alcohol. It was during this period, there was a change of policy by the Government as per G.O.(D) No.188, Home, P and E (III) Department, dated 13.3.1991 substituting denatured spirit in lieu of rectified spirit for industrial purpose. The Government have taken the view that in order to prevent the misuse of rectified spirit after

eliciting the views of the chemical industries, who have consented to the use of denatured spirit, directed to constitute a Technical Expert Committee to look into the claims of the industries from the point of view of technical difficulty in implementing the scheme. The Government granted extension of time upto 31.7.1991 to switch over from rectified spirit to denatured spirit by the concerned industries. The Government's letter dated 12.6.1991 was issued to the petitioner company when the extension of time was in force for switch over from rectified spirit to denatured spirit. Hence, according to Mr.M.A.Sadanand, learned Government Pleader, there was no reference to G.O.(D) No.188, Home, P and E (III) Department, dated 13.3.1991. Therefore, according to him, the question of affording opportunity to the petitioner company about the change of policy stated above did not arise. The petitioner company in their letter dated 12.12.1991 represented that the project was completed and the plant was ready for production. Therefore, there was an inspection by the Assistant Chemical Engineer of the Directorate of Industries and Commerce. According to his report, the company was completed the erection of plant and machinery but it was yet to get the consent order from the Tamil Nadu Pollution Control Board and the work regarding the effluent treatment was under progress. After examining these reports, by the impugned order dated 29.4.1992 of the 1st respondent, the petitioner company was permitted to draw 50,000 litres of denatured spirit (denatured with 5% ether), which is impugned in the writ petition.

11. It is, therefore, urged by Mr.M.A.Sadanand, learned Government Pleader, that the order of allotment made by the 1st respondent in pursuance to the order of the Government in G.O.(D) No.188, Home, P and E (III) Department, dated 13.3.1991, is in order and that the contention of the petitioner that the delay in putting up of the machinery was administrative is far from the truth. By way of answer to the argument put forward by the petitioner's senior counsel with reference to the petitioner's representation that the plant is designed only to have rectified spirit as raw material, the learned Government Pleader submits that there was joint inspection by the Joint Commissioner II (Prohibition and Excise), the Joint Director (Chemicals) in charge and the Assistant

Chemical Engineer on 2.6.1992 and the said committee has jointly reported that the petitioner has erected plant and machinery, and certain minor items of works are to be completed. The learned Government Pleader also invited my attention to the inspecting officers' report, which has been extracted at page 7 of the counter affidavit. The learned Government Pleader further submits that the apprehension of the petitioner of any accident or mishap because of denatured spirit containing ether is absolutely baseless. He also denies the statement of the petitioner that the supply of denatured spirit will result in closure of the industry. He submits that the rectified spirit can be diverted for the manufacture of spurious alcoholic drinks easily and in order to prevent such misuse, the rectified spirit is denatured and supplied so that it will not be possible for human consumption. By this process, the petitioner company is not in any way prejudiced.

12. Mr.M.A.Sadanand, learned Government Pleader then submits that if the petitioner is aggrieved by the impugned order of the 1st respondent, he should have preferred his claim before the Technical Expert Committee and got his grievance redressed. The petitioner has failed to do so but has straightaway approached this Court and filed the writ petition and thereby it has failed to exhaust the opportunities available before the administrative forums. On this ground alone, according to the learned Government Pleader, the direction petitions are to be dismissed. The learned Government Pleader further states that there are no sustainable grounds in the writ petition and the impugned order is valid in law and that the petitioner cannot compel the Government to supply rectified spirit contrary to the policy decision taken after due deliberation. The petitioner cannot be aggrieved by the impugned order and hence, if the interim directions given by this Court are not vacated, the interest of the Government will be greatly prejudiced.

13. I have carefully analysed the elaborate arguments advanced by the learned senior counsel for the petitioner and the learned Government Pleader, and I am unable to accept the arguments put forward by the learned Government Pleader, for the following reasons.

14. I am of the firm view that the interim directions were given by my learned Brother Govindaswami,

J., only after considering and appreciating the arguments of the learned senior counsel for the petitioner. It is an admitted fact that only after due consideration of the representation of the petitioner, the Secretary to Government, Prohibition and Excise Department, by letter dated 12.6.1991 informed the petitioner that the request of the petitioner has been considered and the Government grants time till June, 1992, to commence production, and if production is not commenced by the end of June, 1992, the allotment of 12 million litres of industrial alcohol made by the Government in G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982, would be cancelled. It is not in dispute that all the governmental agencies have completed their formalities and the petitioner company is ready to operate the plant and commence production. It is also a matter of record that only after due inspection, the Department has informed the Government that necessary industrial alcohol can be allotted to the petitioner company to have the trial run. But, the petitioner company to its dismay has received the impugned proceedings of the 1st respondent stating that 50,000 litres of denatured spirit with 5% ether denaturant would be allotted to the petitioner company from E.I.D. Parry (India) Ltd., Nellikuppam, for trial run for five days and the Assistant Commissioner (Excise), North Arcot and the Joint Director (Chemicals), shall monitor the trial run and report to the Government for further orders. I am of the *prima facie* view that the impugned proceedings are not tenable in law.

15. It is seen from the impugned proceedings that in view of the decision of the Government in G.O.(D) No.188, P and E III Department, dated 30.3.1991, the 50,000 litres of denatured spirit with 5% ether has been allotted to the petitioner company for trial run of the plant to manufacture solvent ether and ethylene ether and other chemicals. It is pertinent to note that the 1st respondent has failed to note that the Government in their letter dated 12.5.1991 issued after G.O.Ms.No.188 P and E III Department dated 13.3.1991, has directed the petitioner company to commence the production positively before June, 1992, to enable them to have the allotment of industrial alcohol as per G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982. There was no reference to G.O.Ms.No.188 P and E (III) Department, dated 13.3.1991 or modification of the allotment of

denatured spirit instead of rectified spirit. The 1st respondent, contrary to the orders of the Government, had directed that denatured spirit, with 5% ether alone will be supplied to the petitioner company for trial run. I am of the view, that the above decision of the 1st respondent made in the impugned proceedings is not sustainable in law. The plant, which has been put up by the petitioner company, is designed to have only rectified spirit as the raw material. Such a substitution of raw material in my view, will adversely affect the production, ability, capacity and viability of the plant.

16. Mr.S.Govind Swaminathan, learned senior counsel for the petitioner, at the time of argument has also referred to certain other proceedings initiated by persons similarly placed as that of the writ petitioner. He referred to the proceedings in W.P.Nos.11614 and 11615 of 1991, which have been filed by other persons, wherein this Court has directed the Government to continue the existing arrangement of supplying only the rectified spirit to the alcohol based industries till the disposal of the writ petitions. He also referred to W.P.No.12585 of 1991 filed by one Kurunji Chemicals, similarly placed like the petitioner company, wherein also this Court has directed the Government to allot rectified spirit since the said plant is designed to have the same as raw material. It is not disputed by the learned Government Pleader that the above referred orders of this Court are still in force and the Government have not so far taken any steps to vacate the interim directions given by this Court in the above matters.

17. The Government have issued G.O.Ms.No.188, Home, P and E (III) Department, dated 13.3.1991, indicating the decision of the Government concerning the proposal of the 1st respondent. In this G.O., the Government have specifically ordered in paragraph 3 as under:

"The Government also direct the Commissioner of Prohibition and Excise to constitute a technical expert committee to look into the pleas of any industries from the point of technical difficulty in implementing the scheme. If any industry persists in the allocation of rectified spirit alone, it should be only under the stringent formalities."

It is seen from the above G.O., that the Government have clearly indicated that if any industry persists in the allocation of rectified spirit alone, the same alone could be allotted enforcing

stringent formalities. When the policy decision of the Government is unambiguous, the 1st respondent, without any authority or power, has chosen to order that denatured spirit of 50,000 litres with 5% ether would be allotted to the petitioner for trial run. The 1st respondent has also erroneously stated that the policy of the Government was to switch over from rectified spirit to denatured spirit and the same has been ordered in G.O.Ms.No.188, Home, P and E (III) Department, dated 13.3.1991 and therefore, 50,000 litres of denatured spirit would be allotted to the petitioner. I am of the view, that the above conclusion of the 1st respondent is contrary to the policy decision of the Government. A mere reading of G.O.(D) No.188, Home, P and E (III) Department, dated 13.3.1991 will disclose that the Government have specifically ordered in the said G.O., that if any industry persists for the allocation of rectified spirit, then the same should be allotted imposing stringent conditions. This being the policy decision of the Government, the 1st respondent, in my view, ought to have allotted only rectified spirit to the petitioner company taking into consideration the nature of design of the plant and machinery.

18. The 1st respondent failed to notice a very important factor viz., that only after G.O.(D) No.188, Home, P and E (III) Department, dated 13.3.1991 was issued, the Secretary, P and E Department, issued the letter dated 12.6.1991 directing the petitioner to commence production on or before June, 1992, and if they failed to do so, the allotment of 12 million litres of industrial alcohol by the Government as per G.O.Ms.No.87, P and E (III) Department, dated 5.2.1982, would be cancelled. When the Government have not imposed any condition and in the letter only allotment of industrial alcohol has been indicated, the 1st respondent has no authority to allot denatured spirit to the petitioner. The 1st respondent, in my view, ought to have ascertained from the petitioner-company about the allotment of denatured spirit instead of rectified spirit. Without affording any opportunity to the petitioner company, the 1st respondent has arbitrarily ordered in the impugned proceedings that denatured spirit of 50,000 litres will be allotted to the petitioner company for trial run. In my opinion, the order of the 1st respondent is erroneous and improper. Hence, the same shall not be given effect to during the pendency of the writ petition.

19. Another important thing which the Government have failed to see is that the Petitioner Company has designed the plant and machinery to have only rectified spirit as the raw material to manufacture ether anesthetic products classified under Indian Pharmacopia. The design of the plant and machinery of the petitioner company cannot have denatured spirit as the raw material. According to the writ petitioner, if denatured spirit with 5% ether is used as the basic raw material, then the design and the storage facilities have to be modified accordingly incurring considerable expenditure. It is also stated that transporting and storing of denatured spirit with 5% ether denaturant is hazardous and is security risk, and that the present fabricated structures are not fit to store and the plant is not capable to process the denatured spirit. When the present design of the plant and machinery cannot have denatured spirit as the raw material and only with the modification the same can be done, the Government is not entitled to modify its earlier order and insist upon the supply of denatured spirit. I am, therefore, of the view, that the Government is estopped from imposing such unreasonable condition on the petitioner.

20. Balance of convenience is also only in favour of the petitioner. There are nearly 35 workers employed in the company and any denial of rectified spirit would result in closure of the factory, thereby throwing them out of employment. The petitioner has also invested borrowed capital from banks and other authorities. Interests of justice would be amply met only if the earlier directions given by this Court are allowed to continue pending disposal of the writ petition. I am of the view that my learned Brother S.Govindaswami, J., is right and well within his jurisdiction in issuing such interim directions pending disposal of the writ petition. The argument of the learned Government Pleader that this Court has no jurisdiction to pass interim orders without hearing the affected respondents is not tenable in law. I am of the firm view that this Court can issue such interim directions in suitable cases taking into consideration of the various aspects of the case and even without hearing the respondent, if necessary. In my view, this is eminently a fit case for issuing interim directions even without hearing the respondents, since this Court has only directed the respondents to act upon their own earlier

commitment. In the instant case, various steps have been taken by the petitioner company only on the assurance and promise made by the Government in unequivocal terms for the allotment of rectified spirit. It is unfortunate that the 1st respondent has issued the impugned proceedings to the petitioner company which has already established the industry at huge cost and is ready to start trial run.

21. Since the matter was argued at length by both the learned counsel, I am compelled to write a detailed and elaborate order even in the W.M.Ps. As already stated, the writ petition was admitted on 5.5.1992 and interim direction was given on the same day. The same was clarified on 29.6.1992. My learned brother S. Govindaswami, J., has made it very clear that the Government is expected to comply with the directions and failure to do so will amount to contempt of Court. However, my learned Brother, instead of issuing notice of contempt, by way of indulgence, issued directions to the respondents to effect supply in a period of two weeks from the date of receipt of the order dated 29.6.1992. My learned Brother has also rightly extended the time to commence the trial run. However, the Government without complying with the clarified order dated 29.6.1992, have filed W.M.P.Nos.15082 and 15083 of 1992 on 29.7.1992. I am of the view, that the stand taken by the Government is unrealistic. The Government shall not delay any further in implementing the directions given by this Court on 5.5.1992 and clarified on 29.6.1992, and comply with the same within two weeks from to-day.

22. For the foregoing reasons, the interim directions given by this Court in W.M.P.Nos.9519 and 11856 of 1992 are made absolute. W.M.P.Nos.9519 and 11856 of 1992 are ordered and W.M.P.Nos.15082 and 15083 of 1992, which are filed by the Government to vacate the interim directions, are dismissed.

B.S.

Petitions ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- K.M.Natarajan, J.

W.P.No.6587 of 1983 20th September, 1991.

N.Sivadasan

...Petitioner

v.

The Appellate Authority under the Payment of Gratuity Act and others ...Respondents.

Payment of Gratuity Act (XXXIX of 1972), Sec. 2(s) - "Wages" - If includes cash equivalent of tiffin and meals supplied.

It is clear from the definition of "wages" in the Payment of Gratuity Act that the value of tiffin and food supplied cannot be included in the term "wages". It is true that under the Tamil Nadu Catering Establishments Act, 1958, the cash equivalent of the meals and tiffin supplied to the employee free of charge is also included in the term "wages" as defined in that Act. But the same cannot be imported in the matter of payment of gratuity under the Payment of Gratuity Act.

[Paras 4 and 6]

Cases referred to:

The Delhi Cloth and General Mills Company Ltd. v.

The Workmen, A.I.R. 1970 S.C. 919. [Para 6]

Lakshmi Coffee Hotel v. Their Workmen, (1967) 1

L.L.J. 258. [Para 7]

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records of the 1st respondent relating to payment of gratuity Appeal No.30 of 1980 dated 31.10.1980 confirming the 2nd respondent's order in P.G. Case No.252 of 1979 dated 5.12.1979 and quash the same in so far as it denies the petitioner from receiving full gratuity and consequently directing the 3rd respondent to pay the petitioner a sum of Rs.247.50 towards the balance of gratuity.

M/s. Anna Mathew, for Petitioner.

M.Liakat Ali, Government Advocate, for Respondent Nos.1 and 2.

The Court made the following

ORDER: This writ petition has been filed for the issue of a writ of *certiorarified mandamus* calling

for the records of the 1st respondent relating to Payment of Gratuity Appeal No.30 of 1980, dated 31.10.1980 confirming the 2nd respondent's order in P.G. Case No.252 of 1979 dated 5.12.1979 and quashing the same in so far as it denies the petitioner from receiving full gratuity and consequently directing the 3rd respondent to pay the petitioner a sum of Rs.247.50 towards the balance of gratuity.

2. The brief facts which are necessary for the disposal of this writ petition can be stated as follows:

The writ petitioner herein filed a petition before the controlling authority under the Payment of Gratuity Act, 1972, in which both parties made an endorsement to the effect that the parties agreed about the services of the applicant as six years and the parties agreed that the applicant's last drawn wages in cash is Rs.45 p.m. The contention of the petitioner was that the cash equivalent to the food value per mensem i.e. Rs.82.50 should be counted as wages while the respondents argued that the definition clause of wages refers only to the amount paid in cash and shall not include the food allowance or amount equivalent to the food or tiffin given along with wages as conditions of employment. The parties agreed that the Controlling Authority may pass orders on the basis of the endorsement. The controlling authority came to the conclusion that in view of the definition of wages under the Payment of Gratuity Act it is not possible to accept that the food equivalent is paid in cash, and as such the petitioner is entitled to claim gratuity on the basis of last drawn wages paid at Rs.45 p.m. and on the basis of the same he was awarded a sum of Rs.135. He was unsuccessful before the appellate authority. Hence the writ petition.

3. The learned counsel for the petitioner mainly submitted that the value of food supplied to the petitioner is also included in the wages and if it is included the salary of the petitioner would come to Rs.147 and the petitioner is entitled to get more gratuity and he would submit that for construing the terms 'wages' reliance should be placed on the definition in Tamil Nadu Catering Establishments Act, 1958. He also cited a decision reported in *Lakshmi Coffee Hotel v. Their Workmen*, (1967) 1 L.L.J. 258, which arose out of the Industrial Disputes Act.

4. The point that arises for determination in this petition is whether the definition of wages under

the Tamil Nadu Payment of Gratuity Act, would include the value of food provided. According to the learned counsel for the petitioner it would come under the word 'wages' in accordance with the terms and conditions of the employment even though the same was not paid in cash. For proper appreciation of the rival contentions it is worthwhile to consider the relevant definition of "wages" under the Payment of Gratuity Act.

" 'Wages' means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus commission house-rent allowance, overtime wages and any other allowance."

It is seen from this definition that all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus can be termed as wages. As per the definition bonus commission house rent allowance overtime wages and any other allowance cannot be included in the definition of "Wages".

5. Sec.2(13)(A) of the Tamil Nadu Catering Establishments Act, 1958 defines wages:

" 'Wages' means the basic wages dearness allowance, the cash equivalent of the meals and tiffin supplied to the employee free of charge and the value of any other amenity or of service or of any concessional supply of foodgrains or other articles which can be computed in terms of money but does not include bonus."

It is clear from the above definition that the cash equivalent of the meals and tiffin supplied to the employees free of charge is also included in the term "wages". The learned counsel for the petitioner submitted that in view of the said definition in the abovesaid Act which is a special enactment the same can be imported in the case of the petitioner in the matter of granting payment of gratuity. I do not find any force in the said contention.

6. Now we will deal with the question of payment of gratuity. It is clear from the definition of "wages" in the Tamil Nadu Catering Establishments Act, 1958, (*sic*. Payment of Gratuity Act) that the value

of food supplied cannot be included in the term of wages as it is only the amount paid as cash equivalent to the meals. In this connection the learned Government Advocate drew the attention of the court to the decision of the Supreme Court reported in *The Delhi Cloth and General Mills Company Ltd. v. The Workmen*, A.I.R. 1970 S.C. 919, wherein their Lordship had observed thus:

"In determining the scope of an industrial reference it cannot be held that the words used either in the claim advanced or in the order of reference made by Government under Sec.10 of the Industrial Disputes Act must have the meaning they have under the Industrial Disputes Act. Merely because the expression 'wages' includes D.A. within the meaning of the Industrial Disputes Act, the tribunal is not obliged to base a gratuity scheme on consolidated wages. Normally gratuity is based not on the consolidated wage but on basic wage."

7. The learned counsel for the petitioner relied upon a decision of this Court in *Lakshmi Coffee Hotel v. Their Workmen*, (1967) 1 L.L.J. 258, which arose under the Industrial Disputes Act and wherein Sec.2(rr) of the Industrial Disputes Act was considered. The definition of wages under Sec.2(rr) of the Act is very wide enough to include the free food and tiffin supplied to the employee. Sec.2(rr) of the Industrial Disputes Act reads as follows:

" 'Wages' means all remuneration capable of being expressed in terms of money which would if the terms of employment expressed or implied were fulfilled be payable to a workman in respect of his employment or of work done in such employment and includes--

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession;

(iv) any commission payable on the promotion of sales or business or both, but does not include--

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service."

It is only in view of the definition under the said act it was held so in the said decision that the value of the food supplied forms part of the wages. The decision cited by the learned counsel for the petitioner is not applicable to the fact of this case. On a careful consideration of the entire material and the relevant provisions with regard to the definition of wages under the Payment of Gratuity Act, I am of the view that the authorities have rightly interpreted the word 'wages' while granting relief to the petitioner and as such no case is made out for the issue of a writ of *certiorari* and *mandamus* as prayed for.

8. In the result, the writ petition fails and is dismissed. There will be no order as to costs.

V.K.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present:- Srinivasan, J.

W.P.No.183 of 1985

18th August, 1992.

M.Devan

...Petitioner

v.

The Tamil Nadu Civil Supplies Corporation Limited, Dharmapuri District ... Respondent.

Domestic enquiry - Charges framed against petitioner for tampering with document - Document not produced during enquiry - Petitioner not given opportunity to make submissions with reference to the said document - Enquiry not concluded having been adjourned at the instance of the petitioner - Termination of services of petitioner, held illegal.

Two charges were framed against the petitioner that he concealed the fact that he did not have the requisite educational qualification for the post of Assistant Quality Inspector and obtained that appointment by giving an application containing false information and that he tampered with the temporary certificate issued by the University by erasing the word 'Mathematics' and writing the

word 'Botany' and thus forged the certificates. The petitioner denied the charges and prayed for the production of the documents on which reliance was placed by the respondent. The Enquiry Officer put some questions to the petitioner on 19.9.1984. The petitioner filed a petition for adjournment till the production of the relevant documents. The Enquiry Officer made an endorsement that the enquiry was adjourned. But he submitted a report stating that both the charges were proved to be correct and his services were terminated on the basis of the report. The order was challenged by way of a writ petition.

Held: There can be no doubt whatever that the enquiry has not been conducted properly in accordance with law apart from the fact that the enquiry was not conducted by the Enquiry Officer and sufficient evidence was not on record to substantiate the two charges framed against the petitioner. The respondent ought to have produced the documents before the Enquiry Officer which are relevant for the purposes of the enquiry and which prove the two charges framed against the petitioner and the petitioner ought to have been given an opportunity to make his submissions with reference to the said documents. As the said procedure has not been followed, the court has no option, but to quash the impugned order passed by the respondent. [Para 8]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings No.N.K.22282 of 1983 E1, dated 20.11.1984 of the respondent herein, quash the same.

Venkataraman, for Petitioner.

V.V.Bhanu for *G.Bhaskaran*, for Respondent.

The Court made the following

ORDER: When the writ petition was taken up for hearing it was represented on behalf of learned counsel appearing for the respondent that a letter has been received by them from the respondent this morning to the effect that their services as counsel for the respondent have been terminated. The letter has been produced before me. I find that according to the letter a new panel of advocates has been prepared and the present advocates on record have been requested to hand over the records in all the pending cases to the respondent so

that they could entrust the same to the new advocates. Hence learned counsel expressed his dilemma in continuing with the arguments in the case. This writ petition was taken up for hearing on 11.8.1992. It was part-heard on that day and I posted it to 17.8.1992. It could not be heard yesterday and it was adjourned to this date. As this matter is part-heard, the letter of the respondent will not certainly prevent the counsel on record from continuing the arguments and concluding the same. I directed the learned counsel for the respondent on record to complete the arguments. Pursuant to my direction arguments were advanced by learned counsel for the respondent.

2. This writ petition has to be allowed on a very short ground. The prayer of the petition is to quash the order dated 20.11.1984 passed against him by the respondent terminating his services on the ground that though he was not qualified for the post of Assistant Quality Inspector he made false representation and produced false certificates and got promoted as Assistant Quality Inspector.

3. According to the petitioner he never made false representation and he gave the correct information in his application that he had passed B.Sc., with Chemistry as main subject and Physics and Mathematics as ancillaries. It is his further case that the documents which are said to be forged are not tampered by him and when they were handed over by him to the respondent they contained only the correct entries to the effect that he had passed B.Sc., Chemistry with Mathematics and Physics as ancillary subjects.

4. Two charges were framed against the petitioner on 9.5.1984 as follows:

(1) The petitioner concealed the fact that he did not have the requisite educational qualification for the post of Assistant Quality Inspector and gave an application on 9.7.1982 containing false information thus, cheating the officials and obtained an appointment as Assistant Quality Inspector.

(2) He tampered with the temporary certificates issued by the University by erasing the word Mathematics and writing the word Botany thereon and thus forged the certificates.

The petitioner denied the charges and prayed for production of the documents on which reliance is placed by the respondent.

5. The Enquiry Officer posted the matter to 19.9.1984

from 14.9.1984 on which later date the enquiry, commenced at 3.00 p.m. The Enquiry Officer put some questions to the petitioner as to whether he was denying the charges. The petitioner denied the charges. The Enquiry Officer put in all six questions. The petitioner only reiterated his stand taken earlier and ultimately he stated that the relevant documents, viz. his applications as well as the certificates should be produced for the enquiry as they were necessary thereafter. The last question put by the Enquiry Officer as whether the petitioner wanted to say anything. The answer of the petitioner was that he was presenting an application. The said application was one for adjournment till the production of the relevant documents. The Enquiry Officer received the application. An endorsement was made on the minutes of the proceedings that the enquiry was adjourned. The Tamil expression used is

6. Thereafter, the Enquiry Officer submitted a report to the disciplinary authorities stating that both the charges against the petitioner were proved to be correct. In the report, the Enquiry Officer had stated about the allegations, replies given by the petitioner and his conclusions. The proceedings submitted along with the report only contained the questions put by the Enquiry Officer to the petitioner and his answers to which I have already made a reference. The entry as to adjournment is also found in the proceedings submitted by the Enquiry Officer and it is significant to note that the signature of the petitioner and the endorsement made by him that he had read the proceedings and found them to be correct are at the bottom below the endorsement relating to adjournment. Therefore, it is clear that the petitioner was informed by the Enquiry Officer that the enquiry was adjourned.

7. Admittedly, no further enquiry was held and the petitioner was not informed that his application for adjournment was refused or rejected by the Enquiry Officer submitted a report on the basis of which the disciplinary authority passed the impugned order.

8. There can be no doubt whatever that the enquiry has not been conducted properly in accordance with law, apart from the fact that the enquiry was not conducted by the Enquiry Officer and sufficient evidence was not on record to

substantiate the two charges framed against the petitioner. The respondent ought to have produced the documents before the Enquiry Officer which are relevant for the purposes of the enquiry and which prove the two charges framed against the petitioner and the petitioner ought to have been given an opportunity to make his submissions with reference to the said documents. As the said procedure has not been followed, I have no option but to quash the impugned order passed by the respondent. The order dated 20.11.1984 in N.K.No.22282/83 E1 on the file of the respondent is quashed. The writ petition is allowed. The respondent, if it so desires may continue the enquiry from the stage at which it was left and conclude the same in accordance with law. There will be no order as to costs.

9. As the order of termination is quashed, the petitioner will be deemed to be in service and the order of suspension made against him previously will get revived. Hence the petitioner will be treated as an employee under suspension until further orders are passed by the respondent.

10. It is necessary to mention that the respondent filed a criminal complaint against the petitioner by forwarding a complaint to the Inspector of Police, District Crime Branch, Dharmapuri on 21.3.1983. That was taken on file and a case was registered under Secs.420 and 468 of the I.P.C. Now the case is pending as C.C.No.85 of 1984 on the file of the Judicial Magistrate No.1, Dharmapuri. The petitioner has filed CrI.O.P.No.3780 of 1991 in this court for quashing the said proceedings. In CrI.M.P.No.2321 of 1991 an order of stay of the criminal proceedings has been passed on 12.6.1991. I am of the view that the CrI.O.P.No.3780 of 1991 shall be disposed of immediately on its merits as the relevant question as to whether the petitioner is guilty of forgery or not shall be decided. The petitioner states that the ground on which he seeks to have the criminal proceedings quashed is that the proceedings have been unduly delayed for over eight years and they should not be continued. If this court thinks that the proceedings can be quashed on that ground, it is for the court to decide accordingly. At any rate, the proceedings which was initiated in 1984 should not be kept stayed indefinitely by virtue of an order of this court in a proceedings for quashing the same under Sec.482 of the CrI.P.C.

11. The registry is directed to post CrI.O.P.No.3780

of 1991 and CrI.2324 of 1991 before the concerned Judge on 20.8.1992 for orders as to fixing the date for hearing.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- Raju, J.

W.P.Nos.14595, 15225 and 15226 of 1990
27th August, 1992.

Muthuswamy and others ...*Petitioners*
v.

The State of Tamil Nadu represented by Secretary to Government Adi-Dravidar and Tribal Welfare Department, Madras and another ...*Respondents.*

(A) *Land Acquisition Act (I of 1894), Sec.4(1) - Acquisition of land - Notification under - Delay of 25 days in publication of substance of notification at convenient places in the locality and in public offices - Effect.*

Held:- The publication within 25 days of the Sec.4(1) notification cannot be said to be an infirmity in law or that it cannot be legitimately said to be not a simultaneous publication. [Para 9]

(B) *Land Acquisition Act (I of 1894), Sec.6, Proviso - Notification for acquisition of land published in gazette on 16.11.1988 - Substance of notification published in public office on 20.12.1988 - Declaration under Sec.6 issued on 20.11.1989 and published in gazette on 27.11.1989 - Declaration, if within one year of publication.*

Factually, the details disclosed would show that the declaration has been made and issued under the Act within the stipulated period of one year from the date of the publication of the notification having regard to the fact that as held by a Division Bench of this Court, in *Government of Tamil Nadu v. S.Jayaraman, 1992 Writ L.R. 332*, the period of one year has to be computed with reference to the date of the last of the category of various kinds of publications contemplated under Sec.4 of the Notification. [Para 9]

(C) *Land Acquisition Act (I of 1894), Sec.6 - Declaration under - Name of owner found in, known to be dead to the authorities - Notification, if valid.*

Admittedly, the respondents were aware of the fact that the original owner of the lands had died long before. In spite of the said factual position under Sec.6 of the Act, the name of the erstwhile owner whose death was known to the respondents is found published. On this ground alone, the impugned order of acquisition deserves to be quashed. [Para 10]

(D) *Land Acquisition Act (I of 1894), Sec.5-A - Enquiry under - Owner of land to be acquired, dead - Authorities not making proper enquiries to find out heirs of owner - Accepting claim made by son-in-law that the lands had been given to him by some arrangement - Allowing him to participate in enquiry - Entire proceedings if vitiated.*

It is beyond comprehension as to how the responsible authorities discharging statutory functions under the Act were very much indifferent in making due enquiries to ascertain about the heirs of the deceased owner and were so gullible to readily accept a claim by someone that the lands have been given to him by mutual and oral understanding. The person who made such a claim claimed to be the son-in-law of the erstwhile owner. Such contentions coming from responsible statutory functionaries cannot be either justified or sustained in a Court of Law. The authorities have miserably failed to verify properly about the heirs of the deceased pattadar and the fact that such heirs have not themselves come on record cannot be a valid plea in a case of the nature involving the issue of a notification or a declaration in the name of a dead person. The procedure adopted by the respondents cannot be approved by a Court of Law. On account of the irregularities and lapses committed in the part of the respondents in properly verifying about the ownership or the legal ownership the petitioners have been seriously prejudiced. This vitiates the impugned land acquisition proceedings. [Para 10].

Case referred to:

Government of Tamil Nadu v. S.Jayaraman, 1992 Writ L.R. 332. [Para 6]

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writs of

certiorari calling for the records relating to the Declaration under Sec.6 of the Land Acquisition Act made in G.O.Ms. No.2171, Adi Dravidar and Tribal Welfare, dated 20.11.89 and published in the Tamil Nadu Government Gazette (Extraordinary), Part II, Sec.2, dated 27.11.89 and quash the same in so far as the petitioners.

1. in S.F.No.138/12B measuring about 0.15.5 hectares at 94, Nattar Mangalam Village, Perambalur Taluk, Trichy District (in W.P. No.14595/90), etc. *V.Nicholas* and *M/s.K.Venkataraman* and *R.K.Ravindran*, for Petitioners.

P.Balasubramanian, Additional Government Pleader for Respondents.

The Court made the following

ORDER: These three writ petitions can be considered, and disposed of together since they relate to the same acquisition and declaration under Sec.6 of the Land Acquisition Act, 1894 and the learned counsel appearing on either side also made submissions in common.

2. The above writ petitions have been filed seeking for quashing the declaration issued under Sec.6 of the Act and in G.O.Ms.No.2171, Adi Dravidar and Tribal Welfare, dated 20.11.1989 in so far as the lands of the respective writ petitioners are concerned. The petitioners in W.P.No.14595 of 1990 claimed to be the sons of late Ramasamy Moopanar, S/o.Muthusamy Moopanar, the original owner of Survey No.138/12B. The petitioner in W.P.No.15225 of 1990 claims to be the owner of the property in Survey No.138/13B. W.P.No.15226 of 1990 has been filed by a person claiming to be the owner of Survey No.138/10 and he claims title under a Will said to have been executed on 6.7.1963 by his aunt by name Poonjolai Ammal, stated to be the original owner of the said item of land.

3. Notice of motion has been ordered by this Court in W.P.No.14595 of 1990 on 10.9.1990 and the other two writ petitions on 18.9.1990 and at that time, interim stay of dispossession alone was granted with liberty to proceed with further proceedings. Notices have been served and the respondents have entered appearance. A counter-affidavit has also been filed for the respondents.

4. Mr. V.Nicholas, learned counsel appearing for the petitioners in all these cases contended in common for all the writ petitions, that (a) No personal service of notices for the enquiry under Sec.5-A of the Act has been served on the petitioners; (b) that the declaration under Sec.6 of the Act

came to be made beyond a period of one year from the date of notification under Sec.4 of the Act in contravention of the Proviso to Sec.6 of the Act; and (c) There was no simultaneous publication of the substance of the notification and that this infirmity vitiates the acquisition proceedings.

5. While meeting the above contentions, learned counsel for the respondents points out from the averments contained in the counter filed that the acquisition in question relating to dry lands measuring about 0.99.0 hectares in S.F.Nos.138/10, 138/12B, 138/13B and 138/14B of Nattarmangalam Village, Perambalur Taluk, Trichy District was for the purpose of providing house sites to 40 houseless Adi-Dravidar families, that the notification under Sec.4(1) of the Act was issued in G.O.Ms.No.334 (ADTW), dated 1.11.1988 and published on 16.11.1988 in the Tamil Nadu Government Gazette that the same was published in the Tamil daily newspapers on 17.11.1988, that the substance of the notification under Sec.4(1) of the Act was published at the convenient places in the locality on 9.12.1988 as required under the Act and that the substance of the notification was also published in Form 3 under the Act at the Collector's Office, Trichy Taluk Office, Perambalur Sub Registrar's Office, Chettikulam and Police Station at Padalur on 20.12.1988 and that individual notices for enquiry under Sec.5-A of the Act in the prescribed Form 3-A were served on the land owners and interested persons in the lands on 25.1.1989. While elaborating the above submission regarding the personal service of notice, it is pointed out for the respondents that so far as the owner in respect of Survey No.138/12B is concerned, the pattadar was said to have died long before and that one Ramasamy, S/o.Arunachala Moopanar claiming to be the son-in-law of the deceased represented that the lands were given to him by oral agreement and mutual understanding and that he has been served with notice in respect of the said survey number treating to him to be the owner and enjoyer. In respect of the land which is the subject matter of W.P.No.15225 of 1990 it is claimed that Ramasamy, S/o. Arunachala Moopanar who claimed to be also the son-in-law of the owner of the land which is the subject matter of W.P.No.14595 of 1990 has been served with notice and that he did also appear for the enquiry by participating in it. So far as the owner of the land which is the subject matter of W.P.No.15226 of

1990 is concerned, it is claimed that on the refusal of the petitioner to receive the notice the same was served by affixure and that the petitioner also participated in the enquiry under Sec.5-A of the Act and, therefore, no valid objection could be taken on behalf of the said writ petitioner making a grievance of absence of personal service. It is admitted that so far as the writ petitioners in W.P.No.14595 of 1990 is concerned, no notices have been served on them and that they have not also participated in the enquiry under Sec.5-A of the Act.

6. So far as the contention based on the alleged violation of the Proviso to Sec.6 of the Act is concerned, it is pointed out for the respondents that the declaration under Sec.6 of the Act came to be made in G.O.Ms.No.2171, ADTW, dated 20.11.1989 and published in the Tamil Nadu Government Gazette on 27.11.1989 and having regard to the date of the last of the different kinds of publication of the notification under Sec.4(1) of the Act referred to already the proviso to Sec.6 of the Act could not be said to have been violated and that the declaration was made well within the period of one year from the date of the last of such publication viz. 20.12.1988 (*Vide: Government of Tamil Nadu v. S.Jarayaman, 1992 Writ L.R. 332*).

7. So far as the ground and grievance made on the absence of simultaneous publication, the learned counsel for the petitioner himself fairly stated on going through the materials and details furnished in the counter-affidavit that the publication has been effected within 25 days. The same could not be said to suffer any infirmity in law.

8. I have carefully considered the arguments of the learned counsel appearing on either side. So far as the petitioners in W.P.Nos.15225 and 15226 of 1990 are concerned, the plea of absence of personal notice cannot be countenanced in the light of the details furnished in the counter-affidavit which has been referred to supra. The writ petitioner in W.P.No.15225 of 1990 has been served and he has participated in the enquiry too. Though the writ petitioner in W.P.No.15226 of 1990 has not been personally served, it was only due to the refusal of the petitioner to receive the notice and in the wake of such refusal it is claimed for the respondents that the notice has been served by affixure. The procedure adopted cannot be said to be bad in law particularly when the said person actually participated in the enquiry under Sec.5-A

of the Act. So far as the said writ petitioners are concerned, the grievance projected on the ground of alleged absence of personal service of notice has to fail in the light of the facts stated and my conclusions referred to above.

9. So far as the ground relating to the absence of simultaneous publication is concerned, the details furnished in the counter-affidavit to which a reference has been already made would belie the claim of the petitioners and the publication within 25 days of the notification cannot be said to be an infirmity in law or that it cannot be legitimately said to be not a simultaneous publication. This ground of challenge also does not merit acceptance. Equally untenable is the ground of challenge based on the proviso to Sec.6 of the Act. Factually the details disclosed would show that the declaration has been made and issued under the Act within the stipulated period of one year from the date of the publication of the notification, having regard to the fact that as held by a Division Bench of this Court the period of one year has to be computed with reference to the date of the last of the category of various kinds of publications contemplated under Sec.4 of the Notification.

10. So far as the absence of personal service of notice on the petitioners in W.P.No.14595 of 1990 is concerned, the only answer of the respondent is that the son-in-law of the erstwhile owner represented that the lands have been given to him on a mutual arrangement and that therefore notice was served on such persons, that he has participated in the enquiry under Sec.5-A of the Act and that therefore no objection could be taken to the enquiry conducted or the absence of personal notice to the petitioners. The stand taken by the respondents in this regard cannot be countenanced in law. Admittedly, the respondents were aware of the fact that the original owner of the lands comprised in S.F.No.138/12B by name Ramasamy Moopanar, S/o.Muthusamy Moopanar died long before. In spite of the said factual position, it is surprising that even in the declaration under Sec.6 of the Act the name of the erstwhile owner whose death was known to the respondents is found published. On this ground alone, the impugned order in so far as it seriously relates to S.F.No.138/12B deserves to be quashed. That apart, it is beyond comprehension as to how the responsible authorities discharging statutory functions under

the Act were very much indifferent in making due enquiries to ascertain about the heirs of the deceased owner and were so gullible to readily accept a claim by someone that the lands have been given to him by mutual and oral understanding. The person who made such a claim claimed to be the son-in-law of the erstwhile owner. Such contentions coming from responsible statutory functionaries cannot be either justified or sustained in a Court of Law. The authorities, in my view have miserably failed to verify properly about the heirs of the deceased pattadar and the fact that such heirs have not themselves come on record cannot be a valid plea in a case of the nature involving the death of the only owner of the land or justify the issue of a notification or a declaration in the name of a dead person. The procedure adopted by the respondents cannot be approved by a Court of Law. On account of the irregularities and lapses committed on the part of the respondents in properly verifying about the ownership or the legal heirship in respect of S.F.No.138/12B, the petitioners have been seriously prejudiced. This vitiates the impugned land acquisition proceedings in so far as it relates to S.F.No.138/12B. The grievance made on the absence of notice as well as the manner of issue of notification and the declaration under Sec.6 of the Act in so far as it relates to the land of the petitioners in W.P.No.14595 of 1990 deserves to be sustained.

11. For all the reasons stated above, W.P.No.14595 of 1990 shall stand allowed as prayed for in so far as it relates to the lands of the petitioners are concerned, they fail and shall stand dismissed. But, in the circumstances, there is no order as to costs.

B.S.

Petitions ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Ratnam and Somasundaram, JJ.*

W.A.Nos.551 and 552 of 1988

21st September, 1992.

L.T.Morais

...Appellant

v.

J.A.James and others

...Respondents.

Civil Services - Seniority - Ad hoc Advice, if can be counted - Person appointed as Section Officer on 1.7.1963 - Rule requiring three years previous' experience for initial appointment introduced subsequently - Appointment if can be said to have been made not according to rules - Seniority if can be reckoned from 1.7.1963.

Held: It is a settled position of law that *ad hoc* service cannot be counted for determining seniority. If the initial appointment is not according to rules, subsequent regularisation of service does not entitle the employee to the benefit of the intervening *ad hoc* service for seniority. Seniority has to be reckoned from the date of regular appointment and not to be counted from the date of any stop-gap appointment. [Para 6]

The admitted factual position is that on 1.7.1963 when the appellant was appointed as Section Officer, there was no rule prescribing the condition that for initial appointment as Section Officer, a person should have three years of previous service. In the absence of such a rule, it cannot be said that the initial appointment of the appellant was not made according to the rules and that the appellant's initial appointment as Section Officer on 1.7.1963 was only *ad hoc* appointment. There is nothing on record to indicate that the appellant's initial appointment as Section Officer was only on *ad hoc* basis particularly when his appointment was made in respect of a post sanctioned by the ministry and that the appellant was immediately put on probation. It necessarily follows that the appellant's service has to be reckoned from 1.7.1963 for the purpose of fixing seniority. [Para 7]

Cases referred to:

Direct Recruit Class II Engg. Officers' Association v. State of Maharashtra, A.I.R. 1990 S.C. 1607; 1990 Lab.I.C. 1304; (1990) 2 S.C.C. 715. [Paras 4, 6]
P.S.Mahal v. Union of India, A.I.R. 1984 S.C. 1291;

1984 Lab.I.C. 176: (1984)2 Serv.L.J. 197: (1984)2 Lab.L.J. 282. [Para 4]

Delhi W.S. & S. Disposal Committee v. R.K.Kashyap, A.I.R. 1989 S.C. 278. [Para 4]

Keshav Chandra Joshi v. Union of India, A.I.R. 1991 S.C. 204. [Para 5]

Union of India v. S.K.Sharma, (1992)2 S.C.C. 728. [Para 5]

A.L.Somayaji, for Appellant.

R.Muthukumaraswamy for B.S.Gnanadesikan, for Respondent No.1 in W.A.No.551 of 1988.

R.Ganesan, for Respondent No.1 in W.A.No.552 of 1988.

Venkatachalapathy, for Respondent Nos.2 and 3 in both cases.

The Judgment of the Court was delivered by *Somasundaram, J.*: These writ appeals have been filed against the common order allowing Writ Petition Nos.2684 of 1983 and 2733 of 1986 filed by the first respondent in Writ Appeal Nos.551 and 552 of 1988 respectively, and setting aside the seniority list dated 15.3.1983 and restoring the seniority list published on 24.9.1981. The appellant herein is the 4th respondent in both the writ petitions referred to above.

2. By the order dated 18.8.1959, the appellant was appointed as apprentice in the Tuticorin Port Trust and the period of apprenticeship ended on 19.8.1960. Between 27.1.1961 and 23.2.1963, the appellant was employed in the Madras Electricity Board as construction foreman. Again on 27.3.1963, the appellant was appointed as Tracer in the scale of pay of Rs.110-4-150-EB-4-170-5-180-EB-5-200 in the Tuticorin Port Trust. Thereafter, by the order dated 8.7.1963, the appellant was appointed as Section Officer (Civil) in the scale of pay of Rs.180-10-290-EB-380 with effect from 1.7.1963 against the post sanctioned by the Ministry. On 17.7.1963 an advertisement inviting applications for the post of Section Officer in the Tuticorin Port Trust was issued. On the basis of the said advertisement, the first respondent in W.A.No.551 of 1988 applied for appointment as Section Officer and on 6.11.1963 he was appointed as Section Officer. Similarly, on 11.11.1963 Shri A.S. Ganapathi, the first respondent in W.A.No.552 of 1988 was appointed as Section Officer. Subsequently, questions arose regarding the *inter se* seniority of the diploma holders like the appellant and the first respondent in these writ appeals in the category of Section Officer/Junior Engineer,

working in the Tuticorin Port Trust. This question eventually came to be agitated before this Court in Writ Petition Nos.6700, 6701 of 1973 and W.P.Nos.161 of 1974, 1852 of 1974 filed by the first respondent in Writ Appeal No.551 of 1988 and in Writ Petition No.6704 of 1973 filed by one Thiru Vetrivelsamy. All the writ petitions referred above were dismissed by a single Judge of this Court. Against the dismissal of W.P.No.6704 of 1973 Thiru Vetrivelsamy filed Writ Appeal No.446 of 1974 and against the dismissal of Writ Petition No.6700 of 1973, Writ Appeal Nos.591 to 594 of 1974 have been filed. By the judgment dated 15.11.1977, a Division Bench of this Court disposed of the above writ appeals. The question of fixation of *inter se* seniority in the category of Section Officer/Junior Engineer was dealt in Writ Appeal No.594 of 1974 and the Division Bench in Writ Appeal No.594 of 1974 directed that the *inter se* seniority of Section Officer/Junior Engineers should be re-fixed after publishing the draft seniority list, inviting objections and representations and finalising the seniority list after giving reasons and making a speaking order. Pursuant to the judgment of the Division Bench dated 15.11.1977, by his proceedings dated 1.7.1981, the third respondent circulated the draft seniority list as on 31.3.1980. In the said draft seniority list, the seniority of the first respondent in W.A.No.551 of 1988 was shown against Sl.No.2. In the said draft seniority list, the period of service of the appellant from 1.7.1963 to 27.3.1966 in the Tuticorin Harbour Project was shown as *ad hoc* service and it was further shown that the appellant was deemed to have been regularly appointed as Section Officer with effect from 28.3.1966. In fixing the *inter se* seniority, the 3rd respondent also invited objections and representations. After receiving the same, the 3rd respondent by his proceedings dated 24.9.1981 published the final seniority list. In the final seniority list, the first respondent in W.A.No.551 of 1988 was shown against Serial No.2 and the appellant was shown against Serial No.11. Subsequently, the third respondent found that the seniority list dated 24.9.1981 was inherently defective and erroneous and consequently another draft seniority list was prepared by the 3rd respondent on 31.7.1982 and circulated to all the interested parties who were given an opportunity to raise objections if any to the draft seniority list dated 31.7.1982. After considering the objections

of the interested parties, on 15.3.1983, the seniority list of Section Officers/Junior Engineers was finalised as on 8.8.1973. In the seniority list dated 15.3.1983, the first respondent in W.A.No.551 of 1988 was shown as No.4 and the first respondent in W.A.No.552 of 1988 shown as No.8 and the appellant was shown as No.2. Aggrieved by the seniority list dated 15.3.1983, the first respondent in these writ appeals filed W.P.Nos.2684 of 1983 and 2733 of 1986 respectively to quash the said seniority list dated 15.3.1983 so far as it relates to the appellant and one Chinna Kaliapillai and to implement the seniority list dated 24.9.1984.

3. It was contended before the learned single Judge on behalf of the writ petitioners that the order of regularisation passed on 1.7.1981 by the 3rd respondent pursuant to the judgment in W.A.Nos.446 of 1974, 591 of 1974 to 594 of 1974 being correct and appropriate, there was no justification for the 3rd respondent to issue the proceedings dated 15.3.1983 refixing the *inter se* seniority of the Section Officer/Junior Engineers and therefore, the proceedings of the third respondent dated 15.3.1983 is illegal and liable to be set aside. The learned single Judge took the view that the appellant and one Thiru Chinna Kaliapillai were temporarily appointed on 1.7.1963 and 6.8.1962 respectively as Section Officers and that they did not possess the required three years previous experience. The learned single Judge also held that the regularisation process started only after the rules were framed for the first time by the Government of India by issuing notification dated 31.12.1968 and by the time the regularisation could be done, the experience qualification having become applicable to the appellant and Thiru Chinna Kaliapillai, they cannot claim to be differently treated from all others who could be considered for regularisation on that date. The learned single Judge further found that the Division Bench in Writ Appeal Nos.446, 591 to 594 of 1974 has held that the condition of three years prior experience would apply to all appointments in the category of Section Officer/Junior Engineers. Consequently, the learned single Judge by a common order allowed the writ petitions and set aside the impugned proceedings of the 3rd respondent dated 15.3.1983 and restored the proceedings of the 3rd respondent dated 1.7.1981 which was published on 24.9.1981. Aggrieved by the common order of the learned single Judge, the

appellant who is the 4th respondent in both the writ petitions has preferred these writ appeals.

4. Before us Mr.A.L.Somayaji, the learned counsel appearing for the appellant contended that the learned single Judge erred in thinking that the Division Bench in Writ Appeal Nos.446, 591 to 594 of 1974 has laid down the principle for fixing the *inter se* seniority of the Section Officers. The learned counsel further contended that the period of service rendered by the appellant from 1.7.1963 has to be reckoned for fixing the *inter se* seniority because at the time when the appellant was appointed as section officer on 1.7.1963 there was no rule prescribing previous experience of 3 years as an essential qualification for appointment as Section Officer and such experience qualification was prescribed for the first time only. On 17.7.1963. The learned counsel also contended that the learned single Judge erred in applying the rules prescribing experience qualification to the case of the appellant who was appointed as Section Officer on 1.7.1963 and admittedly there was no rule at that time. The further contention of the learned counsel for the appellant is that persons like the appellant who were appointed prior to 17.7.1963 cannot be covered by the subsequent rules and the subsequent rules cannot be invoked for fixing the seniority of persons who were appointed prior to the coming into force of the said rules. Mr.A.L.Somayaji again contended that even temporary service and *ad hoc* service should also be reckoned for the purpose of seniority and in support of his contention, the learned counsel relied on the following decisions:

- (1) *Direct Recruit Class II Engg. Officer's Association v. State of Maharashtra*, A.I.R. 1990 S.C. 1607; 1990 Lab.I.C. 1304; (1990) 2 S.C.C. 715,
- (2) *P.S.Mahal v. Union of India*, A.I.R. 1984 S.C. 1291; 1984 Lab.I.C. 176; (1984) 2 Serv.L.J. 197; (1984) 2 Lab.L.J. 282, (3) *Delhi W.S. & S. Disposal Committee v. R.K.Kashyap*, A.I.R. 1989 S.C. 278.

5. *Per contra*, Mr.R.Muthukumaraswamy, the learned counsel appearing for the first respondent in W.A.No.551 of 1988 and Mr.R.Ganesan, the learned counsel appearing for the first respondent in W.A.No.552 of 1988 submitted that the Division Bench in W.A.Nos.446, 591 to 594 of 1974 has found that the 3 year experience qualification is necessary for regularisation of the services of the appellant and others as Section Officers that the

finding of the Division Bench is binding on the appellant and therefore he cannot contend that the three year experience rule will not apply to him. The learned counsel further contended that the experience gained by the appellant as a result of *ad hoc* appointment cannot be taken into account for the purpose of fixing the seniority. The learned counsel for the first respondent also contended that on 1.7.1981, on the basis of the Division Bench Judgment in W.A.Nos.446, 591 to 594 of 1974 the 3rd respondent passed an order of regularisation. The said order of regularisation dated 1.7.1981 shows that during the period from 1.7.1963 to 27.3.1966, the appointment of the appellant was an *ad hoc* appointment and therefore, the experience gained by the appellants as a result of the *ad hoc* appointment cannot be taken into account for the purpose of seniority. In support of this contention, the learned counsel relied on the decisions,

(1) *Keshav Chandra Joshi v. Union of India*, A.I.R. 1991 S.C. 204. (2) *Union of India v. S.K.Sharma*, (1992) 2 S.C.C. 728.

6. First let us examine the position of law on this aspect before going into the factual details of this case. It is a settled position of law that *ad hoc* service cannot be counted for determining seniority. If the initial appointment is not according to the rules, subsequent regularisation of service does not entitle the employee to the benefit of the intervening *ad hoc* service for seniority. Seniority has to be reckoned from the date of regular appointment and not to be counted from the date of any stop-gap appointment. In *Direct Recruit Class II Engg. Officer's Association v. State of Maharashtra*, A.I.R. 1990 S.C. 1607; 1990 Lab.I.C. 1304; (1990) 2 S.C.C. 715, the Supreme Court has summarised the position of law on this aspect in the following terms:

"To sum up, we hold that.

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only *ad hoc* and not according to the rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by

following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

7. The question was have to examine in this case is whether the appellant's appointment as Section Officer on 1.7.1963 can be considered as an *ad hoc* appointment and whether his services from 1.7.1963 to 27.3.1966 can be considered only as *ad hoc* service. It must be remembered that on 1.7.1963 when the appellant was appointed as Section Officer there was no rule prescribing three year experience qualification as an essential qualification for appointment as a Section Officer and therefore, it cannot be said that his initial appointment was made according to rules. By the order dated 8.7.1963, the appellant was appointed as Section Officer (Civil) with effect from 1.7.1963 against the post sanctioned by the ministry. There is nothing in the order of appointment to show that the appellant's appointment is an *ad hoc* appointment. On the other hand, the order of appointment shows that the petitioner was appointed against the post sanctioned by the ministry and that he was put on probation. On 5.10.1971, the appellant was promoted temporarily as Assistant Engineer. Further on 14.2.1972, quasi promotion status of the appellant was declared in the post of Section Officer with effect from 1.7.1966. Again on 30.4.1975, the appellant was confirmed as Junior Engineer with effect from 18.12.1973. The appellant was also confirmed as Assistant Engineer with effect from 11.7.1977 by the order dated 20.10.1977. The above factual materials go to show that the appellant continued in the post of Section Officer-uninterruptedly till he was promoted to the next post. It is seen from the counter affidavit filed in the writ petition by the 3rd respondent herein that the condition that for initial appointment as Section Officer, the person should have got three years previous experience was first introduced only by the employment notice issued by the Tuticorin Harbour Project on 17.7.1963 and there was no such condition prior to the said notice. As pointed out by the learned single Judge, the following are the four categories of Section Officer/Junior Engineer appointed in the Tuticorin Port Trust:

1. Persons appointed as Section Officers prior to 17.7.1963.

2. Persons appointed between 17.7.1963 and

30.12.1968.

3. Persons appointed between 30.12.1968 and 1.4.1979.

4. Persons appointed on or after 1.4.1979.

However, the observation of the learned single Judge that out of these four categories of persons employed as Section Officers, the appellant who was appointed on 1.7.1963, did not possess the required three years experience is not correct because on the date when the appellant was appointed as Section Officer on 1.7.1963, no rule prescribing three years experience qualification was in force. The 3rd respondent has stated in detail the circumstances under which the first seniority list dated 24.9.1981 was prepared and the circumstances which necessitated the preparation and the circumstances which necessitated the preparation of the revised seniority list dated 15.3.1983 in para 9 of the counter affidavit filed in the writ petitions in the following terms:

"It is true a draft seniority list as on 31.3.1980 was circulated by me in proceedings No.A/U2/23021/81/D5587, dated 1.7.1981 as averred in para (7) of Petitioner's affidavit. It is also true that in the draft seniority list petitioner's seniority was shown against S.No.2 and the date of his regular appointment was given as 6.11.1963. But it is not correct to state that this is as it ought to be. It is true that in that seniority list 3rd respondent was shown against S.No.9 and 4th respondent was shown against S.No.11. But it is not correct to state that the 3rd and the 4th respondents must be deemed to have been regularly appointed with effect from 6.8.1965 and 28.3.1966 and that these dates viz., 6.8.1965 and 28.3.1966 are as they ought to be. The seniority list dated 24.9.1981 above referred to having been found to be inherently erroneous was later revised and a correct seniority list was formulated by me on the advice of the 1st respondent on 31.7.1982. It is therefore not open to the petitioner to make any contention based on the seniority list dated 24.9.1981. The contention made by the petitioner that the period of service of the 3rd respondent between 6.8.1962 to 5.8.1965 was to be treated as *ad hoc* appointment and he must be deemed to have been regularly appointed with effect from 6.8.1966 and the period of service of 4th respondent from 1.7.1963 to 27.3.1966 in the Tuticorin Harbour Project was, to be treated

as *ad hoc* appointment, and he must be deemed to have been regularly appointed with effect from 28.3.1966 are quite untenable. As there was no pre-condition of three years experience for appointment as Section Officer/Junior Engineer on the dates of their appointment, the contentions of the petitioner as regards the deemed dates of appointment in the case of 3rd and 4th respondents, are baseless and unwarranted. It is true that I have faithfully followed the judgment of this Honourable Court dated 15.11.1977, in fixing the *inter se* seniority. But in implementing the Judgment an error was committed by not applying the correct principles and the seniority list published on 24.9.1981 had therefore to be set right by rectifying the error. The condition of 3 years previous experience for appointment as Section Officers/Junior Engineer in the Tuticorin Harbour Project was for the first time introduced only by the Employment Notice issued on 17.7.1963. This condition cannot therefore be supplied retrospectively to those appointed before 17.7.1963. The seniority list published on 24.9.1981 had been formulated by me without taking into consideration the fact that the condition of 3 years previous experience cannot be applied to those appointed prior to 17.7.1963. The list therefore suffered from an apparent error. This error was pointed out to me by the 1st respondent and I corrected the error and prepared and published a revised list on 31.7.1982 vide proceedings No.A2/23021/82/D.4789, taking into account that the condition of 3 years previous experience will not apply to respondents 3 and 4 who were appointed prior to 17.7.1963. It is therefore submitted that the seniority list published on 13.7.1982 after rectifying the mistake originally committed is alone in conformity with the judgment of this Hon'ble Court dated 15.11.1977."

On a careful examination of the circumstances mentioned in para 9 of the counter affidavit we are fully satisfied that the 3rd respondent is justified in revising the seniority list dated 24.9.1981 and issuing a final seniority list dated 15.3.1983 because in the seniority list dated 24.9.1981, the 3rd respondent proceeded on the wrong basis that three year experience qualification is essential even in respect of appointment of Section Officers

made prior to 17.7.1963, even though no such rule was in force prior to 17.7.1963. It is also seen from the counter affidavit of the 3rd respondent that when the draft seniority list dated 1.7.1981 was circulated to the appellant he submitted his representation dated 14.10.1981 objecting to the seniority list dated 1.7.1981. The admitted factual position is that on 1.7.1963 when the appellant was appointed as Section Officer, there was no rule prescribing the condition that for initial appointment as Section Officer, a person should have been three years of previous experience. In the absence of such a rule it cannot be said that the initial appointment of the appellant was not made according to the rules and that the appellant's initial appointment as Section Officer on 1.7.1963 was only *ad hoc* appointment. There is nothing on record to indicate that the appellant's initial appointment as Section Officer was only on *ad hoc* basis particularly when his appointment was made in respect of a post sanctioned by the ministry and that the appellant was immediately put on probation. In as much as we come to the conclusion Section Officer on 1.7.1963 was not an *ad hoc* appointment, it necessarily follows that the appellant's service has to be reckoned from 1.7.1963 for the purpose of fixing seniority. If the appellant's service as Section Officer has to be reckoned from 1.7.1963, the appellant is admittedly senior to the first respondent in both these writ appeals and therefore, we see no infirmity in the seniority list dated 15.3.1983 fixing the *inter se* seniority of the appellant, the first respondent in these writ appeals and others. The decisions relied on by the learned counsel for the first respondent are not helpful to the first respondent's case because they are clearly distinguishable on facts. Admittedly, in the present case, on the relevant date, viz., 1.7.1963, there was a rule prescribing the service qualification and that is not the position in the decisions relied on by the learned counsel for the first respondent.

8. The learned single Judge, proceeds on the basis that in Writ Appeal Nos.446, 591 to 594 of 1974 batch, the Division Bench of this court by the judgment dated 15.11.1977 has held that the condition of 3 years prior experience would apply to all appointments in the category of Section Officer/Junior Engineers. However, we must point out that the learned single Judge has overlooked the fact that it was not brought to the notice of the

Division Bench which disposed of W.A.Nos.446, 591 to 594 of 1974 batch, that there was no rule at the time when the appellant was appointed as Section Officer prescribing the condition that three years experience is necessary for the initial appointment as Section Officers. Further, the Division Bench dismissed the W.A.Nos.446, 591 to 594 of 1974 batch on the ground that during the pendency of those writ appeals, the writ appellants have been promoted to the next post. In such circumstances, the learned single Judge ought to have seen that the observation of the Division Bench that the condition of three years previous experience would apply to all appointments of Section Officers was quite unnecessary for disposing of the W.A.Nos.446, 591 to 594 of 1974. A careful reading of the judgment in W.A.Nos.446, 591 to 594 of 1974 batch shows that the Division Bench has not laid down any principle with regard to the fixation of the *inter se* seniority of the Section Officers/Junior Engineers. For the reasons stated above, we are unable to agree with the conclusion arrived at by the learned single Judge for quashing the proceedings in Mo.CE/23021/82-A/U2/D 1528 dated 15.3.1983.

9. In view of the above discussions of ours, we are obliged to interfere with the common order of the learned single Judge in W.P.Nos.2684 of 1983 and 2733 of 1986, in these Writ Appeals. Consequently the writ appeals are allowed, the order of the learned single Judge is set aside and W.P.Nos.2684 of 1983 and 2733 of 1986 shall stand dismissed. No costs.

B.S.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Swamidurai, JJ.*

O.S.A.No.166 of 1983

24th April, 1992.

A.K.Gopal and others

...*Appellants*

v.

S.Vasanthan and others

...*Respondents.*

Wills - Execution - Proof - Cordin al principles.

Proof of execution of the Will is accepted only if the three cardinal questions are answered in the affirmative, namely, has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what is contained? and whether the special requirements of attestation prescribed by Sec.63 of the Indian Succession Act had been complied with.

[Para 5]

Cases referred to:

Venkatachala v. B.N.Thimmajamma, A.I.R. 1989 S.C. 443. [Para 5].

Jones v. Great Westmen, (1930)47 B.L.R. 39. [Para 11]

Shyam Sunder v. State of Rajasthan, A.I.R. 1974 S.C. 890. [Para 11]

O.S.Appeal under Clause 15 of the Letters Patent against the Order of Singaravelu, J. dated 25.7.1983 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in T.O.S.No.3 of 1982 (O.P.No.363 of 1981).

P.Veeraraghavan, for Appellants.

G.M.Nathan, for Respondent Nos.1 and 2.

P.Seshadri, for Respondent Nos.3 to 6.

The Judgment of the Court was delivered by *Mishra, J.*:- The caveators/defendants in a testamentary proceeding have appealed questioning the grant of probate of the last Will and Testament of late K.Kulasekaran alias A.K.Sekhar who died on 6th August, 1976. Under the said Will Sekhar bequeathed certain properties to his three daughters appointing two sons-in-law as executors of the Will. The Will had been deposited in the Bank of Baroda by the testator himself.

2. In response to the citation issued, the appellants who are the sons of the testator A.K.Sekhar contested the case of the bequeath to the daughters only alleging that there was no occasion for the testator to execute the Will in their favour since he

had already gifted jewels and cash to them. They brought on record the fact that in the year 1972, the testator had executed settlement deeds and gifted one house each to his four sons. He never thus, according to them intended to give any property to his daughters and alleged that the Will must have been obtained by the sons-in-law and the daughters exercising undue influence and compulsion upon the testator and that the Will could not have been written by their father with the free mind and without any pressure. They accordingly alleged that the Will appeared to be a fraudulent document got up by the daughters to defeat the rights of the sons. The testator who died four years after the execution of the Will was an Art Director in Film Studios. He had good wealth gained by the learning and profession of Art Director and in the property that he had acquired were five houses with appurtenant grounds in the City of Madras. In the year 1972 he executed a deed of settlement and gave four houses to his four sons, one house each. More than four years after the gifts deed in favour of the sons, he executed the impugned Will bequeathing the house property in a posh locality of the City of Madras to his three daughters.

3. The Will however which was brought to the Court from the Bank of Baroda, has been proved by one of the two attestors P.W.1, who also has been Assistant Director of Films at Madras. According to him, A.K.Sekhar executed a Will in his house at Mahadeva Iyer Street. Besides himself, one Thota Venkateswara Rao who was also an Assistant Art Director and working along with the testator, attested the Will. He deposed that the testator sent for him and when he went to his (testator's) house, he found the other witness Thota Venkateswara Rao there. The testator showed him the papers and explained to him that he was making a Will and requested him and Thota Venkateswara Rao to attest the Will. After telling them about the Will, the testator signed the Will in their presence in each page of the document. Thereafter, P.W.1 and Thota Venkateswara Rao attested the Will by affixing their signature. Thus, according to this witness, both the attesting witnesses as well as the testator signed the Will after knowing about its contents in the presence of each other. On the question about the health condition of the testator P.W.1 stated that he was hale and healthy at the time of the execution of the Will and

that the entire Will as written by the testator himself in his own hand. He claimed familiarity with the handwriting of the testator. The trial Court has found on the basis of the evidence that the execution of the Will has been proved. Noticing the cross-examination and some contentions as to the testimony of this witness, learned trial Judge has stated:

“Though there was lot of cross-examination of this witness, nothing worth mentioning was elicited from him. It is not challenged that P.W.1 was the Assistant Director in films while the testator was the Art Director of prestigious studios at Madras like Vauhini Studios, A.V.M.Studios. The other attester is assistant Art Director, who the testator know for more than a quarter century. Therefore, these are the most competent and natural witnesses to attest the bequest of the testator who was working in the Film Studio. It is not suggested that P.W.1 is a stranger or a chance witness to this Will. On the other hand, it was suggested in cross-examination that the testator came to the house of the witness at Mouni Road and took his signature in the document. The evidence of P.W.1 is unshakable and he is a witness of truth and a man of status he has no axe to grind against the defendants. The result is the evidence of P.W.1 is sufficient proof of the execution of the Will according to law.”

4. Some comments however have been made before us on the deposition of P.W.1 and it is contended that the court should reject the evidence of this witness as he is not consistent in his deposition that he arrived at the house of A.K.Sekhar because he had been called by him and that he was not a stranger or a chance witness to the Will. An attempt has also been made to suggest that many others including the caveators/appellants who lived in the house, never saw P.W.1 or Thota Venkateswara Rao arriving at A.K.Sekhar's residence at Mahadeva Iyer Street. In any case when there was another attesting witness and it is not the case that he was not available to depose as a witness, on the sole testimony of P.W.1 the court should not have held that the Will is proved according to law. We have gone through the evidence of this witness and found that it has clearly come out that he had been visiting A.K.Sekhar's house frequently and that A.K.Sekhar had in fact sent a message to call him and since he received the message he arrived only

to find that Sekhar intended to execute a Will and wanted him and Thota Venkateswara Rao to attest the Will. Why however Thota Venkateswara Rao has not been examined as a witness of the respondents, is also explained in the facts that he (Thota Venkateswara Rao) had been hobnobbing with the caveators/respondents and came to court with them on few occasions, however, he never appeared to depose, it seems he decided to abstain.

5. In *Venkatachala v. B.N.Thimmajamma, A.I.R. 1989 S.C. 443*, the Supreme Court has stated what is the true legal position in the matter of proof of Wills. In the words of Supreme Court:

“It is well known that the proof of Wills presents a recurring topic for decision in Courts and there are a large number of judicial Pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Secs.67 and 68, Evidence Act are relevant for this purpose. Under Sec.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Secs.45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Sec.68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Secs.59 and 63 of the Indian Succession Act are also relevant. Sec.59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression ‘a person of sound mind’ in the context. Sec.63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall

be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of proof of Wills. It would *prima facie* be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Sec.63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

We have chosen this authority of the Supreme Court for the reason that the above principle has invariably been quoted in almost all subsequent judgments of the Supreme Court as well as the High Courts and proof of execution of the Will is accepted only if the three cardinal questions are answered in the affirmative, namely, has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? and whether the special requirements of attestation prescribed by Sec.63 of the Indian Succession Act had been complied with? In the instant case, it is clear on the evidence of P.W.1 that the testator not only signed the Will in the presence of the other attesting witness, but the entire contents of the Will had been in his hand writing. As the author, of the contents of the Will he fully know, that he was writing. He also fully understood, according to the witness the nature and effect of the dispositions in the Will for he clearly told P.W.1 as well as the other attesting witness that he intended to execute a Will in favour of his daughters.

6. A simple and legalistic approach, however, is not approved by the Supreme Court and in the Judgment in the case of *H.Venkatachala v.*

B.N.Thimmajanna, A.I.R. 1989 S.C. 443, it is stated as follows:

"However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world, cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testators' mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder, can be taken to be discharged on proof of the essential facts just indicated."

We have no reason, while exercising the caution as indicated above in the judgment of the Supreme Court, to take any different view than the view expressed by the learned trial Judge that P.W.1 who is one of the two attesting witnesses has given disinterested and satisfactory evidence which constitutes sufficient proof of the execution of the Will by A.K.Sekhar. The evidence of this witness is also to the effect that A.K.Sekhar was in a sound and disposing state of mind when he put his signature upon the Will which has been written by him and when the attesting witnesses put their signatures upon the Will.

7. It has almost become ritualistic for all caveators and defendants in a testamentary proceeding to allege (1) that the testator had no sound and disposing state of mind, (2) that he acted under undue influence of the beneficiaries under the Will or subjected to coercion fraud etc and

invariably is every case, the execution of the Will is alleged to be surrounded by suspicious circumstances. This is always so even though there has not been one or more circumstances suggesting any suspicion as to the execution of the Will. The Supreme Court has also pointed out in the above judgment that there may be causes in which the execution of the Will may be surrounded by suspicious circumstances and added as follows:

"The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the attestor may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free Will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free Will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

8. On the touch stone of the above, it is not possible in the instant case to say that the signature of the testator has been shaky doubtful and that the evidence of P.W.1 has not removed any doubt or suspicion as to the genuineness of the signature of the testator. There is also nothing preceding or proceeding the execution of the Will to create any doubt as to the disposing state of

mind of the testator. The Will after execution, was deposited in a Bank. The testator, however did not register the Will. But then, that alone is not a suspicious circumstance. There is nothing unnatural also for a father to divide his only remaining self acquisition amongst his daughters for the benefit of his daughters after his death. It is nothing unnatural for the father to demise the only self-acquired house property left in his hands after giving one house each to his four sons, for the benefit of his three daughters. Yet some allegations have been made by the caveators/appellants and some arguments have also been advanced before the learned single Judge in this regard. We shall be doing no better job than what has been done by the learned Single Judge in this behalf by ourselves entering into each such circumstance that according to the caveators/appellants are suspicious, or grave suspicion about the execution of the Will. It will be sufficient, in our opinion if we reiterate in the words of the trial Judge and indicate how on the basis of the evidence that has been adduced on behalf of the party nothing is show to the court to entertain any suspicion or doubt and in any case, the defendants/appellants have not been able to discharge the onus which as the Supreme Court has itself stated "if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveators".

Learned trial Judge has stated:

"Though vanquished the defendants could not reconcile themselves with the Will of the father bequeathing one house to his three daughters and picked holes in the plaintiffs' case by contending that there are certain suspicious circumstances in the execution of the Will. According to them the suspicious circumstances are as follows:

Firstly it was contended on behalf of the defendants that the father had studied only upto the 9th standard and therefore he could not have written the terms of the Will in English Language as found in Ex.P-1. The evidence is that Ex.P-1 was written by the testator in his own hand writing throughout and this handwriting has not been challenged by the defendants. Their grievance is that the father who was educated only upto 9th standard would not have written the Will in such chaste English

and that it might have been copied. This argument is bankrupt if we probe into the evidence. The defendants themselves have filed a number of documents like account books, pass books, letters *viz.*, Exs.D-39, D-28, D-27, D-25, D-24, D-23, D-22, D-11, D-12 and D-13 which clearly establishes that A.K.Shekhar's knowledge of English was sound at that has was maintaining accounts in English. He was having correspondence with his daughters only in English and it is not denied that he wrote the contents of the Will in his own hand. He was a very knowing man being a leading Film Art Director in the City of Madras over 35 years of backing. Just because his school education was only upto 9th standard it is futile to contend that he had no sufficient knowledge in English. The documents stated supra clearly show that he has acquired more than sufficient knowledge of English and even the daughters write letters to him only in English.

The second contention of the defendants was that the father used to sign only as A.K.Sekhar and that he never signed in two places one as A.K.Sekhar and the other as A.Kulasekaran. The argument also is devoid of substance A.K.Sekhar is only an abbreviation of A.Kulasekaran. While executing valuable document, viz., Will the testator was careful enough not only to sign the name of A.K.Sekar, but also signed as A.Kulasekaran. If fact he has signed in two places in Ex.P-2 namely, sealed cover under which he deposited the Will with the Bank of Baroda on 6.8.1976. Even on the top of the sealed cover, he has clearly mentioned A.Kulasekaran *alias* A.K.Sekar signed in two places. Therefore, nothing turns upon the facts that the testator signed in his own hand his abbreviated name and the full name. The defendants then contended half-heartedly that the signature in the disputed document is different from the admitted signature in Exs. D-33 and D-34 and that the former does not stand for comparison. This argument can be characterised as desperate as it is very clear even to the naked eye that the signature in Ex.P-1 and the admitted signature in Exs.D-33 and D-34 are exactly similar and identical. There is no iota of difference between the two. As already pointed out, if the defendants are serious about this contention, they could have

very well sent the disputed signature for the handwriting expert for comparison and opinion. They dare not do it. And as already pointed out their main attack is that the Will was executed under pressure from the daughters. The result of my discussion is that I do not see any suspicious circumstances whatsoever in Ex.P-1 executed by the testator. On the other hand it is the natural Will of any prudent man. There are no intrinsic improbabilities of the execution of the Will. The father (testator) had already settled four houses on each of the four sons and the remaining house was given to his 3 daughters jointly. In other words he gave one house each to four of his sons and he gave only one house jointly to all the three daughters. It is not as if he gave the house property to the daughters free from encumbrances. He directed the daughters and son-in-law who are beneficiaries under the Will to pay all incidental taxes on the property to pay all the maintenance charges of the property, to pay all taxes due on his behalf, to pay estate duty for the abovesaid property and to meet all his death and funeral expenses and medical expenses incurred for him. The Will recites "after meeting the above and other incidental expenses the remaining amount shall be shared equally amongst my three daughters mentioned here below". All the three daughters had been already married and they are living with their husbands in different places. One son-in-law was in L.I.C., the other a Co-operative Sub Registrar in Andhra Pradesh and the third son-in-law a Chartered Accountant at Coimbatore. Therefore, the Will is a natural Will of the father who in his last days thought he should provide the daughters also with some properties. It is important to note that the admitted evidence is that the father's relationship with the sons was very cordial at the time of execution of the Will and he was living with his last son at West Mambalam. What is more under this Will he gave all his personal furniture and other art materials, library etc., to his last son Srinivasalu. That the Testator was a strong Willed and an independent man is evident from the fact that even though he lived with his last son in the last few years of his life, he was paying Rs. 350 per month for his stay and food to his own son-vide admission of D.W.1 in cross-examination. It

was while he was residing in his last son's house he executed the Will in that house and that too on an auspicious 'Varalakshmi Viradham' day, perhaps with the knowledge of his sons. The father executed the Will openly and he had, nothing to hide from his sons and he was careful enough to deposit the same on the very same day of execution in the back with directions to open the same only after his death. Now with reference to Ex.P-2 the sons are not able to reconcile with the Will of the father bequeathing some property to the daughters and they are uncharitably questioning the Will of their father after his death."

9. Learned counsel for the appellants has reiterated each of the circumstance and taken us through the evidence of witnesses and several documents produced by one of the other party to emphasis (i) the father had no natural love for the daughters so as to exclude his sons from inheritance in the most valuable property that he possessed: (ii) that sons-in-law of the testator were or at their instigation, his daughters were every time coercing him to part with either cash or kind and there is every reason for him to say that it was under their coercion that the testator executed the Will and (iii) the testator always signed as M.K.Sekhar excepting the Will where he signed as Kulasekaran alias A.K.Sekhar. Why he wrote his full name when in any other document he only used only part of his name and that it is suspicious why the execution of the Will was kept a secret and not disclosed until the demise of the testator to the caveators/appellants particularly when there are documents on the record to show that the propounders knew about the above execution of the Will before the death of the testator.

10. It is indeed the rule and the Supreme Court has also in the abovesaid judgment in *Venkatachala v. B.N.Thimmajamma*, A.I.R. 1989 S.C. 443, said that when the propounders themselves take a prominent part in the execution of the Will which confers on them substantial benefits, this itself is a suspicious circumstances attending the execution of the Will. But on the facts that had been presented in the instant case, it will be wholly unnatural to be guided by such remote suggestion as fallen from the caveators/appellants that it appears that the sons-in-law exercised undue influence upon the testator and the applicant or they

coerced him to execute the Will. The evidence in this regard is generally too remote to be relevant both in point of time as well as in exercise of any influence. Sons were too Willing to appropriate the houses settled in their favour by their father; but not ready to reconcile with the division of one house between the three daughters. If the Will is viewed independently, the entire house has been given to the three daughters and sons had been left out. But if the narration of the facts is kept in mind, it is fully evident that the father gave almost equal care to the interest of the sons by giving to each one of them a house and no less care to the daughters by providing them equal share in the 5th house that he had acquired as gain of his own monies. There are absolutely no circumstances beyond as noticed by the learned single judge and by us which create even a semblance of doubt as to the validity as the Will.

11. Before we part with this judgment, we may indicate that we had been careful in keeping in mind the dividing line between conjecture and inference - Lord Macmillan said in his dissenting judgment in *Jones v. Great Westmen*, (1930)47 B.L.R. 39:

"The dividing line between conjecture and inference is of course a very difficult one to draw. A conjecture was be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

The above passage has been quoted with approval by the Supreme Court in the landmark judgment in *Shyam Sunder v. State of Rajasthan*, A.I.R. 1974 S.C. 890. The entire evidence that is brought on record on behalf of the caveators/appellants is nothing but bundle of informations showing certain correspondence between the daughter and the father or between brothers and sisters or between brothers-in-law themselves. In these there are one of the other sentence or word that appears to suggest either a demand of a daughter to receive some money from the father or a demand of the sister to receive some money from the brother or such payments made either by the father or the brother to the daughter or the sister, or that there has been some complaints against the attitude of one of the other about the properties covered by the Will. Unless one reports to conjectures which

Will not be of value, it is not possible to draw any reasonable deduction as to the validity of the execution of the Will by the testator.

12. For the reasons aforementioned, we find no merit in the above appeal. The appeal is accordingly dismissed. However, there will be no order as to costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan, J.

C.R.P.No.3209 of 1991 9th September, 1992.

M.A.A.Mahab and another ...Petitioners
v.

Jayams Engineering & Co. Ltd., Madras. ...Respondent.

(A) Evidence Act (I of 1872), Sec.17 - Admission made by landlord in application for fixation of fair rent - Can be explained by him. [Para 5]

(B) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.4 - Proceedings for fixation of fair rent - Market value of site - To be considered on the basis of entire evidence on record. [Para 5]

Cases referred to:

M/s.Dovo Tax Company v. T.R.Ramnath, 99 L.W. 269. [Para 5]

Krishnaswamy Mudaliar v. The Controller and Authorised Officer of Buildings, 99 L.W. 705. [Para 5]

The Collector of Madras, Accommodation Wing, Madras v. A.R.Gajendran, (1988)2 L.W. 49. [Para 5]

A.Emberumanar v. K.Raghavan, (1988)1 L.W. 568. [Para 6]

Savani Transports (P) Ltd. v. Jamal Mohammed, (1989)1 L.W. 172. [Para 6]

B.Kumar, for Petitioners.

Jose Ukkur, for Respondent.

The Court made the following

ORDER: This revision petition arises out of an application for fixation of fair rent filed by the

landlord/petitioner herein. According to the petitioner, the ground floor of the building in No.138, Thambu Chetty Street, comprises of an area of 2,547 sq.ft. and it has been let out to the respondent for non-residential purposes. The agreed rent is Rs.1,200 per mensem. The landlord claimed Rs.16,516 as fair rent. The Rent Controller held that the area of the ground floor in the occupation of the respondent is only 2,356 sq.ft. He fixed the fair rent at Rs.2,861 per mensem. On appeal, the Appellate Authority increased it to Rs.4,055 per mensem. A revision was filed by the respondent in this Court in C.R.P.No.2355 of 1991. It was dismissed *in limine* on 27.9.1991.

2. The landlord has challenged the same order of the Appellate Authority in this revision petition. The main objection raised by the petitioner is that in the matter of calculating the cost of construction of the building and also the market value of the site, the Appellate Authority has clearly erred by not considering the relevant evidence on record and fixing the value unconnected with the evidence produced before the court. As regards cost of construction, the Appellate Authority has fixed it at Rs.85 per sq.ft. It is the contention of the petitioner that he has produced the Min-Technical Hand Book published by the Association of Engineers and Assistant Engineer's Association of the Tamil Nadu Public Works Department. That is published in the year 1990. That is marked as Ex.P-19. The petitioner contends that the Appellate Authority is in error in completely ignoring the said document on the ground that the petition having been filed in 1987, the rates mentioned in the hand book are not relevant. It is stated by learned counsel for the petitioner that evidence has been let in as to how the calculation should be made on the basis of Ex.P-19 for the relevant year 1987. No reference has been made by the Appellate Authority to any such evidence.

3. It is also contended that the worksheet filed by P.W.4, the Engineer examined by the landlord is based upon the figures contained in Ex.P-19 as calculated for the year 1987. There is no reference by the Appellate Authority to the evidence of P.W.4 or the work sheet filed by him.

4. Similarly with regard to the market value of the site, the Appellate Authority has stated that the relevant documents are Exs.P-26, P-27 and P-29 and the market value shall be fixed only with the help of the said documents. The Appellate

Authority has rejected the documents filed by the tenant and also refused to accept the finding of the Rent Controller that the value of the site is Rs.4,50,000, per ground. But, unfortunately, the Appellate Authority has not considered the documents on record properly. There is no document marked as Ex.P-29. The total number of documents filed on the side of the landlord is only 28. Ex.P-26 is a photograph of a building. That does not in anyway help the Court in fixing the market value of the land. Thus, the Appellate Authority is in error in referring to Exs.P-26 and P-29 for fixing the market value of the land. However, Ex.P-27 is a relevant document which has been filed by the landlord. Similarly, Ex.P-17 is another document which is a said deed of the year 1985 filed by the landlord. While referring to Ex.P-17 at an earlier stage in the course of discussion, the Appellate Authority has stated that the value of the land is mentioned as Rs.9,00,000. That is clearly erroneous. The value mentioned in the document is Rs.19,00,000 and not Rs.9,00,000. It is based on that erroneous impression the Appellate Authority has ultimately fixed the value of the land at Rs.9,00,000 per ground. Hence, the order of the Appellate Authority is clearly vitiated.

5. It is argued by learned for the respondent that the landlord has himself mentioned the market value of the site is Rs.10,000 in the petition for fixation of fair rent. It is contended by learned counsel for the petitioner that the value mentioned in the petition is not conclusive and it is the duty of the Court which fixes the fair rent to take into account the evidence on record and arrive at the fair rent. He places reliance on the judgments of this Court in *M/s.Dovo Tax Company v. T.R.Ramnath*, 99 L.W. 269, *Krishnaswamy Mudaliar v. The Controller and Authorised Officer of Buildings*, 99 L.W. 705 and *The Collector of Madras, Accommodation Wing, Madras v. A.R.Gajendran*, (1988) 2 L.W. 49. Learned counsel for the respondent contends that the statement in the petition for fixing of fair rent would amount to an admission and it is not open to the landlord to go behind the same. But, it is settled law that admissions made by parties can be explained. The rulings referred to above and cited by learned counsel for the petitioner show that it is open to the fair rent court to fix the rent at a value higher than what is stated by landlord and therefore, the contention of learned counsel for the respondent

cannot be accepted. But, the Court has to consider what is the market value of the site on the basis of the entire evidence on record. As the Appellate Authority has not considered the evidence on record properly, the matter has to go back and he has to decide the question in accordance with law. 6. With regard to P.W.1 it is for the Appellate Authority to take into account the entire documentary evidence including Ex.P-19 and the oral evidence of the parties and ascertain what the cost of construction is. It has been held by this Court in *A.Emberumanar v. K.Raghavan*, (1988) 1 L.W. 568 and *Savani Transports (P) Ltd. v. Jamal Mohammed*, (1989) 1 L.W. 172, that P.W.D. rates, are relevant for the purpose of fixing the cost of construction. The Appellate Authority shall bear in mind the principles laid down in the decisions of this Court and proceed to fix the fair rent in accordance with law.

7. In the result, the C.R.P. is allowed, the order of the Appellate Authority in R.C.A.No.1152 of 1990 is set aside and the matter is remanded to the Appellate Authority, viz the VIII Judge, Court of Small Causes, Madras, for fresh disposal according to law and in the light of the observations contained in this order and in accordance with the principles laid down in the various decisions of this Court. If the parties want to adduce any further evidence, they may file applications in that regard and the Appellate Authority may consider and dispose of the same in accordance with law. It is represented that the Court of VIII Judge in the Court of Small Causes, Madras, is now vacant. The Chief Judge, Court of Small Causes may assign the appeal to any other Judge who is empowered to deal with appeals under the Tamil Nadu Buildings (Lease and Rent Control) Act. There will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.173 of 1992 16th October, 1992.

S.A.Azizullah and another ...Petitioners
v.
Sakthivelu and others ...Respondents.

Decree - Execution - Decree granting possession of suit site to plaintiff with mandatory injunction to defendant to remove superstructure thereon - Execution petition - Decree for mandatory injunction alone time barred - Execution petition if liable to be dismissed in toto.

Where a decree in suit grants possession of the suit site and also grants a mandatory injunction directing the defendants to remove the superstructure put up by them on the suit site, an execution petition filed by the plaintiff cannot be dismissed *in toto* merely because the decree for mandatory injunction cannot be executed because of bar of limitation under Art.135 of the Limitation Act. The Court cannot dismiss the E.P. *in toto*, but should order the E.P., relating to the possession of the suit land. In such a case, the court should grant an opportunity to the judgment-debtors to remove the superstructure. If within the time allowed the judgment-debtors do not remove the superstructure, then the Executing Court shall direct delivery of both the site and superstructure to the decree-holder. [Paras 4 and 5]

Cases referred to:

Duraisami Mudaliar v. Ramasami Chettiar, 92 L.W. 144. [Para 2]

Ramrup Rai v. Gheodhari Kuer, A.I.R. 1980 Pat. 197. [Para 2]

Bashir Ahmed v. Menbdi Hasan, A.I.R. 1982 All. 321. [Para 2]

Kauk Sike v. Ong Hock Sein, A.I.R. 1927 Rang. 82. [Para 2]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Dharmapuri, dated 9.7.1991 and made in E.P.No.9 of 1990 in O.S.No.303 of 1977 (on the file of the Court of the Subordinate Judge, Krishnagiri).

V.Krishnan, for Petitioners.

N.Sathiamoorthy, for Respondent No.3.

The Court made the following

ORDER: This civil revision petition is filed by the decree-holders against the dismissal of their E.P.No.9 of 1990 for executing the decree obtained by them in O.S.No.303 of 1977 on 15.10.1979. The material portion of the decree runs as follows:

"1. That the plaintiffs' title be and the same is hereby declared to the suit site."

2. That the defendants do deliver the possession of the suit property to the plaintiffs.

3. That the defendants do remove the superstructure put by them in the suit site by means of mandatory injunction at their own cost."

So clause 2 of the decree grants possession of the suit site to the plaintiffs/petitioners and since there is a superstructure on the suit site, as per the prayer in the suit, clause 3 grants a *mandamus* directing the defendants/respondents to remove the said superstructure put up by them in the suit site. The abovesaid E.P. is for executing the said decree for possession and for mandatory injunction to remove the abovesaid superstructure. The Court below has dismissed the E.P. *in toto* on the ground that the abovesaid clause 3 of the decree being a decree for mandatory injunction, cannot be executed in view of Art.135 of the Limitation Act, which prescribes only a three year period for the execution of the decree. The E.P., was filed on 2.3.1990, and as already stated, the decree is dated 15.10.1979. Since the said three years-period has elapsed, the Court below has refused to execute the decree *in toto*. Aggrieved by the said order in the E.P. the decree-holders have preferred this civil revision petition.

2. The learned counsel for the petitioners submits that even assuming that the portion of the decree, which grants the abovesaid mandatory injunction is not executable in view of Art.135 of the Limitation Act, the Court below should not have dismissed the E.P. *in toto* but should have ordered the E.P. in so far as the abovesaid Clause 2 of the decree relating to possession of the suit site. He also submits that the Court below has erred in distinguishing the decision in *Duraisami Mudaliar v. Ramasami Chettiar*, 92 L.W. 144. In the said case, there was no such mandatory injunction decree, though there was a decree for possession. In that context, this Court in the abovesaid decision observed thus:

"Where, however, the superstructure were put

up before the institution of the suit and were not ordered to be removed as a part of the mandate in the decree, the proper course in appropriate cases would be to direct the judgment-debtor to remove the superstructures so put up by him so as to effectuate vacant delivery of the suit site to the decree-holder."

But the Court below has held that this decision is not applicable since in that case there was no decree for mandatory injunction for removal of the superstructure. The learned counsel for the petitioners also relied on the decisions in *Ramrup Rai v. Gheodhari Kuter*, A.I.R. 1980 Pat. 197, *Bashir Ahmed v. Menbdi Hasan*, A.I.R. 1982 All. 321 and *Kauk Sike v. Ong Hock Sein*, A.I.R. 1927 Rang. 82, for substantiating his abovesaid argument.

3. On the other hand, the learned counsel for the respondents argues that *Duraisami Mudaliar v. Ramasami Chettiar*, 92 L.W. 144, is distinguishable since in that case there is a specific decree for mandatory injunction.

4. I have considered the rival submissions. All that the learned counsel for the petitioners argues is that the possession decree, which is lawfully obtained, should at least be executed, since admittedly there is no bar of limitation with reference to that portion of the decree and that the petitioners should not be in a worse position than a person, who has only obtained a decree for possession of the suit site and not any mandatory injunction decree for removal of the superstructure over it. There is considerable force in the argument of the learned counsel for the petitioners. Because the mandatory injunction decree cannot be executed in view of the law of limitation, it cannot be said that the other portion of the decree, viz. the decree for possession, also cannot be executed. Just as in the abovesaid *Duraisami Mudaliar v. Ramasami Chettiar*, 92 L.W. 144 even in *Ramrup Rai v. Gheodhari Kuter*, A.I.R. 1980 Pat. 197, is also a case where there is no decree for mandatory injunction, but there is only a decree for possession of the site. There also, it has been observed as follows:

"It cannot be disputed that where the defendant put up construction *pendente lite* or after the passing of the decree, then the Executing Court can order demolition of the structures and deliver vacant possession. But, where the construction are put up before the institution of the suit, the Executing Court cannot order

demolition of the structures, but would simply deliver possession of the land and the buildings after removal of the judgment-debtor therefrom. In either case, however, the court may before ordering delivery of possession give time to the judgment-debtor to remove himself the materials, if he so liked."

The other decisions cited by the learned counsel for the petitioners also reiterate the same view. No doubt, *Bashir Ahmed v. Menbdi Hasan*, A.I.R. 1982 All. 321, is a case of composite decree including a decree for mandatory injunction. But there too, though the mandatory injunction was not allowed to be executed, the other portion of the decree was allowed to be executed.

5. Therefore, the order of the Executing Court in E.P.No.9 of 1990 on the file of the Sub Judge, Dharmapuri in O.S.No.303 of 1977 on the file of the Sub Judge, Krishnagiri, is set aside and this civil revision petition is allowed, with costs. The Executing Court is directed to post the E.P. immediately after the receipt of the copy of this order (after giving short notice to the parties counsel), and give an opportunity to the judgment-debtors by granting four weeks time, for themselves removing the superstructure. If within the time allowed the judgment-debtors do not remove the superstructure, then the Executing Court shall direct delivery of both the site and the superstructure to the decree-holders.

V.K.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam and Somasundaram, JJ.

W.A.No.519 of 1991

17th August, 1992.

The Tamil Nadu Electricity Board represented by its Chairman

...Appellant

v.

R.Srinivasan

.. Respondent.

Tamil Nadu Private Electricity Supply Undertakings (Acquisition) Act (1973), Sec.15 - Tamil Nadu Private Electricity Supply Undertakings

(Acquisition) Rules (1973), Rule 17(1) - Person in category of Engineer-in-charge under the Salem-Erode Electricity Distribution Company transferred to the Tamil Nadu Electricity Board on the former being taken over - Fitted into category of Assistant Divisional Engineer on the basis of his experience - Order, if sustainable.

The respondent joined the Salem-Erode Electricity Distribution Company as a Junior Engineer on 17.10.1963 and was promoted as Assistant Engineer in 1967 and as Engineer-in-charge in June, 1973. The Government of Tamil Nadu took over the Company under the Tamil Nadu Private Electricity Supply Undertakings (Acquisition) Act, 1973. The respondent was fitted in the post of Assistant Divisional Engineer. According to the respondent, he ought to have been appointed as a Divisional Engineer. In fact one Vasudevan who was also an Engineer-in-charge was appointed as Divisional Engineer. He filed a writ petition challenging the action. A learned single Judge allowed the petition. In appeal,

Held:- The nature of the powers, duties and responsibilities of the Engineer-in-charge in the service of the erstwhile licensee company was higher and more onerous than that of a Divisional Engineer under the Board and it is perhaps for this reason that under the scheme of absorption, the post of Engineer-in-charge in the service of the licensee company was equated to that of Divisional Engineer in the service of the Board. It is significant that neither under the Act nor under the Rules nor even under the scheme of absorption, any weightage has to be given to experience. It may be that on the date of absorption, persons in the category of Engineers-in-charge might have put in varying or different years of service but that is not the criterion at all either under the Act or the Rules for the purposes of considering the fitment of the Engineers-in-charge in the erstwhile licensee companies in the service of the Board. It may also be observed that an Engineer-in-charge of the name of Thiru V. Vasudevan who was in the service of Tirunelveli-Tuticorin Electrical undertaking had been absorbed into the service of the Board on 1.12.1973 as a Divisional Engineer while the respondent who was also an Engineer-in-charge though in Salem-Erode Electricity Distribution Company was not so absorbed. It is in this context it has to be remembered that the nature of the powers, duties and

responsibilities of Engineers-in-charge under the erstwhile licensee companies is the same but one such Engineer-in-charge viz., the respondent herein had been discriminated against in the matter of absorption into the service of the Board with reference to the other Thiru V. Vasudevan. When the provisions in the Act, Rules or even in the scheme of absorption do not refer to seniority as a criterion at all, it is difficult to uphold that fitment of the respondent who was an Engineer-in-charge in the service of the erstwhile licensee company as an Assistant Divisional Engineer while Thiru V. Vasudevan, similarly placed had been fitted as a Divisional Engineer. To put in differently, the respondent and Thiru V. Vasudevan who were both holding the post of Engineer-in-charge and discharging the same duties and responsibilities on the same scale of pay in the service of the erstwhile licensee companies had been fitted differently in that Thiru V. Vasudevan had been fitted in a higher post as a Divisional Engineer on a higher scale of pay while the respondent had been fitted against a lower post on a lesser scale of pay and this action of the appellant cannot at all be accepted or upheld. [Para 6]

Case referred to:

P. Savits v. Union of India, A.I.R. 1985 S.C. 1124. [Paras 5, 6]

Appeal under Clause 15 of the Letters Patent against the Order of Kanakaraj, J., dated 25.7.1990 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.11437 of 1981 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* *mandamus* calling for the records relating to the orders of the respondent made in B.P.Ms.No.591, (Admn.) dated 30.9.1981 and the consequential seniority list published by the respondent in its proceedings B.P.Ms.No.629, (Admn.), dated 22.10.1981, quash the same in so far as they affect the petitioner here as and direct the respondent herein to absorb the petitioner in as equivalent category grade or cadre namely Divisional Engineer with effect from 1.12.1973 as per law.

R. Krishnamoorthy, Senior Counsel, for *P.T. Narendravasan*, for Appellant.

M.R. Narayanaswami, Senior Counsel, for *M.R. Raghavan*, for Respondent.

The Court made the following

ORDER:- This appeal has been preferred by the Tamil Nadu Electricity Board against the order in

W.P.No.11437 of 1981 allowing that writ petition filed by the respondent herein praying for the issue of a writ of *certiorarified mandamus* calling for the records relating to the orders of the appellant in B.P.Ms.No.591 (Admn.), dated 30.9.1981 and the consequential seniority list published by the appellant in its proceedings B.P.Ms.No.629 (Admn.), dated 22.10.1981 and quash the same in so far as they affected the respondent and to direct the appellant to absorb the respondent in an equivalent category, grade or cadre, viz., Divisional Engineer with effect from 1.12.1973.

2. Briefly stated, the facts giving rise to this writ appeal are as follows: On 17.10.1963, the respondent joined Salem-Erode Electricity Distribution Company as a Junior Engineer and was promoted as an Assistant Engineer from 1.1.1967. A further promotion as Engineer-in-charge was also given to the respondent in June, 1973. The Government of Tamil Nadu took over Salem-Erode Electricity Distribution Company under the Tamil Nadu Private Electricity Supply Undertakings (Acquisition) Act, 1973 (hereinafter referred to as 'the Act') and after the take over, the company was transferred to the Tamil Nadu Electricity Board. Under Sec.15 of the Act, provision was made in respect of the existing staff of licensees and thereunder, every person on the staff of the licensee immediately before the vesting date shall become on that date an employee of the Government and upon the transfer under sub-sec.(5) of Sec.6 to the Board, of the property, rights, liabilities and obligations of the Government, become an officer or a servant of the Board and shall hold his office or service under the Government or the Board, as the case may be, on the same terms and conditions and with the same rights to pension, gratuity and other matters as would have been admissible to him if the undertaking had not vested in the Government and continue to do so unless and until his employment under the Government or the Board is terminated or until his remuneration, terms and conditions of service are duly altered by the Government or the Board. Under Rule 17(1) of the Tamil Nadu Private Electricity Supply Undertakings (Acquisition) Rules, 1973 (hereinafter referred to as 'the Rules'), provision was made for absorption and fitment of the staff of the erstwhile licensee company, in the corresponding class, category or grade of the Board's service. Under that Rule, it was provided that the employees

taken over by the Government under sub-sec.(1) of Sec.15 and transferred to the Board under sub-sec.(5) of Sec.6 of the Act, shall be absorbed in the corresponding class, category or grade of the Board's service, as the case may be. According to the respondent, he was expecting orders regarding absorption in the Board's service and that only after another person filed a writ petition calling upon the Board to discharge its duty under Sec.15 of the Act and Rule 17(1) of the Rules, the Board issued the proceedings in B.P.Ms.No.591 (Admn.), dated 30.9.1981 absorbing the respondent as Assistant Divisional Engineer and the *inter se* seniority of the officers so absorbed was fixed in B.P.Ms.No.621 (Admn.), dated 22.10.1981. The respondent claimed that at the time of the take over of Salem-Erode Electricity Distribution Company, he was an Engineer-in-charge and he should have been fitted in the service of the Board as a Divisional Engineer and not as an Assistant Divisional Engineer and thus aggrieved by his absorption in a lower post and consequent loss of seniority, the respondent approached this Court for relief under Art.226 of the Constitution of India, as stated earlier. Annexed to the affidavit of the respondent were three annexures regarding the duties and responsibilities of an Engineer-in-charge, a comparative statement of the powers exercised by the Engineer-in-charge of the company and the Assistant Divisional Engineer and the Divisional Engineer of the Board and hierarchy of posts in the company and the Board.

3. The appellant, in its counter, put forward the plea that the field experience, qualifications, duties and responsibilities as well as the area of work had all been taken into account before their absorption and the absorption of one Thiru V.Vasudevan, who was an Engineer-in-charge as a Divisional Engineer in the Board was on the basis of his experience, while the respondent had only 10 years of service and was incharge of a distribution system consisting of a lesser number of consumers. With reference to the details furnished by the respondent in the annexures referred to earlier, the Board did not come forward with any specific stand, but merely stated that it reserved its right to file a better counter-affidavit at a subsequent stage, which, however, was not done till the matter was heard. The appellant also maintained that the post of Engineer-in-charge was equated, to the post of Assistant

Divisional Engineer on the basis of criteria laid down by the Board, though there was no disclosure of what the criteria was.

4. On a consideration of the provisions of the Act and the Rules, the nature of the duties and responsibilities and also the criteria for absorption, the learned Judge took the view that the respondent had been discriminated against in the matter of his fitment into the service of the Board, as he had been treated differently from one Thiru V. Vasudevan who as an Engineer-in-charge in the company taken over, had been absorbed as a Divisional Engineer in the service of the Board and that the post of Divisional Engineer under the Board corresponded to the category of Engineer-in-charge in the service of the licensee company taken over and that the respondent was entitled to be absorbed by the appellant Board in the post of Divisional Engineer (as per the designation then in vogue) with effect from 1.12.1973 as the question of length of service or the work experience in the bigger power distribution system were not relevant under the Act or the Rules. In the view so taken, the learned Judge allowed the writ petition and directed the appellant Board to absorb the respondent in the post of Divisional Engineer and work out the monetary benefits available to him and fix his seniority appropriately and also give promotions on the basis of such absorption. It is the correctness of the order so passed that is questioned in this writ appeal.

5. Mr. R. Krishnamurthi, learned counsel for the appellant strenuously contended that the fitment of the respondent in the service of the Board was considered in the light of the nature of the duties performed by him in the erstwhile licensee company and the experience gathered by him and that the respondent though he was an Engineer-in-charge, had been found fit to be absorbed only as an Assistant Divisional Engineer and not as a Divisional Engineer, and therefore, no exception could be taken by the respondent to the order passed to that effect by the appellant. On the other hand, Mr. M. R. Narayanaswami, learned counsel for the respondent, pointed out that under the provisions of the Act, Rules as well as the scheme of absorption an Engineer-in-charge in the service of the erstwhile licensee company had to perform more onerous duties and discharge higher responsibilities than even a Divisional Engineer in the Board and that no weightage could be given

to experience either under the provisions of the Act or the Rules or even under the scheme of absorption and that in any event, the respondent had also put in more than 10 years of service on the date of absorption, though by itself that would not be a criterion. It was also further pointed out by learned counsel that another person Thiru V. Vasudevan, who was also similarly placed like the respondent as an Engineer-in-charge in the service of another erstwhile licensee company, had been absorbed as a Divisional Engineer, while the respondent had not been so absorbed and this demonstrated that discrimination was writ large in the matter of fitment of the respondent and Thiru V. Vasudevan in the service of the Board. Referring to the details given in the annexures I to III in the affidavit, learned counsel submitted that the nature of the duties performed by the Engineer-in-charge is more onerous and responsible than that of the Divisional Engineer and, therefore, even looked at from the point of view of higher responsibility in the discharge of the duties, the respondent ought to have been absorbed into the service of the Board as a Divisional Engineer with effect from 1.12.1973 and not as an Assistant Divisional Engineer. Reliance in support of these was also placed upon the decision of the Supreme Court reported in *P. Savits v. Union of India*, A.I.R. 1985 S.C. 1124.

6. In Annexure-I to the affidavit filed by the respondent in support of the writ petition, he had set out the nature of the duties and responsibilities of an Engineer-in-charge in the service of the erstwhile licensee company as on the vesting date under the different heads, like workload, technical, financial and accounts, stores, administration, annual responsibilities, etc. In Annexure-II, the respondent had given a comparative statement of the powers, duties and responsibilities of the Divisional Engineer of the Board and the Engineer-in-charge in the service of the erstwhile licensee company. From columns 3 and 5 of that annexure, it is seen that the financial powers of the Engineer-in-charge in the service of the erstwhile licensee company were unlimited in regard to improvement and also improvement of original works. Even as regards temporary supply, repairs to vehicles, etc., the Engineer-in-charge in the service of the erstwhile licensee company had higher financial powers. In regard to tools and plants, powers of purchase, appointments,

administration, billing, stores, etc. the powers and responsibilities of an Engineer-in-charge in the service of the erstwhile licensee company were far higher than that of a Divisional Engineer of the Board. Annexure-III sets out the hierarchy of posts in the Board and also in the erstwhile licensee company and the post of Divisional Engineer in the Board corresponds to that of an Engineer-in-charge. It has also to be borne in mind that the appellant has not in any manner demurred to the contents of the annexures referred to above. From the contents of the annexures, we are clearly of the view that the nature of the powers, duties and responsibilities of the Engineer-in-charge in the service of the erstwhile licensee company was higher and more onerous than that of a Divisional Engineer under the Board and it is perhaps for this reason that under the scheme of absorption, the post of Engineer-in-charge in the service of the licensee company was equated to that of Divisional Engineer in the service of the Board. It is significant that neither under the Act nor under the Rules nor even under the scheme of absorption, any weightage has to be given to experience. It may be that on the date of absorption, persons in the category of Engineers-in-charge might have put in varying or different years of service but that is not the criterion at all either under the Act or the Rules for the purposes of considering the fitment of the Engineers-in-charge in the service of the erstwhile licensee companies in the service of the Board. We may also observe that an Engineer-in-charge of the name of Thiru V. Vasudevan, who was in the service of Tirunelveli-Tuticorin Electrical undertaking had been absorbed into the service of the Board on 1.12.1973 as a Divisional Engineer while the respondent, who was also an Engineer-in-charge though in Salem-Erode Electricity Distribution Company, was not so absorbed. It is in this context it has to be remembered that the nature of the powers, duties and responsibilities of Engineers-in-charge under the erstwhile licensee companies is the same but one such Engineer-in-charge viz., the respondent herein had been discriminated against in the matter of absorption into the service of the Board with reference to the other Thiru V. Vasudevan. In this connection, the decision of the Supreme Court in *P. Savits v. Union of India*, A.I.R. 1985 S.C. 1124, is relevant. In that case, between the two classes of senior

draughtsmen, a distinction was made by providing two different scales of pay based on seniority and the denial of a higher scale of pay to one class of senior draftsmen based on the ground of length of service only, was challenged. In that context, the Supreme Court pointed out that for the same work and same functions, one class of senior draftsmen would get less pay than the other group and when the draftsmen do equal and same work, the classification of the draftsmen into two groups for purposes of different pay based on seniority was violative of Art. 14 of the Constitution of India. In this case also, we find that when the provisions in the Act, Rules or even in the scheme of absorption do not refer to seniority as a criterion at all, it is difficult to uphold that fitment of the respondent, who was an Engineer-in-charge in the service of the erstwhile licensee company as an Assistant Divisional Engineer while Thiru V. Vasudevan, similarly placed had been fitted as a Divisional Engineer. To put it differently, the respondent and Thiru V. Vasudevan who were both holding the post of Engineer-in-charge and discharging the same duties and responsibilities on the same scale of pay in the service of the erstwhile licensee companies, had been fitted differently in that Thiru V. Vasudevan, had been fitted in a higher post as a Divisional Engineer on a higher scale of pay, while the respondent had been fitted against a lower post on a lesser scale of pay and this action of the appellant cannot at all be accepted or upheld. We are, therefore, of the view that no case is made out to interfere with the order of the learned Judge. The writ appeal fails and is dismissed with costs.

B.S.

Appeal dismissed

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Swaminudurai, JJ.*

L.P.A.No.4 of 1988 4th September, 1992.

Abdul Sathar and others ...Appellants
v.

Muhammad Ali and others ...Respondents.

(A) Mohamedan Law - Gift of undivided share in property which is capable of partition or division - Whether valid.

The law applicable to the Mohamedans in India accepts a valid gift of an undivided share in property which is not capable of partition or division and holds a gift of an undivided share in property which is capable of division *fasid*, that is to say irregular, but not *batil*, that is to say not void. Such a gift can be perfected by subsequent partition and delivery to the donee of the share given to him. Until, however, possession is taken by the donee, the gift is not validated. Exceptions to the above rule however, are: (1) A gift of an undivided share is capable of division from the moment of the gift in the case where the gift is made by one co-heir to another. See *Kanij Fatima v. Narain*, (1944) 23 Pat. 216. (2) A gift of a share in free hold property in a large commercial town See *Ibrahimi Goolam Ariff v. Saidoo*, I.L.R. 35 Cal. 1, etc. [Para 4]

(B) Mohamedan Law - Gift - Validity of - Delivery of actual physical possession of subject-matter of gift - If essential - Construction possession, if sufficient.

Instead of actual physical possession, even constructive possession of the subject matter of the gift would do for the purpose of the validity of a *hiba* (gift) notwithstanding the fact physical delivery of the same has not been given. It will, however, depend on the nature of the interest in the property which is sought to be transferred, whether in the facts and circumstances of the case, only constructive or actual physical possession would be required. [Para 14]

(C) Mohamedan Law - Gift - Objection to validity on the plea of 'musha' - Effect.

The objection as to the *hiba* being invalid can be based upon the plea of *Musha* as in the instant case and unless there is an answer to the validity on account of *Musha*, only on a finding as to delivery

of possession, a gift can not be declared to be valid. [Para 16]

Cases referred to:

- Vahzullah Sahib v. Boyapati Nagayya*, I.L.R. 30 Mad. 519; 17 M.L.J. 562. [Para 7]
Alabi Koya v. Mussa Koya, I.L.R. 24 Mad. 513; 11 M.L.J. 227. [Para 7]
Bawa Saib v. Mohamed, I.L.R. 19 Mad. 343. [Para 7]
Hussain v. Shaik Mira, I.L.R. 13 Mad. 46. [Para 7]
Nabob Amiruddaula Muhammad Kakya Hussain Khan Bahadur Anirjung v. Nateri Srinivasan Charlu, 6 M.H.C.R. 356. [Para 7]
Mohamed Buksh Khan v. Hosseini Bibi, I.L.R. 15 Cal. 684. [Para 7]
Gobind Dayal v. Inayatullah, I.L.R. 7 All. 775. [Para 7]
Mogulsha v. Mohammed Sahib, I.L.R. 11 Bom. 517. [Para 7]
Ismal v. Ranji Sambhaji, I.L.R. 28 Bom. 682. [Para 7]
Mullick Abdool Gaffoor v. Muleka, I.L.R. 10 Cal. 1112. [Para 7]
Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan, L.R. 16 I.A. 205. [Para 7]
Bibi Khaver Sultan v. Bibi Bukha Sultan, 6 Bom. L.R. 983. [Para 7]
Chaudhri Mehdi Hasan v. Mohammed Hasan, L.R. 33 I.A. 68. [Para 7]
Shaik Ibrahim v. Shaik Suleman, I.L.R. 9 Bom. 146. [Para 7]
Humera Bibi v. Najmun-nissa Bibi, I.L.R. 28 All. 147. [Para 7]
Jayanabibi v. Jayarabi, (1950) 1 M.L.J. 209. [Para 9]
Mohamed Sadic Ali Khan v. Fakir Jahan Begum, (1931) 62 M.L.J. 320. [Para 9]
Bibi Kanig Fathima v. Jainarayan, A.I.R. 1944 Pat. 334. [Para 10]
Emnabai v. Hajirabai, I.L.R. 13 Bom. 352. [Para 11]
Ameeroonissa Khatoon v. Abadoonissa Khatoon, 16 Beng. L.R. 67; L.R. 2 I.A. 87. [Para 12]
Jiwan Baksh v. Imtiaz Begum, I.L.R. 2 All. 93. [Para 12]
Kasim Hussain v. Sharif-un-nissa, I.L.R. 5 All. 287. [Para 12]
Ameena Bibee v. Zeifa Bibee, 3 Cal. W.R. Civ. Rule 37. [Para 12]
Fathima Bivi v. Bhavasa Maracair, (1979) 1 M.L.J. 409. [Para 13]
Para Prasanna Sen v. Shandi Bibi, (1922) I.L.R. 49

Cal. 68. [Para 13]

Munni v. Bai Abdul Gani, A.I.R. 1939 M.P. 225.

[Para 13]

Yusuf Rowther v. Yusuf Rowther, (1958) 1 M.L.J. 14.

[Para 14]

Sheikh Muhammad Muntaz Ahmed v. Zubaida Jan, (1889) L.R. 16 I.A. 205; I.L.R. 11 All. 460.

[Para 14]

Mohammad Sadiq Alikhan v. Fakhir Jahan Begum, (1931) 62 M.L.J. 320. [Para 14]

Nurbai v. Abhram Muhammad, A.I.R. 1939 Bom. 149. [Para 14]

V. Raghavachari, for Appellants.

Sundararajan, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.*:- Defendants 2, 4 and 6 in a suit for declaration of title to 26/35 shares in the plaint schedule properties by the plaintiff/respondent have preferred this appeal against the judgment of this Court, by which the learned single Judge has confirmed the trial court's judgment and decree based on a deed of gift. The original plaintiff who is the second wife of the alleged donee (eighth defendant in the suit) filed the suit stating that defendants 1 to 3 were the sons and defendants 4 and 6 were the daughters of the eighth defendant through his predeceased first wife. After the death of his first wife, the eighth defendant married the plaintiff as his second wife, who herself was the widow of another through whom she had four children. She did not beget any child for the eighth defendant. The seventh defendant was the brother of the eighth defendant. The plaintiff claimed that the eighth defendant was entitled to 26/35 shares in the schedule mentioned properties. On 14.10.1965 he executed a registered deed of gift in favour of the plaintiff in respect of his 26/35 shares in the schedule mentioned properties and handed over the deed of gift to her, who accepted it and accordingly, the plaintiff was put in possession of the schedule mentioned properties. According to the original plaintiff, she continued to be in possession of the 26/35 shares in the schedule mentioned properties, but found that the defendants enraged by the execution of the deed of gift attempted to trespass into the suit properties. Defendants 9 to 18 were added as party/defendants as the heirs and legal representatives of the seventh defendant, who died during the pendency of the suit. The eighth defendant also died pending suit and the plaintiff and defendants 1 to 6 were recorded as his

legal representatives.

2. In a common written statement, defendants 1 to 6 admitted the relationship set out in the plaint, but contended that the suit houses were purchased by their mother, the first wife of the eighth defendant from out of her moneys in the name of the eighth defendant, his brother, the seventh defendant, their another brother, their sister and mother, all benami for her. The eighth defendant, therefore, had no right in the suit properties. He had executed a letter of undertaking on 11.4.1958 admitting that the suit house was purchased out of consideration provided by his first wife and mother of defendants 1 to 6. As he had no right in the suit properties, the gift deed executed by him in favour of the plaintiff was void in law. The defendants 1 to 6 disputed the plaintiff's claim that she was in possession of the suit properties and alleged that they also resided in the suit house where the plaintiff lived as the second wife of the eighth defendant and not in her independent right. They also maintained that the gift deed had been procured by the plaintiff by coercing the eighth defendant which was as a result of the undue influence of the plaintiff upon him and not out of his own free will and volition.

3. There has been no other contest except by defendants 1 to 6. The trial court answered the two main questions viz., whether the deed of gift dated 14.10.1985 was true, valid in law and binding on the defendants 1 to 6 and whether the gift was hit by doctrine of *musha* in favour of the plaintiff. The same two points, however, were canvassed before the learned single Judge, who has held that the donor has done all that he could do to put the donee in possession and the donee has continued in possession since then. Learned Single Judge has accordingly dismissed the appeal.

4. It is on record that the plaintiff is the second wife of the eighth defendant and before she married the eighth defendant, she had been married to another and had four sons through the other husband. She never got any child for the eighth defendant. *Musha* is an undivided share in property either moveable or immovable. The law applicable to the Mohamedans in India accepts a valid gift of an undivided share in property which is not capable of partition or division and holds a gift of an undivided share in property which is capable of division *fasid*, that is to say irregular, but not *batil*, that is to say not void. Such a gift can

be perfected by subsequent partition and delivery to the donee of the share given to him. Until, however, possession is taken by the donee, the gift is not validated. Exceptions to the above rule however, are:

- (1) A gift of an undivided share is capable of division from the moment of the gift in the case where the gift is made by one co-heir to another. See *Kanij Fatima v. Narain*, (1944) 23 Pat. 216;
 - (2) A gift of a share in free hold property in a large commercial town. See *Ibrahim Goolam Ariff v. Saidoo*, I.L.R. 35 Cal. 1, etc.
5. Learned single Judge has noticed the three essentials for the validity of a gift under Muslim Law that is to say declaration of gift by the donor, acceptance of the gift express or implied by the donee and delivery of the subject matter of the gift by the donor to the donee. He has also extracted from the deed of gift its contents, which are as follows:

“அடியில் கண்ட மொத்த சொத்தில் பொதுவில் 26/35 பாகம் எனக்கு பாத்தியப் பட்டு என்னுடைய சுவாதீன அனுபவத்தில் இருந்து வரும் ரூபாய் 9000 ஒன்பதாயிரம் மதிப்புள்ள சொத்தை என்னுடைய மனைவியாய் இருப்பதாலும் என்னால் உமக்கு ஒரு ஆஸ்தியை ஏற்படுத்தி வைக்கவேண்டும் என்ற நல்ல எண்ணத்திலும் அதைநான் இன்று தேதியில் உமக்கு ஹிப்பா என்னும் செட்டில் மெண்டு செய்து கொடுத்து இன்று தினமே உம் முனைய சுவாதீனம் செய்து கொடுத்து விட்டேன்.”

and found on facts that it is not a case of actual delivery of possession or separate possession to the donee by the donor but said,

“It was held by the Judicial Committee that having regard to the declaration in the deed and it handed over to the donee, the gift was valid and that in the case of an intended gift by a husband to his wife, the Muslim Law does not require actual vacation by the husband and an actual taking of separate possession by the wife. In the deed on hand there is an express declaration that the possession has been delivered to the wife, the deed has been handed over to, received and retained by the wife. She has been living with her husband and in the circumstances, the gift is perfectly valid.”

6. It is only after recording as above, he has taken

notice of the doctrine of musha and declared on the basis that the donor did everything in his power to put the donee in possession and that he declared that possession had been handed over to the donee, delivered the deed and relinquished all his rights thus delivering possession to the donee. 7. In one of the earliest judgments on the subject in the beginning of the present century in the case of *Alabi Koya v. Mussa Koya*, I.L.R. 24 Mad. 513: 11 M.L.J. 227, there had been certain observations which created a doubt as to whether law of Musha applied in the State of Madras (now Tamil Nadu) but soon thereafter a Bench of this Court in case of *Vahzullah Sahib v. Boyapati Nagayya*, I.L.R. 30 Mad. 519: 17 M.L.J. 562, entered into this question and made a candid study in the light of the pronouncements of the Courts on the subject available until then. It was a case in which the issue contested was whether, when the donor did not part with the possession of the property comprised in the deed of gift and later he himself alienated the property to another, any right could be claimed under the gift or not. The judgment proceeded to consider the case stating as follows:

“Both the lower Courts have held the Mohammadan Law inapplicable to gifts by registered instrument on the authority of certain observations of Benson, J. in the case of *Alabi Koya v. Mussa Koya*, I.L.R. 24 Mad. 513: 11 M.L.J. 227. It was held by that learned Judge that Sec.16 of the Madras Civil Court Act did not expressly make the Mohammadan Law applicable to gifts, that gifts of Mohammedans must be governed by justice, equity and good conscience, and that it was open to doubt whether the Mohammadan rule as to delivery of possession being necessary to validate the gift, was adapted to modern requirements, and whether the mode of transfer laid down as obligatory on Europeans and Hindus by Sec.123 of the Transfer of Property Act and adopted by the parties in that case, viz., by registered instrument attested by two witnesses and signed by the donor, ought not, in equity and good conscience, to be held as efficacious as delivery of possession in the case of Mohammadans. These observations were not necessary for the decision, as the learned Judge proceeded to hold that the requirements of Mohammadan Law as to delivery of possession had been sufficiently complied with in that case, nor were

they concurred in by Mr. Justice Shephard who held that, assuming the Mohammadan Law to apply, the gift was good. On the other hand we have been referred to *Bawa Saib v. Muhomed*, I.L.R. 19 Mad. 343, in which the Mohammadan Law was held applicable to gifts in this Presidency, a case which does not appear to have been cited in the case of *Alabi Koya v. Mussa Koya*, I.L.R. 24 Mad. 513: 11 M.L.J. 227. In that case the gift was made orally, but this fact cannot in our opinion make any difference, as if a gift is bad by Mohammadan Law for want of possession when made orally, there is nothing in the provisions of the Registration Act III of 1877 or the Transfer of Property Act IV of 1882 to render such gift valid when made by registered instrument. There are also earlier cases in which gifts between Mohammadan Law, viz., *Hussain v. Shaik Mira*, I.L.R. 13 Mad. 46, *Nabob Amiruddaula Muhammad Kakya Hussain Khan Bahadur Amirjung v. Nateri Srinivasan Charlu*, 6 M.H.C.R. 356. Under Sec. 24 of the Bengal Civil Courts Act, 1871, the terms of which for the present purpose are substantially identical with those of Sec. 16 of the Madras Civil Court Act III of 1873, the Mohammadan Law has been applied by the Privy Council to gifts between Mohammadans vide *Mohamed Buksh Khan v. Hosseini Bibi*, I.L.R. 15 Cal. 684, and in the North-West Provinces the same section has been expressly construed as rendering Mohammadan Law applicable to such gifts, see North-West Province High Court Reports, 1874, page 2, and *ibid.*, page 28, cited in the case of *Gobind Dayal v. Inayanullah*, I.L.R. 7 All. 775. In these two cases the Courts were unanimous that Mohammadan Law was applicable, but there was a difference of opinion as to the grounds on which it was applicable, the majority holding that in the circumstances it was applicable as a rule of justice, equity and good conscience, while the minority were of opinion that questions as to gift, between Mohammadans were covered by the express provisions as to questions regarding succession, inheritance, marriage or caste or any religious usage or institution. Lastly in Bombay it has been expressly held that gifts between Mohammadans by registered instrument are invalid unless the requirements of Mohammadan Law as to possession are

complied with—vide *Mogulsha v. Mohammed Sahib*, I.L.R. 11 Bom. 517 and *Ismael v. Ranji Sambhaji*, I.L.R. 28 Bom. 682. We are therefore of opinion that Mohammadan Law is applicable to gifts between Mohammadans even when effected by registered instrument and that the lower Courts were wrong in deciding otherwise. It must however, be borne in mind that the task of discovering and applying the rules of Mohammadan Law to the circumstances of this country is often one of great difficulty as pointed out by Garth, C.J., in the case of *Mullick Abdool Gaffoor v. Muleka*, I.L.R. 10 Cal. 1112 at p. 1123, and that in choosing between conflicting authorities the principles of justice, equity and good conscience must be regarded vide *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan*, L.R. 16 I.A. 205, and *Bibi Khaver Sultan v. Bibi Bukha Sultan*, 6 Bom. L.R. 983. Assuming Mohammadan Law to be applicable, as laid down in *Chaudhri Mehdi Hasan v. Mohammed Hasan*, L.R. 33 I.A. 68 at p. 75, it is incumbent on a party claiming under a gift to show very clearly that the requirements of Muhammadan Law have been met, and consequently, if he relies on a gift without consideration, to show that there has been delivery of the thing given, so far as it is capable of delivery. The appellant has also contended on the authority of *Bawa Saib v. Muhomed*, I.L.R. 19 Mad. 343, that the fact of the donor of the house continuing to live in it would invalidate the gift, while on the other side we have been referred to the cases of *Shaik Ibrahim v. Shaik Suleman*, I.L.R. 9 Bom. 146, *Humera Bibi v. Najmun-nissa Bibi*, I.L.R. 28 All. 147, to which may be added the case of *Bibi Khaver Sultan v. Bibi Bukha Sultan*, 6 Bom. L.R. 983."

8. After stating the law as above, the Bench, however said,

"Mohammadan Law being applicable, a finding is necessary as to whether the defendants Nos. 1 and 2 have shown that the gift under which they claim has satisfied the requirements of that law as to transmutation of possession and otherwise. Apart from the question of the continuing residence of the donor in the house, there appears to be some conflict of evidence on the point, and we direct the District Judge to return a distinct finding on this issue within six weeks. Seven days will be

allowed for filing objections.”

9. This Court has, however, followed the above principle and when occasion arose in the case of *Jayanabibi v. Jayarabi*, (1950)1 M.L.J. 209, this Court reiterated the law in these words:

“The property was in the hands of tenants at the time of Ex.D-8. Under it, firstly the settlor reserves to himself the right to receive rents during his lifetime and secondly he also undertakes to pay municipal taxes. It is contended by Mr.Suryanarayana, learned counsel for the appellant, that notwithstanding these two undisputed facts there was sufficient delivery of possession as required by the Mohammadan Law by the mere declaration to that effect in the document. It is said that the intention to deliver which is unequivocally manifested by the clause of the document

“I have delivered possession of the property to you even “now” need not be followed up by any attornment of the tenants to the donee or by any perception of the rents and profits by her. Reliance is placed by the learned counsel on the ruling of the Privy Council in *Mohamed Sadic Ali Khan v. Fakir Jahan Begum*, (1931)62 M.L.J. 320, and in particular on the observation at page 18 which is in these terms:

“In the case of a gift by a husband to his wife their Lordships do not think that the Mohammadan Law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion the declaration made by the husband followed by the handing over of the deed are amply sufficient to establish a transfer of possession.”

The observation must however be understood in relation to the facts of that case which was a case of the husband and wife living together in the house at the time of its gift by the one to the other, and in the light of West, J’s statement of the law relied upon by their Lordships in a question which they make, namely,

“that when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession.”

Moreover, the effect of acts such as the two referred to above as existing in the present case did not fall to be considered by their Lordships in the ruling relied upon by the learned Counsel for the appellant before me.”

10. A Bench of the Patna High Court in *Bibi Kanig Fathima v. Jainarayan*, A.I.R. 1944 Pat. 334, has said,

“All that the law is concerned to find is that before the validity of such a gift is declared, the donor must have parted with complete possession in favour of the donee and then it is the look out of the donee as to whether he wants a partition or not. If the donor had partitioned the property and given it to a donee in a definite share the donee could still hold the property as a tenant in common with his co-sharers and no question could have been raised regarding the validity of the gift. The same result in my opinion should follow provided the donee has been found to be in possession. Possession of a co-owner or a co-tenant is possession which has to be recognised by the law. I desire to observe that in almost every one of these cases which have been cited and which could be cited the importance was rightly given to the question whether possession was obtained by the donee or not.”

11. A Bench of the Bombay High Court dealt with a case in *Emnabai v. Hajirabai*, I.L.R. 13 Bom. 352, in which there were two hibas, one relating to a house which, at the time of the gift and upto the death of the donor, was occupied by tenants and the other under which an undivided moiety of a house in which the donor and the donee resided (husband and wife) and to which the donor and his brother were entitled to equal shares, fell for consideration. As to the former, the Bench said,

“It is not in dispute that, after this execution of the deed of gift, Haji Gazi continued to collect the rents as before and that they were entered in his books and drawn upon for family purposes in the same manner as they had always been. But in 1876 the house was transferred into the name of the wife in the municipal books; and in 1877 the fazandari bill was made out in her name. Lastly, in 1881-81 Haji Gazi had an account of the rents of the first house prepared in the name of Hajirabai from 1871-72 up to date. Much reliance was placed by the plaintiffs on the circumstances that the donor had continued to collect the rents as before; but this circumstance in the case of gift from a husband to a wife may be accounted for by the husband (as the person upon whom the task would naturally devolve), collecting the rents

as his wife's manager; and slight evidence to show that such was the case may well, in our opinion, be accepted as sufficient, in a case like the present, of a formal instrument of gift accompanied by registration."

12. With respect to the second hiba, however, the Court said as follows:

"As to the second hiba, the subject of which was an undivided moiety of a house in which Haji Gazi and his wife resided and to which Haji Gazi and his brother were entitled in equal shares; it was objected that it was invalid as being a gift of a "moosha," or undivided part, in a thing susceptible of partition. The rule of Mohammedan Law is stated thus in the *Hydaya*, Vol. III; p. 293: "That seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition; but a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible, in such, to make seisin of the thing given without its conjunction with something that is not given; and that is a defective seisin." And again the *Shurhi Viquaya*: "A gift of part of a thing which is capable of division is not valid, unless such part be divided off, so that seisin may be definite and not include anything else." In *Ameeroonissa Khatoon v. Abadoonissa Khatoon*, 16 Beng. L.R. 67: L.R. 2 I.A. 87, it was held by the Privy Council that "shares in samindaris, from the special legislation relating to them and before any partition of the land, were definite estates capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore, not falling within the principle and reason of the law relating to mushaa." In *Jiwan Baksh v. Intiaz Begum*, I.L.R. 2 All. 93, in which the last case was referred to, the Allahabad High Court held that a defined share in a landed estate was a separate estate, and not open to the objection which attaches under Mohammedan Law to the gift of joint and undivided property. The landed estates in that case were *zamindari* villages, and the Court said their view was sanctioned by the rulings of the Privy Council-referring, we presume, to the decision of the Privy Council we have already mentioned, as there is none of them, that we are aware of, in which the rule is discussed, In *Kasim Hussain v. Sharif-un-nissa*,

I.L.R. 5 All. 287, the donor's gift was of the one-twelfth share in a "muaf" estate, and the Court supported the gift on the ground that a gift of a "specific share is not open to objection under Mohammedan Law" - meaning, we apprehend, a share recognized and a separate estate capable of distinct enjoyment. In the Tagore Lectures for 1884 the author refers to these decisions as only applicable to the large landed estates in the North-West of India. The above decisions do not, therefore, touch the present question, viz., whether a gift by the donor of his undivided share in a house, or ordinary lands, not forming part of estates as they are found in Northern India, is open to objection under Mohammedan Law. It was said that the rule did not apply, unless the donor retained some share of the property. The objection was taken in *Ameeroonissa Khatoon v. Abadoonissa Khatoon*, 16 Beng. L.R. 67: L.R. 2 I.A. 87, already referred to, but not decided by the Privy Council, as it was not necessary, in their view of that case, to consider it. In Case VIII of Macnaghten's *Precedents of Gifts* it is assumed that a gift by one of several co-sharers of his share to a stranger is invalid. Alluding to the widow's gift to the donee, the answer at the bottom of page 204 continues: "A gift even of her own portion (as one of the heirs) is invalid, that being undefined and not admitting of legal seisin." Again, in the note to Case X, p. 208, the author, after alluding to the supervenient indefiniteness arising from the discovery that the donor was not the sole proprietor, says: "It would have been otherwise had the right of a third person been recognized to exist at the time of the gift, which would in that case have been null and void *ab initio*." However in *Ameena Bibee v. Zeifa Bibee*, 3 Cal. W.R. Civ. Rule 37, it was held, on the authority of Case XIII of Macnaghten's *Precedents of Mohammedan Law*, that one of two sharers in lands and houses can give over his share to the other co-sharer even before division; and this ruling was extended by the Privy Council, in *Mohamed Buksh Khan v. Hossein Bibi*, I.L.R. 15 Cal. 701, to the case of the gift by one of three co-sharers (and, therefore, of any number of co-sharers) of his share to one of the others, on the ground that not to do so would in their Lordships' opinion, be refining on a refinement amounting almost

to a *reductio ad absurdum*. In the present case the object of the gift is an undivided moiety of a house which had admittedly not been partitioned, and the donee is not a co-sharer, but a third person. The case, therefore, is not governed by any of the above judicial decisions, and falls within the rule as interpreted by the cases in Macnaghten's Precedents, and which we think this Court ought to follow. Whether such a gift is void, or only invalid, as to which there would appear to be some difference of opinion between Mohammedan lawyers, is not a question which arises in this case, as there had been no partition, and defendant had not been put into possession of any specific portion of the house as her husband's share before her husband's death."

13. It seems, however, that without in any manner departing from the above rule when occasion came to decide whether on the facts of a particular case, the liberal understanding of the condition of hiba under the personal law of Muslims as to the delivery of possession should be zealously adhered to or for the reasons of equity and good conscience, departure should be permitted, a Bench of this Court in the case of *Fathima Bivi v. Bhavasa Maracair*. (1979)1 M.L.J. 409, has considered whether a gift of equity of redemption is possible and if such a gift is made, how to account for the delivery of possession. The Bench has observed,

"At one time, there was a controversy whether a gift of an equity of redemption as in this case was valid at all. We have seen that the property was usufructually mortgaged under Ex.B-1. The first defendant's case is that it was gifted to her orally, which is possible under the Muslim law, by her husband when the property was subject to the aforesaid mortgage with possession with the father of defendants 4 and 5. The question is whether a gift by a mortgagor of his equity of redemption is possible at all. As we said, delivery of possession, if understood as the *sine qua non* under all circumstances, of the subject-matter of the gift, then, on such a word understanding of one of the terms of a hiba, such a gift would be hit by the principle underlying it. But as observed by the Judicial Committee, taking possession of the subject-matter of the gift by the donee either actually or constructively is sufficient to complete the gift. Therefore, sufficient inroads were made in

very early times into the necessity to deliver physical possession of the subject matter of gift in order to make it a valid gift. The Bombay High Court, however, took a different view that a gift of equity of redemption where the mortgagee is in possession of the mortgaged property at the date of the gift is not valid. Many of the High Court in our country took a different view. It appears that even the Bombay High Court watered down their earlier strict view of the position as is seen from the illustration given by the author Mulla in the eighteenth edition of the Principles of Mohammedan Law at page 154. The illustration runs as follows:-

"A owns six immovable properties. He mortgages three with possession to M. He then makes a gift of all the six properties to D and puts him in possession of the three properties not mortgaged to M. The High Court of Bombay has held that in such a case the gift of all the six properties is valid...."

This puritanic view of the Bombay High Court itself is no longer the view of that High Court. Further, a Division Bench of the Calcutta High Court stated in *Para Prasanna Sen v. Shandi Bibi*, (1922) I.L.R. 49 Cal: 68.

"In British Courts the Mohammedan Law of Gift is administered as between Mohamedans on the ground of equity and good conscience...." Therefore, equity made a sufficient dent upon the necessity to deliver physical possession of properties in order to make a complete and valid gift. The learned Judges in the said decision continued to say:

".....We are of the opinion that the right of the equity of redemption which is under consideration in this case and such similar rights which are termed in some of the decided cases as incorporeal rights, as distinguished from the corpus, may, in view of the exigencies and necessities of modern conditions and conception of legal rights of property, be subjects of a valid gift, the mode of delivery of possession varying according to the nature of the right conveyed."

Hidayatullah, C.J. as he then was in *Munni v. Bai Abdul Gani*, A.I.R. 1939 M.P. 225, in his usual style made the following observation:

"..... three conditions which are necessary for a valid gift under the Mohammedan Law are: (1)

manifestation of the wish to give on the part of the donor; (2) acceptance of the donee, either expressly or impliedly and (3) taking of possession of the subject-matter of the gift by the donee, either actually or constructively....."

Dealing with the third aspect, the learned Chief Justice stated that delivery of possession can be made in such manner as the subject of the gift is susceptible of.

Another learned author Tyabji on Muslim Law, Fourth Edition at page 343 reiterated what the other author stated and added that possession of the equity of redemption of immovable property in the possession of a mortgage may be transferred by the donor giving to the mortgagee notice of his having conveyed to the donee the property subject to the mortgage and permitting the donee to exercise all acts of ownership that may be exercised by the owner of the equity redemption.

Therefore it follows that constructive possession of the subject-matter of the gift provided could be made out in a given case and it would be sufficient to make a *hiba* valid notwithstanding the fact that physical delivery of the same has not been given. It is only such possession as the subject-matter is capable of or susceptible of that could be thought of and if once such available possession is given by the donor to the donee and as a follow-up, the donee exercises rights of ownership over the property taken over by him though constructively that would be sufficient evidence to establish that there was a valid *hiba* as is known in Mohammedan Law."

14. The law thus has gone for that instead of actual physical possession, even constructive possession of the subject matter of the gift would do for the purpose of the validity of a *hiba* (gift) notwithstanding the fact physical delivery of the same has not been given. It will, however, depend on the nature of the interest in the property which is sought to be transferred, whether in the facts and circumstances of the case, only constructive possession would be enough or actual physical possession would be required. This view has been stated by a learned single Judge of this Court in *Yusuf Rowther v. Yusuf Rowther*, (1958) 1 M.L.J. 14, in these words:

"It is no doubt true that delivery of possession of gifted properties is an essential condition of

the validity of the gift and its operative nature under the Muslim Law and it would be for the donees to establish it. But the Courts below have failed to appreciate the evidentiary value of the declaration by the donor which constitutes an admission as against him and those claiming under him. In Ex.B-1 the donor said: "I have by means of this document settled on you, the immovable properties....which are described hereunder which belong to me absolutely and which are in my possession and enjoyment and left them in your possession. Both of you shall from this day onwards hold and enjoy in peace the gift properties with absolute right and with powers of alienation..... You shall if you so desire enjoy the settlement property jointly in common or enjoy the same by dividing by metes and bounds."

The effect of a recital of this type by a donor was the subject of consideration in any early decision of the Privy Council reported in *Sheikh Muhammad Muntaz Ahmed v. Zubaida Jan*, (1889) L.R. 16 I.A. 205; I.L.R. 11 All. 460 (P.C.). One of the points in controversy in that case related to the validity of a deed of gift and one of the grounds upon which the operative character of the deed was challenged was that possession had not been delivered by the donor in pursuance of the deed. Sir Barnes Peacock who delivered the judgment of the Privy Council said:

"In the deed of gift (the donor) declared (an admission by which Uşman as her heir and all persons claiming through him were bound) that she had made the donee; that she had abandoned all connection with them; and that the donor was to have complete control of every kind in respect thereof."

This is therefore authority for the position that a declaration by the donor of having parted with possession of the property was an admission and one which was binding upon those who claimed under him. This question was again before the Judicial Committee in *Mohammad Sadiq Alikhan v. Fakhir Jahan Begum*, (1931) 62 M.L.J. 320. The opinion of the Council was delivered by Sir George Lowndes who said in dealing with the conditions necessary to be satisfied before a gift by a Muslim could be upheld:

"The second objection involves some consideration of the Mohammedan Law. It is not disputed that a gift of immovable property

must ordinarily be completed by a transfer of possession and there seems to be no difference on this point between Hanafi and Shia Law. The Chief Court thought it was clear that Fakhr Jahan had taken actual possession but it is pointed out that this was only after her husband's death. So long as Baquar Ali was alive she merely resided there with him and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement; 'I deliver possession of the gifted property to my said wife' and this as a declaration of fact must be regarded as binding on the heirs of the donor. (See *Sheikh Muhammad Munir Ahmed v. Zubaida Jan*, (1889) L.R. 16 I.A. 205; I.L.R. 11 All. 460 (P.C.). In their opinion the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to establish a transfer of possession."

These two decisions were cited to the Courts below but they held that their effect was somewhat modified and that the law as laid down by them was dependent upon the special circumstances of each of those cases, relying on a decision of the Bombay High Court in *Nurbai v. Abhram Muhammad*, A.I.R. 1939 Bom. 149. I am unable to concur in this view. The learned Judges of the Bombay High Court distinguished the observations of the Privy Council which I have extracted earlier on the specific ground that in the case before them the person who challenged the deed was not claiming under the donor, but under an independent title. But this apart, there was also the further fact that on the facts proved in the Bombay case those who impugned the gift had been able to establish that possession was not in fact transferred. In my judgment there are no such circumstances in the present case. The proper rule to apply here as regards the burden of proof would be to hold that the declaration by the donor of his having parted with possession was an admission binding upon the plaintiffs and the 3rd defendant which however they might by cogent evidence disprove but that in the absence of independent proof by them the presumption raised by the admission ought to suffice to support the deed."

15. The above, however, was observed in a case in which all the properties dealt with in the settlement deed were specified divided portions of properties and were in the enjoyment of the

settlor till the date of the settlement and they were as per enjoyment delivered over to defendants 1 and 2. Learned single Judge while dealing with the objection on the plea of Musha has said,

"I have already set out the issues and it would be seen that this objection to the gift on the ground of Musha did not figure in them; nor was it the subject of discussion in either of the Courts below. This objection is based upon the description of some of the items, conveyed under Ex.B-1 as if they were undivided shares belonging to the donor. There is nothing in the evidence of the plaintiff's witnesses pointing to their reliance on this feature of the gift deed. Nor was there anything suggested during the cross-examination of the defence witnesses indicating such reliance. I have already pointed out that during the course of the argument in the two Courts this was not put forward as an objection to the deed. In these circumstances, I am inclined to hold that this objection even if indicated in the pleadings was really not thought to have been put forward seriously and was in any event abandoned during the proceedings anterior to the hearing before me. I am not therefore inclined to include this as a point on which any further evidence should be permitted to be led."

16. The above thus is a clear enunciation of the principle as to the validity of the gift in the case of undivided interest. The objection as to the *hiba* being invalid can be based upon the plea of Musha as in the instant case and unless there is an answer to the validity on account of Musha, only on a finding as to delivery of possession, a gift cannot be declared to be valid.

17. According to the plaintiff, the eighth defendant was entitled to 26/35 shares in the schedule mentioned properties and he executed a deed of gift of the said undivided share only. If it is found that the plaintiff was a stranger to the family in the sense that she had no interest of her own in the estate of the eighth defendant in common with other defendants, the case will be one as indicated in the judgment of the Bombay High Court in the case of *Emnabai v. Hajirabai*, I.L.R. 13 Bom. 352, (second *hiba*) and governed by the case in Macnaghten's Precedents. The plaintiff, who was inducted as the wife in the house by the eighth defendant brought with her other strangers to the family viz., children of her first husband. Learned

single Judge no doubt found that there has been a clear declaration of gift by the donor and the donor handed over the deed of gift to the donee, who accepted the gift and there being also a declaration as to the delivery of possession therein, it has to be held that the hiba was valid by delivery of possession. He has, however, held that the gift is not affected by the doctrine of musha only on this ground and not on account of the rule for which musha stands, that is, how undivided share the donor transferred to the donee viz., his second wife, who was a stranger to the family in the sense that she had no share in the property from before. In this respect, in our opinion, the learned trial Judge has committed an error of law. It is a fit case for the said reason for a re-consideration of the whole matter on the evidence adduced by the parties. Since this aspect of the case has not been adverted to by the learned single Judge at all in the appeal, we are inclined to set aside the judgment and remit the case to the trial court for a re-hearing and disposal in accordance with law. 18. Taking notice, however, of the delay which has already occurred, we indicate to the parties that it was a case in which they could arrive at some amicable settlement and while other members of the undivided family, who were tenants-in-common should not be denied interest in the share of their father, the second wife should also not be excluded altogether. In this attempt we found the appellants responding favourably and agreeable to a division of the properties of the eighth defendant, who is since dead in equal moiety between the plaintiffs (since the plaintiff died, her children of the first husband were added as plaintiffs) and the children of the eighth defendant from his first wife. The heirs of the original plaintiff/respondents have expressed disinclination to any amicable settlement. We have no alternative in such a situation except to remit the case to the trial court for a re-hearing and disposal in accordance with law.

19. In the result, the appeal is allowed. The impugned Judgment is set aside. The case is remitted to the trial court for a re-hearing and disposal in accordance with law. No costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No.10284 of 1992

12th August, 1992.

Tvl.Pattukkottai Azhagiri Transport Corporation Ltd., Rangapuram, Vellore ...Petitioner v.

Tvl.V.K.Velayutham and Sons., Imperial Motor Service, Vellore and others ...Respondents.

(A) *Motor Vehicles Act (XLVII of 1982), Secs.89(ii)(a) and 103(2)(a) and (3) - Regional Transport Authority mentioning in order that 'application is rejected as not in consonance with public interest' - Order does not amount to refusal to entertain the application - Order is appealable.*

(B) *Motor Vehicles Act (XLVII of 1982), Sec.90 - Order of Regional Transport Authority found improper and illegal - Order, if can be revised by State Transport Appellate Tribunal.*

(C) *Motor Vehicles Act (XLVII of 1982), Sec.72(1) - State Transport Appellate Tribunal if can curtail the permit by suitable modification.*

(D) *Constitution of India (1950), Art.226 - Locus standi - Writ if can be maintained at instance of person not aggrieved.*

The first respondent made an application for the grant of stage carriage permit before the Regional Transport Authority (second respondent) in respect of the route 'Vellore to Alangayam'. The second respondent rejected it as one not in consonance with public interest. The first respondent preferred an appeal to the State Transport Appellate Tribunal (third respondent) which set aside the order and directed the second respondent to issue a permit to the first respondent curtailing the portion of 0.2 km. which overlapped the approved scheme at one end. The third respondent held that the second respondent was in error in taking into account the history sheet of the first respondent and some lapses committed by him 15 years previously. The petitioner who was not a party to the proceedings before the second and third respondents filed a writ petition contending, (1) that appeal to the third respondent against the order of the second respondent was not maintainable, (2) that power of revision could not be

exercised by the third respondent as provisions of Chapter VI override the provisions of Chapter V and (3) that the power of curtailment was not available to the third respondent. The 1st respondent contended that the petitioner had no *locus standi* to maintain the writ petition.

Held:- The second respondent has referred to the merits of the claim made by the first respondent by taking into consideration the public interest in the matter. In fact, the reason given by him in his order is that introduction of an additional bus facility would lead to unhealthy competition endangering the public safety. He has set out the overlapping of the route only as the second reason. The third reason given by him is based on his history sheet of the first respondent. Ultimately, the last sentence of the order of the second respondent reads that 'the application is therefore rejected as not in consonance with public interest'. That also makes it clear that the second respondent entertained the application and considered the merits of the same and passed an order on merits. It is futile to contend that the second respondent refused to entertain the application of the first respondent and consequently no appeal would lie against the said order. There is no doubt whatever that the order of the second respondent amounted to a refusal to grant a permit within the meaning of Sec.89(1)(a) of the Act and, therefore, appealable. [Para 7]

The finding of the third respondent is that the second respondent's order was improper and illegal. No doubt, the third respondent has not stated anywhere that it is exercising the power of revision in the view that the appeal before it is not maintainable. Even if it is found that the appeal was incompetent, the Order passed by the third respondent could be justified under Sec.90 of the Act which confers powers of revision on the third respondent. The contention of the learned counsel that the provisions of Chapter VI override the provisions of Chapter V and the other laws and in view of the same, power of revision could not be exercised by the third respondent is without any substance. The language of Sec.90 of the Act is very wide and all orders of the State Transport Authority or Regional Transport Authority against which no appeal lies will be subject to the power of revision under that section. [Para 9]

It is settled law that the powers of the tribunal are co-extensive with those of the Regional Transport

Authority. It is in exercise of the said power under Sec.72(1) of the Act, the third respondent has curtailed the permit by suitable modification thereby excluding the overlapping portion. [Para 14] It has been repeatedly held that for maintaining a writ petition, the petitioner should be a person aggrieved and even in cases of statutory violations, a writ cannot be entertained at the instance of a person who is not aggrieved. Mere violation of a provision of law is not sufficient to enable the third party who is not aggrieved to challenge the order in question. The sine qua non is a public injury. [Paras 18 and 21]

Cases referred to:

Samarth Transport Corporation (P) Ltd. v. The Regional Transport Authority, Nagpur, A.I.R. 1961 S.C. 93. [Para 6]
Nilkanth Prasad v. State of Bihar, A.I.R. 1962 S.C. 1135: (1962)1 S.C.R. (Supp.) 728. [Para 8]
Cheran Transport Corporation (P) Ltd. v. The State Transport Appellate Tribunal, (1978)2 M.L.J. 136. [Para 11]
Pandiyan Roadways Corporation Ltd. v. Thiru M.A.Egappan, A.I.R. 1987 S.C. 958. [Para 12]
A.P.State Road Transport Corporation v. P.V.Rammohan Chowdhary, A.I.R. 1992 S.C. 888. [Para 13]
N.Sambandam v. S.Khadar Sheriff, A.I.R. 1966 Mad. 1: I.L.R. (1964)2 Mad. 631. [Para 14]
Ramkrishna Verma v. State of U.P., Jt. (1992)2 S.C. 545. [Para 15]
Mithilesh Garg v. Union of India, A.I.R. 1992 S.C. 447. [Paras 17, 20]
Kalyan Singh v. State of U.P., A.I.R. 1962 S.C. 1183. [Para 18]
The Nagar Rice and Flour Mills and others v. N.Teekappa Gowda & Brothers and others, A.I.R. 1971 S.C. 246. [Para 19]
Nasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, A.I.R. 1976 S.C. 578. [Para 19]
M.L.Krishnamurthy v. The District Revenue Officer, Vellore, (1989)2 L.W. 442. [Para 20]
Surendra Rao v. Regional Transport Authority, Gorakhpur, A.I.R. 1992 All. 211. [Para 21]
Quilon District Private Bus Operators Association v. State Transport Appellate Tribunal, Ernakulam, A.I.R. 1992 Ker. 267. [Para 21]
Mohammed Swalleh v. IIIrd Additional District Judge, Meerut, A.I.R. 1988 S.C. 94. [Para 22]
 Petition under Art.226 of the Constitution of India, praying that in the circumstances stated

therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the third respondent, pertaining to the order made in Appeal No.79 of 1991, dated 11.2.1991, in granting stage carriage permit, in favour of first-respondent to ply on the route officer's Line to Alangayam and quash the same.

M.Palani, for the Petitioner.

M.Krishnappan, for Respondent No.1.

V.P.Sengottuvel, Government Advocate, for Respondent No.2.

The Court made the following

ORDER:- The petitioner is a State owned transport undertaking, operating stage carriage services in the entire North Arcot Ambedkar District/ Tiruvannamalai-Sambuvarayar District and also on the inter district and inter-state routes. The first respondent made an application for the grant of stage carriage permit before the second respondent in respect of the route Vellore to Alangayam, on 14.9.1989. The second respondent rejected the same as one not in consonance with public interest, by order dated 11.2.1991. In his order he stated that there was no representation from the public or any quarters that additional services had to be provided on the route in question and there were already adequate number of buses owned by the private operators and State Transport Undertakings on the route and the introduction of any additional, but facility would lead to unhealthy competition endangering public safety. It was also observed by him that the sector of the route in question, from Vellore Bus Stand to Officer's Line, of a length of 0.2 km. overlapped the approved scheme route Vellore to Kadapakkam, published in G.O.Ms.No.2290, Home, dated 24.9.1974 in Tamil Nadu Government Gazette No.43(J), dated 6.11.1974, by the State Transport undertakings. He referred to the decision of the Supreme Court of India in *P.R.C. v. Egappan*, C.A No.1758 of 1986 dated 24.2.1987, and observed that no permit or variation could be granted to persons other than the State transport undertakings on a route or part thereof covered by approved scheme. He also referred to the applicant's history sheet during his tenure as a bus operator and observed that punishments for offences of non-payment of tax and overload of passengers had been imposed on the applicant and there was no reason to show any special

consideration just because their application seeking renewal of their existing permit on the route Katpadi-Thorapadi and subsequent applications for grant of permit were rejected by the Regional Transport Authority, which was only a reflection of the applicant's past performance and lack of merits.

2. Aggrieved by the order, the first respondent preferred an appeal to the third respondent under Sec.89 of the Motor Vehicles Act (hereinafter referred to as 'the Act'). By order dated 17.12.1991, the third respondent allowed the appeal, set aside the order of the second respondent and directed the latter to issue a permit to the applicant curtailing the portion of 0.2 km. which overlapped the approved scheme at one end. It was also clarified by the third respondent that a permit shall be issued to the applicant from the officer's Line, Vellore to Alangayam and the bus of the applicant shall not enter the Vellore Bus Stand on any account. The third respondent held that the second respondent was in error in taking into account the history sheet and some lapses committed by the first respondent 15 years previously and in observing that grant of permit would lead to unhealthy competition endangering public safety. It was also held by the third respondent that the overlapping portion of 0.2 km. was very negligible and the second respondent could well have curtailed and granted the permit in respect of the remaining portion. He observed that adding one more but in the route will not create any competition, much less unhealthy competition.

3. The petitioner was not a party to the proceedings before the second respondent or the third respondent. He has filed this writ petition on the ground that the third respondent had acted in excess of jurisdiction and the order passed by the third respondent suffers from errors of law and material irregularity. It is prayed in the writ petition that the order of the third respondent granting permit to the first respondent shall be quashed.

4. The first contention put forward by learned counsel for the petitioner is that the appeal filed by the first respondent before the third respondent against the order of the second respondent was not maintainable in view of the provisions of Sec.103(2)(a) and (3) of the Act. According to him, the order of the second respondent is one of refusal to entertain the application of the first respondent under Sec.103(2)(a) of the Act, with

the result, Sub-sec.(3) of the said section would apply and no appeal shall lie against the same. Sec.103 occurs in Chapter VI of the Act, which contains special provisions relating to State Transport Undertakings. Sec.98 of the Act provides that the provisions of the chapter and the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in Chapter V or in any other law for the time being in force or in any other law for the time being in force in any instrument having effect by virtue of any such law. Sec.103 of the Act relates to issue of permits to State transport undertakings. Sub-sec.(1) of Sec.103 of the Act is to the effect that where, in pursuance of an approved scheme, any state transport undertaking applies in the prescribed manner for a stage carriage permit or a goods carriage permit or a contract carriage permit in respect of a notified area or notified route, the State Transport Authority concerned shall issue such permit to the State transport undertaking, notwithstanding anything to the contrary contained in Chapter V. Sub-secs.(2) and (3) of the said section are in the following terms:

“(2) For the purpose of giving effect to the approved scheme in respect of a notified area or notified route, the State Transport Authority or, as the case may be, the Regional Transport Authority concerned may, by order:

(a) refuse to entertain any application for the grant or renewal of any other permit or reject any such application as may be pending;

(b) cancel any existing permit;

(c) modify the terms of any existing permit so as to:

(i) render the permit ineffective beyond a specified date;

(ii) reduce the number of vehicle authorised to be used under the permit;

(iii) curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route.

(3) For the removal of doubts, it is hereby declared that no appeal shall lie against any action taken, or order passed, by the State Transport Authority or any Regional Transport Authority under sub-sec.(1) or sub-sec.(2).”

5. It is argued that when the second respondent rejected that application of the first respondent, on the ground that a part of the route for which the application was made overlapped the approved

scheme route Vellore to Kadapakkam, it tantamounts to a refusal on the part of the second respondent to entertain the application within the meaning of clause (a) of sub-sec.(2) of Sec.103 of the Act. It is contended that the fact that the second respondent had referred to the history sheet of the first respondent and the public interest in the matter of grant of permit, would not change the character of the order and it would nonetheless be a refusal to entertain the application.

6. I do not agree with the contention. If the second respondent had intended to refuse to entertain the application under clause (a) of Sub-sec.(2) of Sec.103 of the Act, he ought to have done so *in limine*, without referring to any other factor. The meaning of the word “entertain” has been subject matter of consideration in *Samarth Transport Corporation (P) Ltd. v. The Regional Transport Authority, Nagpur, A.I.R. 1961 S.C. 93*. The court observed,

“The word “entertain” may mean to receive on file or keep on file”, and in that sense the Authority may refuse to keep an application on its file by rejecting it either at the time it is filed or thereafter. It does not cannote any time but only described the scope of the duty under that clause. It can only mean that the authority cannot dispose of the application on merits but can reject it as not maintainable. Any other meaning given to this word leads to an anomalous position, for even if the approval of the scheme had been brought to the notice of the Regional Transport Authority, it would have to order the renewal of the permit and thereafter it would have to cancel the permit, presumably, on an application filed by the State transport undertaking.”

7. The second respondent has referred to the merits of the claim made by the first respondent by taking into consideration the public interest in the matter. In fact, the reason given by him in his order is that introduction of an additional bus facility would lead to unhealthy competition endangering the public safety. He has set out the overlapping of the route only as the second reason. The third reason given by him is based on his history sheet of the first respondent. Ultimately, the last sentence of the order of the second respondent reads that ‘the application is therefore rejected as not in consonance with public interest’. That also makes

it clear that the second respondent entertained the application and considered the merits of the same and passed an Order on merits. It is futile to contend that the second respondent refused to entertain the application of the first respondent and consequently no appeal would lie against the said order. There is no doubt whatever that the order of the second respondent amounted to a refusal to grant a permit within the meaning of Sec.89(1)(a) of the Act and, therefore, appealable.

8. It is argued by learned counsel for the first respondent that even if the order of the second respondent was not an appealable one, it could be revised by the third respondent by exercise of its powers of revision under Sec.90 of the Act. According to him, the fee payable for an appeal and revision under the Act is the same and the period of limitation is also the same. Reliance is placed on the judgment of the Supreme Court in *Nilkanth Prasad v. State of Bihar, A.I.R. 1962 S.C. 1135: (1962)1 S.C.R. (Supp.) 728*, in which it has been held that the appellate authority was entitled to revise the order of the Regional Transport Authority, even if the appeal was incompetent, as the Regional Transport Authority had not done its duty under the law and that the appeal board had vast powers of revision.

9. Learned counsel for the petitioner submits that power of revision could be exercised only if the order of the State Transport Authority or the Regional Transport Authority is improper or illegal and in this case the third respondent has found in its order that the second respondent's refusal to grant permit on the ground that it would lead to unhealthy competition endangering public safety, was not in accordance with law. It is also found by the third respondent that the second respondent had not acted properly inasmuch as it had failed to exercise the power to curtail the area which overlapped the approved scheme route, particularly when the overlapping portion was of very negligible length of 0.2 km. Thus, the finding of the third respondent is that the second respondent's order was improper and illegal. No doubt, the third respondent has not stated anywhere that it is exercising the power of revision in the view that the appeal before it is not maintainable. I have already held that the appeal was maintainable. Even if it is found that the appeal was incompetent, the order passed by the third respondent

could be justified under Sec.90 of the Act, which confers powers of revision on the third respondent. The contention of the learned counsel that the provisions of Chapter VI override the provisions of Chapter V and the other laws and in view of the same, power of revision could not be exercised by the third respondent is without any substance. The language of Sec.90 of the Act is very wide and all orders of the State Transport Authority or Regional Transport Authority against which no appeal lies will be subject to the power of revision under that section.

10. It is next contended by the petitioner's counsel that curtailment of a route can be granted only with reference to an existing permit and in the present case, a fresh permit is being issued to the first respondent and the power of curtailment is not available to the third respondent. For this purpose, reliance is placed on Sec.103(2)(c) of the Act. That part of the Section has already been extracted. Under sub-sec.(c) thereof, the State Transport Authority or the Regional Transport Authority, may modify the terms of the existing permit so as to curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route.

11. Reliance is placed on the judgment in *Cheran Transport Corporation (P) Ltd. v. The State Transport Appellate Tribunal, (1978)2 M.L.J. 136*. It was held in that case that the Tribunal erred in exercising its discretion and granting interim directions without having regard to Sec.68-F (1-D) of the old Act. The facts of that case have no relevance to the present case.

12. Learned counsel refers to the judgment of the Supreme Court in *Pandiyam Roadways Corporation Ltd. v. Thiru M.A.Egappan, A.I.R. 1987 S.C. 958*, which is the one cited by the second respondent in his order. In that case, under a scheme for a route published in the gazette it was proposed to exclude completely all other persons from operating their stage carriage services under permits covering the entire route, except those persons mentioned in Annexure II to the said scheme and the operators whose names had been mentioned in Annexure II to the Scheme were existing operators on different sectors of the notified route on the date of publication of the scheme. It was held that an operator whose name was not included in the Annexure to the scheme and an operator who was operating on a non-scheme route could not

operate the stage carriage on the notified route or a portion thereof even though he might have been granted variation of his permit to operate on a sector of the notified route. It was held that an application for the variation of a permit held by the operator in question was in fact an application for a permit and it fell within the mischief of Sec.68-F(1-D) of the old Act. The court pointed out that the principle underlying Sec.68-F(1-D) is that the number of services on such a route should be frozen of the publication of a scheme under Sec.68-C. That judgment will have no bearing on the present case.

13. My attention is drawn to a recent judgment of the Supreme Court in *A.P. State Road Transport Corporation v. P.V. Rammohan Chowdhary*, A.I.R. 1992 S.C. 888. It was held that even on a partial overlapping approved scheme, private operators have been totally prohibited to have corridor shelters and could no longer enter into the frozen area, route or part thereof and obtain permit to render transport service to the travelling public. That judgment also will not help the petitioner.

14. In the present case, the overlapping part has been excluded and the grant of permit has been curtailed. The application filed by the first respondent is one under Sec.70 of the Act. Sec.72(1) of the Act enables a Regional Transport Authority to grant a stage carriage permit in accordance with the application or with such modifications as it deems fit the power was available to the second respondent to grant permit with such modifications as were necessary and the same power is undoubtedly available to the appellate authority viz., the third respondent. It is settled law that the powers of the Tribunal are co-extensive with those of the Regional Transport Authority. *N.Sambandam v. S.Khadar Sheriff*, A.I.R. 1966 Mad. 1; I.L.R. (1964) 2 Mad. 631. It is in exercise of the said power under Sec.72(1) of the Act, the third respondent has curtailed the permit by suitable modification, thereby excluding the overlapping portion.

15. Learned counsel for the petitioner has also relied on the judgment of the Supreme Court in *Ramkrishna Verma v. State of U.P., Jr.* (1992) 2 S.C. 545, in support of his contention that the provisions of Chapter VI of the Act override the provisions of Chapter V. Reliance is placed on the observation that no corridor protection to private operators is permissible with reference to scheme

routes and no private operator has a right to apply under Sec.80 of the Act for and obtain permits to ply the stage carriages on the approved or notified route/routes or areas or portion thereof. The ruling has no bearing on the facts of this case.

16. In view of the curtailment of the permit and exclusion of the overlapping portion, the notified scheme is not in any manner affected and the route for which permit is now directed to be granted by the third respondent falls entirely outside the area of the scheme. The petitioner cannot have any grievance against the same.

17. The first respondent has raised an objection that the petitioner is not an aggrieved person and he cannot maintain the writ petition challenging the grant of permit in his favour. He has also referred to the fact that under the present Act, the policy regarding grant of permits has been considerably liberalised and the State Transport Authority shall not ordinarily refuse to grant an application for permit. Reliance is placed on the observations made by the Supreme Court in *Mithilesh Garg v. Union of India*, A.I.R. 1992 S.C. 447. The following passages in the judgment are very instructive and worth reproduction:

"5. A comparative reading of the provisions of the Act and the old Act makes it clear that the procedure for grant of permits under the Act has been liberalised to such an extent that an intended operator can get a permit for asking irrespective of the number of operators already in the field. Under Sec.57 read with Sec.47(1) of the old Act an application for a stage carriage permit was to be published and kept for inspection in the office of the Regional Transport Authority so that the existing operators could file representations/objections against the said application. The application, along with objections, was required to be decided in a quasi judicial manner. Sec.47(3) of the old Act further permitted the imposition of limit on the grant of permits in any region, area or on a particular route. It is thus obvious that the main features of Chapter IV "control of transport vehicles" under old Act were as under:

1. The application for grant of permits were published and were made available in the office of the Regional Transport Authority so that the existing operators could file representations;

2. The applications for grant of permits along with the representations were to be decided in quasi judicial manner; and

3. The Regional Transport Authority was to decide the applications for grant of permits keeping in view the criteria laid down in Sec.47(1) and also keeping in view the limit fixed under Sec.47(3) of the Act. An application for grant of permit beyond the limited number fixed under Sec.47(3) was to be rejected summarily.

6. The Parliament in its wisdom has completely effaced the above features. The scheme envisaged under Secs.47 and 57 of the old Act has been completely done away with by the Act. The right of existing - operators to file objections and the provision to impose limit on the number of permits have been taken away. There is no similar provision to that of Sec.47 and Sec.57 under the Act. The Statement of Objects and Reasons of the Act shows that the purpose of bringing in the Act was to liberalise the grant of permits. Sec.71(1) of the Act provides that while considering an application for a stage carriage permit the Regional Transport Authority shall have regard to the objects of the Act. Sec.80(2), which is the harbinger of Liberalisation, provides that a Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under the Act. There is no provision under the Act like that of Sec.47(3) of the old Act and as such no limit for the grant of permits can be fixed under the Act. There is, however, a provision under Sec.71(3)(a) of the Act under which a limit can be fixed for the grant of permits in respect of the routes which are within a town having population of more than five lakhs.

... ..

More operators mean healthy-competition and efficient transport system. Over-crowded buses, passengers standing in the aisle, clinging to the bus-doors and even sitting on the roof-tops are some of the common sights in this country. More over one finds a bus which has noisy engine, old upholstery, uncomfortable seats and continuous emission of black-smoke from the exhaust pipe. It is, therefore, necessary that there should be plenty of operators on every route to provide ample choice to the commuter-public to board the vehicle of their choice

and patronise the operator who is providing the best service. Even otherwise, the liberal policy is likely to help in the elimination of corruption and favouritism in the process of granting permits. Restricted licensing under the old Act led to the concentration of business in the hands of few persons thereby giving rise to a kind of monopoly, adversely affecting the public interest. The apprehensions of the petitioners that too many operators on a route are likely to affect adversely the interest of weaker section of the profession is without any basis. The transport business is bound to be ironed-out ultimately by the rationale of demand and supply cost of a vehicle being as it is the business requires huge investment. The intending operators are likely to be conscious of the economics underlying the profession. Only such number of vehicles would finally remain in operation on a particular route as are economically viable. In any case the transport system in a state is meant for the benefit and convenience of the public. The policy to grant permits liberally under the Act is directed towards the said goal.

... ..

It is thus a guaranteed right of every citizen whether rich or poor to take up and carry on, if he so wishes, the motor transport business. It is only the State which can impose reasonable restrictions within the ambit of Art.19(6) of the Constitution of India. Secs.47(3) and 57 of the old Act were some of the restrictions which were imposed by the State on the enjoyment of the right under Art.19(1)(g) so far as the motor transport business was concerned. The said restrictions have been taken away and the provisions of Sec.47(3) and 57 of the old Act have been repealed from the statute book. The Act provides liberal policy for the grant of permits to those who intend to enter the motor transport business. The provisions of the Act are in conformity with Art.19(1)(g) of the Constitution of India. The petitioners are asking this Court to do what the Parliament has undone. When the State has chosen not to impose any restriction under Art.19(6) of the Constitution of India in respect of motor transport business and has left the citizens to enjoy their right under Art.19(1)(g) there can be no cause for complaint by the petitioners."

18. It is, therefore, clear that the petitioner cannot make any complaint against the grant of permit for a route which does not fall within the area of the scheme. The grant of permit to the first respondent with the curtailment as directed by the third respondent cannot be objected to by the petitioner. Learned counsel for the petitioner submits that the statutory authority viz., the third respondent is bound to act in accordance with law and when the statutory provisions are ignored or violated, the petitioner is certainly entitled to bring it to the notice of this court and get the order of the third respondent quashed. There is no substance in this contention, as it has been repeatedly held that for maintaining a writ petition, the petitioner should be a person aggrieved and even in cases of statutory violations, a writ cannot be entertained at the instance of a person who is not aggrieved. The Supreme Court has in *Kalyan Singh v. State of U.P.*, A.I.R. 1962 S.C. 1183, held that a person whose right to ply his buses had been lawfully extinguished, was not entitled to maintain an appeal challenging the right of the State Transport Undertaking to ply their buses with or without permits and a petition under Art.232 of the Constitution of India could not be maintained.

19. In the *Nagar Rice and Flour Mills and others v. N.Teekappa Gowda & Brothers and others*, A.I.R. 1971 S.C. 246, it was held that a rice mill owner had no *locus standi* to challenge under Art.226 of the Constitution of India, the setting up of a new rice mill by another, even if it was in contravention of Sec.8(3)(c) of the Rice Milling Industry (Regulation) Act, 1958, because no right vested in such a person was infringed. The position was reiterated in *Nashbai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed*, A.I.R. 1976 S.C. 578. It was held that a rival in trade, in that case a cinema theatre owner, had no *locus standi* to invoke the special jurisdiction under Art.226 of the Constitution of India.

20. Following the said rulings, a Full Bench of this Court held in *M.L.Krishnamurthy v. The District Revenue Officer, Vellore*, (1989) 2 L.W. 442, that an existing rice mill owner was not a person aggrieved, when permit or licence under the Rice Milling Industry (Regulation) Act was granted to another person, for entitling him to file a writ petition challenging the grant. In *Mithilesh Garg, etc. v. Union of India and others etc. etc.*, A.I.R. 1992 S.C. 443, already referred to in this judgment, the

Apex Court has quoted *in extenso* the observations made by Sarkaria, J., in *J.M.Desai's case*, A.I.R. 1976 S.C. 578, and reiterated the proposition. In the circumstances, the petitioner is not a person aggrieved to maintain the writ petition against the grant of permit to the first respondent with curtailment.

21. Learned counsel for the petitioner places reliance on the decisions in *Surendra Rao v. Regional Transport Authority, Gorakhpur*, A.I.R. 1992 All. 211 and *Quilon District Private Bus Operators Association v. State Transport Appellate Tribunal Ernakulam*, A.I.R. 1992 Ker. 267. In the former case it is held that an existing operator has an alternative remedy of revision before the tribunal against the order of the regional Transport Authority granting stage carriage permit to an applicant. That has no relevance in this case. In the latter case, it is held that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The *sine qua non* is a public injury. Mere violation of a provision of law is not sufficient to enable the third party who is not aggrieved, to challenge the order in question. Hence, that judgment also does not hold the petitioner.

22. It is held in *Mohammed Swalleh and others v. Illrd Additional District Judge, Meerut and another*, A.I.R. 1988 S.C. 94, that the discretion under Art.226 of the Constitution of India shall not be exercised if there is no failure of justice. In the present case, there is absolutely no failure of justice and in fact justice has been done by the third respondent in directing issue of permit with curtailment, thus excluding the negligible overlapping portion of 0.2 km. between Vellore Bus Stand and Officers' Line. The third respondent has also taken care to issue a direction that the bus of the first respondent shall stop with officers' line and shall not enter the Vellore Bus Stand on any account. In those circumstances, the petitioner cannot make any grievance whatever against the grant of the permit.

23. In the result, the writ petition, fails and it is dismissed, with costs. Counsel's fee Rs.1,000.

B.S.

Petition dismissed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

[Special Original Jurisdiction]

Present: D.Raju, J.

W.P.No.5756 of 1992 23rd April, 1992.

R.Parthasarathy ...*Petitioner*
v.

The Union of India ...*Respondent.*

(A) *Constitution of India (1950), Art.226 - Public interest litigation - What is - When can be entertained.*

(B) *Constitution of India (1950), Art.226 - Action complained of, against person whose office is not situate within territorial jurisdiction of High Court - Order impugned having no impact in State in which High Court is situate - Petition under Art.226 - Maintainability.*

The petitioner filed a writ petition in the Tamil Nadu High Court for a declaration declaring the Presidential Proclamation dated 2.4.1992 imposing Central Rule over the State of Nagaland under Art.356 of the Constitution of India as *null and void* and unconstitutional and *ultra vires*.

Held: Public interest litigation does not mean that anyone can institute proceedings anywhere and that too a writ petition for any cause or purpose irrespective of the fact whether he has any semblance of interest either in his personal or representative capacity in the subject-matter concerned or involved in the case. Courts have been encouraging public interest litigation deviating from the normal rule of *locus standi* and the principle of personal grievance or personal injury only in respect of matters where it involved denial of fundamental rights to innocent citizens who cannot protect themselves or where it is to espouse the cause of some helpless individual or representative group who have no vigilance or where withal or the required stamina to have recourse to courts and to fight to secure relief for themselves. Except in such extraordinary situations entertaining of writ petitions on any and every issue at the instance of anyone from the public irrespective of such matter is not to be countenanced. Otherwise, it will lead to serious repercussions and encourage all types of unethical litigation which is to be otherwise severely repelled by Courts of Justice.

[Para 3]

The action complained of is against the respondent whose office is not situated within the territorial jurisdiction of this Court. Further, the order of Proclamation issued under Art.356 has no impact whatsoever in this area or State over which this Court has jurisdiction. No cause of action wholly or in part could be said to have arisen within the territorial jurisdiction of this Court. The effect of proclamation could not be said to have been felt or suffered legally in any manner, by anyone including the petitioner in this State and consequently, the relief prayed for as well as this writ petition cannot be entertained before this Court, under Art.226 of the Constitution. [Paras 4 & 5]

Case referred to:

Sachidanand Pandey v. State of West Bengal, (1987) 2 S.C.C. 295. [Para 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of declaration declaring the Presidential Proclamation dated 2.4.1992, relating to the State of Nagaland, as *null and void* and unconstitutional and *ultra vires*.

R.Parthasarathy, for Petitioner.

The Court made the following

ORDER: The writ petition has been filed for the issue of a writ of declaration, declaring that the Presidential Proclamation dated 2.4.1992 under Art.356 of the Constitution of India relating to the State of Nagaland is *null and void*, unconstitutional and *ultra vires*. The petitioner has made available the xerox copy of a news item containing the gist of the Presidential Proclamation. By virtue of the Presidential Proclamation issued under Art.356 of the Constitution of India, the Administration of the State of Nagaland was brought under the President's rule. Another xerox copy of a news item made available by the petitioner contains the details of advice which appears to have been tendered to the President of India, who issued the proclamation under Art.356 in relation to the State of Nagaland; the sum and substance of it appears to be that the very ground relied upon by the Governor to dissolve the Assembly shows that it was not possible to carry on the administration of the State in accordance with the provisions of the Constitution.

2. The petitioner appeared as party in person and-

argued the case by referring to several judgments of the Apex Court as well as various High Courts. In substance his contention was that the circumstances which prevailed in the said State at the crucial point of time did not warrant or justify recourse to Art.356 of the Constitution of India. In the light of the view, I propose to take in disposing of the writ petition, I consider it unnecessary to deal with extensively the various aspects of the submissions made and referred to, in detail, in the several judgments quoted by the petitioner. In my view, the writ petition is liable to be dismissed for the very simple reason that the petitioner would have no *locus standi* to maintain this writ petition and that at any rate no part of the cause of action for the writ petition arose at all, either wholly or in part, within the territorial jurisdiction of this Court.

3. Though the petitioner has chosen to institute the present writ petition as a public interest litigation, there is no controversy over the fact that he claims to be an Indian citizen and only a voter in the State of Tamil Nadu. Public interest litigation does not mean that anyone can institute proceedings any where and that too the writ petition for any cause or purpose, irrespective of the fact whether he has any semblance of interest either in his personal or representative capacity in the subject matter concerned or involved in the case. Courts have been encouraging public interest litigation deviating from the normal rule of *locus standi* and the principle of personal grievance or personal injury, only in respect of matters where it involved denial of fundamental right to innocent citizen who cannot protect themselves, or where it is to espouse the cause of some helpless individual or a representative group who have no vigilance or wherewithal or the required stamina to have recourse to courts and to fight to secure relief for themselves. Except in such extraordinary situations, entertaining of writ petitions on any and every issue at the instance of anyone from the public irrespective of the nature of the cause or his legitimate concern in respect of such matters, in my view is not to be countenanced. Otherwise, it will lead to serious repercussions and encourage all types of unethical litigation which is to be otherwise severely repelled by Courts of justice.

4. The Supreme Court had an occasion to consider the nature and type of public interest litigation that is of late coming before courts and held that

a cautious approach is to be adopted in countenancing such litigation. Learned Judge, V.Khalid, J. while delivering a supporting, but a separate opinion in *Sachidanand Pandey v. State of West Bengal*, (1987)2 S.C.C. 295, has observed as follows:

"My learned brother has considered the facts in detail and the questions of law relevant for the purpose of this appeal. I fully agree with his conclusions. This short tailpiece is with a purpose. This case goes by the name "Public Interest Litigation". I wish to delineate the parameters of public interest litigation concisely, against the background of the facts of this case, so that this salutary type of litigation does not lose its credibility. Today public spirited litigants rush to courts to file cases in profusion under this attractive name. They must inspire confidence in courts and among the public. They must be above suspicion. See the facts of this case and the end result.

.....

My purpose in adding these few lines of my own is to highlight the need for restraint on the part of the public interest litigants when they move courts. Public interest litigation has now come to stay. But one is led to think that it poses a threat to courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions.

.....

It is only when courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to none in extending help when such help is required. But this does

not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

The apprehension about the indiscriminate volume of litigation under the guise of public interest litigation expressed by the learned Judge applies in my view on all fours to the case on hand. The person or persons, if at all concerned about the action complained of, cannot be said to be one or those who cannot look after themselves or more for protection, if they and so wish the writ petition in my view is instituted more by way of publicity for the self rather than for really serving any practical or useful public purpose.

5. That apart the action complained of is against the respondent whose office is not situated within the territorial jurisdiction of this Court. Further, the order of proclamation issued under Art.356 has no impact whatsoever in this area or State over which this Court has jurisdiction. No cause of action, either wholly or in part could be said to have arisen within the territorial jurisdiction of this Court. The effect of proclamation could not be said to have been felt or suffered legally in any manner by any one including the petitioner in this State and consequently I am of the view that the relief prayed for as well as this writ petition cannot be maintained before this Court under Art.226 of the Constitution.

6. For all the reasons stated above, the writ petition shall stand dismissed.

B.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Swamidurai, JJ.*

L.P.A.No.60 of 1985

28th April, 1992.

K.Varadhan

...Appellant

v.

Pattammal (dead) and others

...Respondents

Evidence Act (I of 1872), Secs.101 and 102 - Plaintiff illiterate woman signing document, unaware of contents - Later on alleging mis-representation and fraud - Onus of proof - On whom lies. Maxim non est factum".

Courts in India have, on the rule of evidence enshrined in Secs.101 and 102 in Chapter VII of the Evidence Act, particularly in cases of woman in India who in some parts and some communities are pardaneshin and in most parts of the country illiterate for the reason that they transact their business generally through malefolk only, men always dominated women, and women lived a life dominated by men, this being the curse that always surrounded women folk even though law recognised their independent rights, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction. One could easily, since the plaintiff alleged mis-representation and fraud, ask her to prove the mis-representation and fraud. But not in a case where a woman being an illiterate and unaware of the contents signed the document. Unless fully and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case. The learned Single Judge is right in holding that the Court will not ask the plaintiff to prove the allegation but demand from the defendant to disprove the allegation of mis-representation and fraud. [Para 8]

Cases referred to:

Foster v. Mackinnon, (1969) L.R. 4 C.P. 704.

[Para 6]

Gallie v. Lee, 1971 A.C. 1004. [Para 7]

Appeal under Clause 15 of the Letters Patent against the Order of Mohan, J. dated 14.2.1985 and made in the exercise of the Appellate Jurisdiction of the High Court in Appeal No.120 of 1979. (O.S.No.39 of 1975 on the file of the Court of the

Subordinate Judge, Chidambaram).

The Judgment of the Court was delivered by *Mishra, J.*:- This appeal is directed by the defendant in a suit for declaration and injunction.

2. The plaintiff/1st respondent, it is not in dispute, owned the schedule B property-house, lived in a portion of the same, while the other portion was occupied by tenants. She mortgaged the property to one Murugesu Asari, borrowing a sum of Rs.1,200 from him. In the middle of December, 1972, however, when she needed further money, the defendant/Appellant who was a close relative volunteered to help her stating that he would advance further sum required by her, that he would discharge the subsisting mortgage and take in his name a fresh mortgage for the amount advanced by him and the amount paid for discharging the earlier mortgage. According to the plaintiff, thus representing, the defendant obtained a document from her on 1.1.1973 and paid a sum of Rs.1,000. The plaintiff/1st respondent, according to her case, was all along under the impression that the document dated 1.1.1973 was only a mortgage deed for a sum of Rs.2,500 consisting of Rs.1,500 to be paid in discharge of the earlier mortgage and Rs.1,000 to be paid to her in cash at the time of registration. Notwithstanding the execution of the document, however, the plaintiff-1st respondent continued to live in the portion in which she was living.

3. A year prior to the institution of the suit, according to the 1st plaintiff an advocate's notice was served upon her. However, she was not made aware of the contents of the notice by the defendant to whom also the lawyer's notice was intended. He represented to her that he would make arrangements to send a suitable reply. The 1st plaintiff relied solely on the defendant and so she was not aware of the reply sent on her behalf. In April, 1974 she however came to know that the defendant had played a fraud on her and obtained a sale deed instead of a mortgage deed. She, thereafter, obtained a copy of the sale deed dated 1.1.1973 and sent a notice to the defendant calling upon him to cancel the deed and accept the amount advanced by him, and when the defendant did not comply with the demand made by her, she filed the suit.

4. The defendant-appellant in the written statement however stated that apart from the money due to Murugesu Asari, the 1st plaintiff had borrowed a sum of Rs.1,000 from one Mariappan, the

brother of the defendant, on a promissory note dated 5.8.1971. Likewise, she had borrowed various sums from the defendant on various occasions totalling in all to Rs.1,800. The first plaintiff wanted to discharge these debts. She also required more money since after the discharge of the debt, she decided to settle down at Madras. It was, in those circumstances, she approached the defendant pressing for the acceptance of the property for Rs.6,000. Even though the property was not even worth Rs.5,000 at that time, on account of the 1st plaintiff's insistence, the defendant agreed to purchase the property. Out of this amount, a sum of Rs.1,500 was paid to Murugesu, a sum of Rs.1,200 to Mariappa and Rs.1,800 was adjusted towards the hand-loan borrowed by the 1st plaintiff from the defendant. Out of the balance, Rs.500 was paid to the 1st plaintiff on the date of execution of the sale deed and the balance of Rs.1,000 was paid to her at the time of registration. The defendant-appellant disputed the allegation of the 1st plaintiff that she was unaware of the contents of the document and asserted that she was fully aware as to what she was doing. She was fully aware as to what she was doing and she had conducted several litigations herself. There was no fraud or misrepresentation as alleged by the first plaintiff. After the sale, the municipal registry as well as the electric supply connection have been transferred in the name of the defendant. Denying the occupation as claimed by the 1st plaintiff of a portion of the building, the defendant-appellant asserted that the 1st plaintiff only recently trespassed into the house and forcibly occupied a room therein.

5. The trial court held that the 1st plaintiff failed to establish that the sale deed dated 1.1.1973 had been obtained from her by exercise of fraud or misrepresentation and accordingly decided the suit against the 1st plaintiff. The learned single Judge who heard the appeal, however, found that it was a case of *non est factum* in which the onus lay upon the defendant to show that the 1st plaintiff was fully aware of the real nature of the transaction and that, therefore, there was no fraud or misrepresentation on his part and held that in the absence of any evidence to contradict the stand of the 1st plaintiff that she was not aware of what she was doing, the principle of *non est factum* would have to be applied in the case and granted a decree in favour of the 1st plaintiff as prayed for.

6. "*Non est factum, scriptum predictum non est*

factum sum "assumed great significance in course of time. In Cheshire and Fifoot's Law of Contract, Tenth Edition at p.229 the principle is found stated and the learned single Judge has also noted this:

"In the course of its development, this plea of *non est factum* was made available to a defendant who could not read, whether owing to illiteracy or blindness, so as to enable him to escape liability upon proof that the written terms of the deed did not correspond with its effect as explained to him before he put his seal to it. In 1952, for instance, in *Thoroughgood's case*, (1582) 2 Co. Rep. 9a,

William Chicken, being in arrears with his rent, tendered to his landlord, thorough good, a deed by which he was relieved from 'all demands whatsoever' which Thoroughgood had against him. Thus the dispensation on its face comprised not only arrears of rent, but also the right to recover the land. Thoroughgood was illiterate, but a bystander, affecting to be helpful, seized the deed and said; 'The effect of it is this, that you do release to William Chicken all the arrears of rent that he doth owe you and no otherwise, and thus you shall have your land back again.' After replying, 'if it be no otherwise, I am content.' Thoroughgood sealed the deed. Chicken subsequently sold the land to an innocent purchaser."

Thorough good sued in trespass *quare clausum fregit* and recovered his land. It was said by the court of Common Pleas to be 'the usual course of pleading' that the defendant was a layman and without learning, and that he had been deceived by a distorted recital of the contents of the deed.

The plea, as its language showed, was confined to cases where the defendant was sued on a deed and at a time when illiteracy was frequent enough to demand special protection, it was unexceptionable. It might have been wiser, therefore, to have discarded it altogether when society became more sophisticated; but in the course of the nineteenth century the courts extended it with little reflection and without warrant to cases of simple contracts, and abandoned the requirement of illiteracy. The justification for these extensions was now said to be want of consent. On this view, the contract was complete nullity. Thus in 1869, the *Foster v. Mackinnon*, (1969) L.R. 4 C.P. 704, the following passage occurs in the judgment of a strong court

delivered by Byles, J.,

"It seems plain on principle and on authority that if a blind man, or a man who cannot read or who for some reason (not implying negligence) forbears to read, had a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (*ibid* at 711)".

At page 233 again it is stated as under:

"The final question is, whether the plea of *non est factum* will be withheld from a party if the mistake was due to his own negligence. In *Foster v. Mackinnon*, (1969) L.R. 4 C.P. 704, the Court of Common Pleas stated in unambiguous terms that a signatory is barred by his negligence from pleading his mistake against an innocent third party who was acted to his less upon the faith of the document.

The action before the Court was against the defendant, described as 'a gentleman far advanced in years', as indorser of a bill of exchange. It appeared that one Callow took the bill to him and asked him to sign it, telling him that it was a guarantee. The defendant, in the belief that he was signing a guarantee similar to one which he had given before, signed the bill on the back. He looked only at the back of the paper, but it was in the ordinary shape of a bill of exchange, and it bore a stamp the impress of which was visible through the paper. The bill was later negotiated to the plaintiff who took it without notice of the fraud.

The action was first tried by the Lord Chief Justice, who told the jury that if the defendant signed the paper without knowing that it was a bill and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, then he was entitled to their verdict.

"The jury found that the defendant had not

been negligent and returned a verdict in his favour. On appeal, the Court of Common Pleas endorsed the direction given by the trial Judge, but ordered a fresh trial on the ground that the issue of negligence had not been fully and satisfactorily considered. In the result, therefore, the right of the defendant to sustain the plea of *non est factum* was to depend upon whether he was eventually found to have been guilty of negligence."

7. It is useful to extract from the judgment of the learned single Judge the authorities on this principle, not many, but useful only such as the case of *Gallie v. Lee*, 1971 A.C. 1004. That was a case in which a 78 year old widow who had a lease-hold interest in a house, gave the deeds to her trusted nephew. She intended to make a gift to him to take effect immediately. She knew that her nephew wished to raise money on the house and that L, her nephew's business associate, was to collaborate with the nephew in raising money on the house.

"In June, 1962, L asked her to sign a document. She had broken her spectacles and could not read it. She asked what it was and L told her that it was a deed of gift of the house to her nephew. She executed it in that belief, and the nephew witnessed the execution, it being part of his arrangements with L, that L should raise money on the house and repay it to the nephew by instalments. The document signed was in fact an assignment of the house by her to L for \$ 3,000. The \$ 3,000 was never paid for intended to be paid to her. L, having obtained the deeds and a reference as to his reliability from the nephew, mortgaged the house for \$ 2,000 to a building society, but used the money so raised to pay his debts and defaulted on the mortgage instalments. The building society sought to obtain possession of the house.

G., at the nephew's instigation, began an action, in which she pleaded *non est factum*, against L, and the building society and asked for a declaration that the assignment was void and that the title deeds should be delivered to her. The Judge found that G did not read the document, the L represented it to her as a deed of gift to the nephew; that she executed it in that belief; and that a sale or gift to L was something which she did not and would not ever have contemplated; and he held that the plea of *non est factum* was established and

granted declaration asked for."

The Court of Appeal reversed the decision. Certain passages occurring in the judgment are vital to the case on hand. At page 1016 Lord Reid States thus:

"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case."

The passage relied on by Mr. Srinivasan, learned counsel for the respondent does not help him in any manner. On the contrary, the following observations of Lord Reid are important.

"We find in many of the authorities statements that a man's deed is not his deed if his mind does not go with his pen."

No doubt, Lord Reid stated that, that is far too wide. But that observation that "That is far too wide" will have to be applied only to the facts of the case before the House of Lords. Again at page 1021, Viscount Dilhorne observes as follows:

"What are the matters which have to be established for the plea to succeed? First, in my opinion, it must be shown that the document signed was radically different in character from that which the signer thought it was"

Lord Wilberforce at page 1027 holds as follows:

"As to persons who are illiterates, or blind, or lacking in understanding, the law is in a dilemma, On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases.

The law ought, in my opinion, to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according in their circumstances in putting their signature to legal documents."

8. Courts in India have on the rule of evidence enshrined in Secs. 101 and 102 in Chapter VII of the Evidence Act, particularly in cases of women in India who in some parts and some communities are *pardanashin* and in most parts of the country illiterate, for the reason that they transact their business generally through malefolk only, men always dominated women, and women lived a life dominated by men, this being the curse that always surrounded women folk even though law recognised their independent rights, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction. One could easily, since the plaintiff alleged mis-representation and fraud, ask her to prove the mis-representation and fraud. But not in a case where a woman being an illiterate and unaware of the contents signed the document. Unless fully and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case. Learned Single Judge, in our opinion, is right in holding that the Court will not ask the plaintiff to prove the allegation but demand from the defendant to disprove the allegation of mis-representation and fraud. The learned single Judge, in our opinion, has taken the correct view of the law on the fact that the 1st plaintiff is an illiterate woman who merely affixed her thumb impression. She is a woman who possibly could not act without help.

9. Learned counsel for the appellant has however, made a serious endeavour before us to show that the 1st plaintiff has been dealing herself in her affairs and not depending upon any help and that in the instant case, there are circumstances to show that she willingly executed the sale deed to discharge the earlier debts, but later instituted the suit on a false plea that she was unaware of the real nature of the transaction. In his endeavour, he has taken us through the evidence of the witnesses and the documents on record. We, however, see no reason to differ from the findings recorded by the learned single Judge in this behalf. The property in dispute is the only house belonging to the 1st

plaintiff. With the transfer of title in this house, she was to become homeless. The theory propounded by the defendant-appellant that the 1st plaintiff wanted to discharge the debts and therefore she required money and after discharging the debts, she desired to settle down at Madras looks ridiculous. Equally ridiculous is the plea that the woman who had already been in possession after transfer of the property in favour of the defendant-appellant, once again trespassed into the house and occupied a room only to create a basis for the suit for declaration and injunction. The learned single Judge has noted these facts as follows:

"The plaintiff-appellant is an illiterate. She has merely affixed her thumb impression. Though an argument was raised on behalf of the respondent that the appellant might be in a position to read but not write, that is made only at the bar and not supported by evidence. She has no male help. The defendant is a trusted relation who has been acting on her behalf with regard to the collection of rents and payment of municipal taxes as spoken to by her.

This is the only house belonging to her and therefore she would not have thought it prudent to sell away that only house to deprive herself of even her right of residence. The plea of the respondent that she wanted to dispose of the property and settle in Madras has been disbelieved by the learned Subordinate Judge. Equally, his theory of trespass. As spoken to by her she continued to be in occupation of that one room throughout even after the execution of Ex. 1.

There was no demand by the mortgagee. The payment of Rs. 1700 on the promissory note debt Ex. X-13 cannot be believed at all because what was required to be paid even assuming there was a borrowing of Rs. 1,000 under that promissory note, together with interest, would only amount to Rs. 1,075 why, therefore, Rs. 1,200 was stated to have been paid has not been explained. The promisee is none other than the defendant's brother.

There is no evidence with regard to the so-called handloans advanced by the defendant.

It is rather curious that all these documents were attested by the same set of attesters in

that Arumugham happens to be the attester in respect of documents, Exs.X-2, X-13 and X-1. All these circumstances taken together with the evidence of P.W.1 clearly prove her case.

10. On the fact of the above, we have no hesitation in holding that the onus lay upon the defendant-appellant to show that the 1st plaintiff fully knew about the contents of the document of sale and that her story that she was made to believe that she was document is not true. The defendant appellant has failed to discharge the onus in this behalf and the evidence as above positively proved that the sale is hit by the doctrine of *non est factum*. We, accordingly, find no merit in this appeal. The appeal is dismissed. On the facts of this case, however, there shall be no order as to costs.

B.S. ----- Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Venkataswami and Abdul Hadi, JJ.

A.A.O.Nos.340 and 341 of 1985 31st March, 1992.

The Superintending Engineer, National Highways, Salem
...Appellant
v.
Vcl.Somasundaram ...Respondent.

Arbitration Act (X of 1940) - Arbitrator appointed under - It has power to send for documents required by any of the parties - Court if can direct production of documents.

It is clear from the decision in *Y.Ranganathan v. P.L.N.Gupta, A.I.R. 1985 Mad. 348*, that the arbitrator has the power to send for documents required by any of the parties before him and that the Court has no such power, to give directions for the production of the documents. The decision in *Bombay Ammonia Pvt. Ltd. v. Union of India, A.I.R. 1987 Del. 148*, also shows that the arbitrator has power to procure necessary document for deciding the dispute before him. The observation in *K.P.Poulose v. State of Kerala, A.I.R. 1975 S.C. 1259*, also shows that the arbitrator has the abovesaid

power to send for the relevant documents.

[Paras 5, 6 and 7]

Cases referred to:

Y.Ranganathan v. P.L.N.Gupta, A.I.R. 1985 Mad. 348. [Para 5]

M/s.Bombay Ammonia Pvt. Ltd. v. Union of India, A.I.R. 1987 Del. 148. [Para 6]

K.P.Poulose v. State of Kerala, A.I.R. 1975 S.C. 1259. [Para 7]

R.Swaminathan, Government Pleader, for Appellant.

R.Subramaniam, for Respondent.

The Judgment of the Court was made by *Abdul Hadi, J.*: A short legal point is alone involved in those two appeals arising out of arbitration proceedings. The point is, whether an arbitrator has power to send for the documents required by any of the parties before him. The appellant's contention is that an arbitrator has no such power and the party requiring any document to be sent for could only move the court for necessary directions. But the contention of the respondent is that an arbitrator himself has such a power.

2. The facts which are necessary for the disposal of those two appeals may now be stated: The dispute is between the contractor, the respondent in both the appeals, and the Superintending Engineer, National Highways, Salem, who is the appellant in both the appeals. Since the contractor could not carry on the work, the appellant terminated the contract. According to the contractor, he could not carry on the work because the appellant who had to supply hot mix plant pavers, etc., did not supply them. The dispute was referred to the named arbitrator, who passed an award rejecting the claim of the contractor that the Government (Appellant) should supply the same and holding that the stand of the Government was correct. Hence, O.P.No.160 of 1978 was filed by the contractor to set aside the award dated 19.7.1978 and also O.P.No.228 of 1980 to prevent the Government from enforcing the bank guarantee given by him till the disposal of the O.P.No.228 of 1980. By a common order dated 25.10.1984 both O.P.Nos.160 of 1978 and 228 of 1980 were allowed in that in O.P.No.160 of 1978 the award was set aside and remitted back to the arbitrator for fresh disposal according to law, in the light of the observations made in that order and in the light of additional documents produced by both parties.

3. As against order in O.P.No.160 of 1978, A.A.O.No.340 of 1985 has been preferred and as against the order in O.P.No.228 of 1980, A.A.O.No.341 of 1985 has been filed by the appellant. The ground on which the abovesaid common order was passed by the court below is that since the required documents were not sent for by the arbitrator, there is a mistake apparent on the face of the record causing prejudice to the contractor which amount to a legal misconduct by the arbitrator.

4. Learned counsel for the appellant contends that the arbitrator has no such power to send for any relevant document required by any of the parties and if at all the party requiring the document could only move the civil court for getting necessary directions and that the arbitrator himself could not send for the document. But, on the other hand, learned counsel for the respondent/contractor drew our attention to three decisions, which we find, support his contention that the arbitrator has such power to send for the documents.

5. The first decision is: *Y.Ranganathan v. P.L.N.Gupta, A.I.R. 1985 Mad. 348*, where a Division Bench of this Court held that any direction by the court to produce documents, while the proceedings before the arbitrator is pending, is not maintainable. The relevant passage in the said decision appearing in paragraph 10 is as follows:

"The present prayer for a direction to produce the documents, in our view, is not contemplated by the second schedule to Sec.41 of the Arbitration Act, nor can Sec.31(3) and (4) of the Act be interpreted to include such type of prayers. The Arbitrator is seized of that matter and he has also made certain observations and given some directions on the applications filed by the appellants, which we have extracted in paragraph supra. To allow such petitions to be filed before court for directions to produce documents will open the floodgates of litigation and the court will be mulcted with many number of petitions of this nature leaving the Arbitrator helpless. Arbitration proceedings are intended to give speedy remedy without burdening the court with cases in which the parties opt for arbitration. If such types of applications, which are not contemplated by the Arbitration Act either under Sec.31 or under Sec.41 or under the Second Schedule thereof, are allowed to be filed, the purpose of

the Arbitration Act itself will be frustrated." Therefore, it is clear that the court has no such power, but the arbitrator himself has such a power. 6. In the second decision, viz., *M/s.Bombay Ammonia Pvt. Ltd. v. Union of India, A.I.R. 1987 Del. 148*, it was found that the arbitrator therein made no efforts to procure vital documents and the award was made by him without considering the vital documents and in such circumstances, the Delhi High Court held that the award was liable to be set aside. This decision also shows that the arbitrator has power to procure necessary document for deciding the dispute before him.

7. In the third decision cited by the learned counsel for the respondent, viz., *K.P.Poulose v. State of Kerala, A.I.R. 1975 S.C. 1259*, the award of the arbitrator therein was set aside by the Supreme Court, since the arbitrator ignored certain very material documents relevant to the controversy between the parties. In that context, the Supreme Court observed as follows:

"In the background of the controversy in this case even if the Department did not produce these documents before the Arbitrator it was incumbent upon him to get hold of all the relevant documents...."

This observation also shows that the arbitrator has the abovesaid power to send for the relevant documents. No other point was argued before in.

8. Therefore, the decisions taken by the Court below cannot be said to be in any way erroneous. The appeals are dismissed with costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- A.R.Lakshmanan, J.

W.P.No.9908 of 1992 and W.M.P.Nos.14296 and
14925 of 1992 *3rd September, 1992.*

**Sri Mahalakshmi Temple, represented by its
Founder Managing Trustee M.R.Srinivasa
Varadachariar** ...Petitioner
v.

**The Commissioner, H.R. & C.E. (Admn.)
Department, Madras and another** ...Respondents.

*(A) Tamil Nadu Hindu Religious and Charitable
Endowments Act (XXII of 1959), Sec.45(1) - Temple
of recent origin - Office of trusteeship of temple
cannot be claimed to be hereditary - Temple held to
have been built by raising funds from public - Com-
missioner of Endowments if can appoint executive
for administration of the temple.*

Held: The temple in question is admittedly of a
recent origin and the office of the trusteeship of
the temple cannot be claimed to be hereditary.
That apart, even assuming that the petitioner is to
make a claim in this regard, until the same is finally
established in a manner known to law, it cannot be
assumed that the temple is under the management
of hereditary trustee. The findings rendered by the
authorities constituted under the Act, the City
Civil Court and this Court go to show that the
temple in question had been built by raising funds
from the public. Having regard to the facts, it
would be perfectly within the powers of the
Commissioner, H.R. & C.E., to appoint an Execu-
tive Officer for the temple in question. [Para 15]

*(B) Tamil Nadu Hindu Religious and Charitable
Endowments Act (XXII of 1959), Secs.6(20) and
45(1) - Temple in question held to be a religious
institution - Founder of temple not a hereditary
trustee, if entitled to notice under Sec.45(1), before
appointment of Executive Officer for temple.*

Held: This Court categorically held that the insti-
tution in question is a religious institution within
the meaning of Sec.6(20) of the Act. Hence, the
petitioner has absolutely to right to claim that he
is entitled to a notice under Sec.45(1) of the Act
before the appointment of an Executive Officer.
The only circumstance under which the first
respondent (Commissioner) cannot appoint an

Executive Officer for a temple is where there is a
hereditary trustee in which case, the 1st respon-
dent has to give notice of the proposed appoint-
ment and consider the objections of the hereditary
trustee regarding such appointment. In the
instant case, the petitioner has miserably failed to
prove that he is the hereditary trustee and hence
he is entitled to notice preceded by the appoint-
ment of the Executive Officer. [Paras 21 and 22]

Cases referred to:

*Commissioner, H.R. & C.E., Madras v.
K.Jothiramalingam, A.I.R. 1985 Mad. 341.* [Paras
5, 23]

*Nagarajan v. Commissioner, H.R. & C.E., Madras,
(1970)2 M.L.J. 599: A.I.R. 1971 Mad. 295.* [Para
23]

*Roopalunga Chettiar v. Deputy Commissioner, H.R.
& C.E., Madras, 97 L.W. 424.* [Para 24]

*G.Subramaniam, Senior Counsel for
W.C.Thiruvengadam, for Petitioner.*

*P.M.Bhaskaran, Government Advocate, for
Respondent No.1.*

*R.Krishnamurthi, Senior Counsel for
R.Muthukumaraswami, for Respondent No.2.*

The Court made the following

ORDER: The petitioner has filed the above writ
petition in his capacity as the Founder Managing
Trustee of Sri Mahalakshmi Temple, Madras-90,
for the following relief:

To issue a writ of *certiorari* or any other appropri-
ate writ, order or direction, calling for the records
of the 1st respondent relating to the appointment
of the 2nd respondent as Executive Officer of Sri
Mahalakshmi Temple, Besant Nagar, Madras-90,
issued in Rc.No.51321/92-L1, dated 16.7.1992 and
quash the same.

2. According to the petitioner, he is the founder
Managing Trustee of Sri Mahalakshmi Temple.
The subject matter of challenge in this writ peti-
tion is the order of the 1st respondent in Proceed-
ings No.51321/92-L1, dated 16.7.1992 appointing
the 2nd respondent as the Executive Officer of the
Sri Mahalakshmi Temple, Madras-90, for better
administration of this temple. The order was passed
by the 1st respondent in exercise of the powers
vested in him under Sec.45(1) of the Tamil Nadu
Hindu Religious and Charitable Endowments Act,
1959 (Act 22 of 1959), hereinafter referred to as
'the Act'. The powers and duties of the Executive
Officer and the non-hereditary trustee have
already been set out in detail in the Annexure to

the order impugned in the writ petition. According to the writ petitioner, he is the founder of the temple and the City Civil Court, Madras, has given a finding in his favour, which clearly establishes his position in the temple ever since its inception. Even though the Courts have held that Sri Mahalakshmi Temple is a public religious institution coming under the provisions of the Act, that cannot be a reason for the appointment of an Executive Officer for the temple without notice and that the present appointment of an Executive Officer for the temple practically replaces the petitioner from his position as founder-cum-managing trustee of the temple. In the circumstances, it is stated, that the petitioner should get a notice before an order is passed under Sec.45(1) of the Act. It is further stated that the dismissal of L.P.A.No.115 of 1992 by a Division Bench of this Court has not given any special power to the 1st respondent to proceed with the appointment of an Executive Officer for the institution in question and hence, the impugned order of the 1st respondent is *ex facie* illegal and is liable to be set aside.

3. The above writ petition was admitted by this Court on 22.7.1992. Along with the writ petition, W.M.P.No.14296 of 1992 was filed to stay the operation of the impugned order of the 1st respondent dated 16.7.1992 in appointing the 2nd respondent as the Executive Officer of the temple in question. S.Govindasamy, J. was pleased to grant interim stay for two weeks on 22.7.1992. To vacate the same, the 2nd respondent has filed W.M.P.No.14925 of 1992. The 2nd respondent has also filed a detailed counter in this case. Likewise, the 1st respondent has also filed a detailed counter affidavit denying the allegations contained in the affidavit filed in support of the writ petition.

4. By consent of all parties, the main writ petition itself was taken up for final hearing and I have heard Mr.G.Subramaniam, learned Senior Advocate on behalf of the petitioner, Mr. R.Krishnamurthi, learned Senior Advocate on behalf of the 2nd respondent and Mr.P.M. Bhaskaran, learned Government Advocate for the 1st respondent.

5. Mr.G.Subramaniam, learned Senior Advocate for the petitioner, at the time of hearing has raised the following only contention. The 1st respondent has no authority to appoint an Executive Officer for the temple in question without any notice to the person in management. According to him, it

has been admitted by all the authorities below and the City Civil Court and this Court, that the petitioner is the founder of the temple. Placing strong reliance on the Division Bench judgment of this Court, Mr.G.Subramaniam further contends, that an enquiry has to be held after giving notice to the person in management before the appointment of an Executive Officer under Sec.45(1) of the Act to any temple and since no such notice has been given to the petitioner by the 1st respondent, the impugned proceedings of the 1st respondent appointing an Executive Officer violates all principles of natural justice. Strong reliance was placed on the Division Bench decision of this Court reported in *Commissioner, H.R. & C.E., Madras v. K.Jothiramalingam*, A.I.R. 1985 Mad. 341. (G.Ramanujam and V.Ratnam, JJ.).

6. *Per contra*, Mr.R.Krishnamurthi, learned Senior Advocate, on behalf of the 2nd respondent submits that the writ petition is misconceived and devoid of merit, and as admitted by the petitioner himself the temple in question has been declared to be a public temple and a religious institution within the meaning of the Act. Since the claim of the petitioner that the said temple is a private temple has been rejected by the authorities constituted under the Act, and the statutory suit filed by the petitioner in O.S.No.3510 of 1981 on the file of the City Civil Court, Madras, was dismissed upholding the findings of the authorities under the Act, and when the appeal filed by the petitioner in A.S.No.853 of 1981 on the file of this Court was dismissed confirming the order of the authorities below and the further appeal in L.P.A.No.115 of 1992 was also dismissed by a Division Bench of this Court finally declaring the temple in question to be a public temple and a religious institution to which all the provisions of the Act would apply, the contention of the petitioner has absolutely no merit and the same has to be rejected in view of the various proceedings and the pronouncements of the authorities constituted under the Act and the legal pronouncements of the City Civil Court, Madras and also this Court.

7. Mr.P.M.Bhaskaran, learned Government Advocate for the 1st respondent, has also supported the contentions raised by Mr. R.Krishnamurthi on behalf of the 2nd respondent. He also reiterated the contentions raised by the 1st respondent in his counter affidavit.

8. I have carefully considered the rival submissions made by the respective senior counsel. The only claim put forward in the present writ petition is that the appointment in question is invalid in law as it had not been preceded by a notice, which according to the petitioner, is mandatory. The petitioner has also relied upon a judgment of this Court in this regard. I am of the view that the aforesaid claim of the petitioner is not tenable in law and on facts. As referred to already, the only issue projected by the petitioner all through was that the temple in question is a private one, to which the provisions of the Act would not apply. That issue, as stated already, had been concluded against the petitioner and in favour of the Department. At no point of time had the petitioner projected a claim that the temple is administered by a *hereditary trustee*. As a matter of fact, the said claim has also not been averred in the affidavit filed in support of the present writ petition. Let me now advert to the findings already given by the authorities constituted under the Act, the City Civil Court and also this Court in the various proceedings referred to above and see whether in view of such categorical and unassailable findings, the petitioner will be entitled to any notice as claimed by him.

9. The first order in this context to be referred to is the order passed by the Deputy Commissioner (Judicial), H.R. & C.E. (Admn.) Department, Madras-34, in O.A.No.60 of 1977 dated 5.1.1979. That is an application under Sec.63(a) of the Act filed by M.R.Srinivasa Varadachariar. It is clearly mentioned in that order that the public at large have donated about Rs.11 lakhs for the construction of the temple and that Sri Mahalakshmi Trust as such was found to be a public trust. According to the Deputy Commissioner, Ex.A-1 filed before him is the deed of declaration of trust, which itself confirms the above fact. In paragraph 2 of Ex.A-1, the following is stated categorically:

“Whereas the founder herein has decided to declare and execute a public charitable and religious trust in the name and style of Shri Mahalakshmi Trust.”

Admittedly, public have contributed for the construction of the said temple and that by itself would, in my view, establish that the temple in question is a public temple under the provisions of the Act. The Deputy Commissioner has found that the temple in question is of public character

as defined under Sec.6(20) of the Act, and has been used for public religious worship and that the same has been dedicated to and for the benefit of and use as of right by Hindus as a public religious worship as laid down in the several rulings referred to in the order. Therefore, the Deputy Commissioner has dismissed the petition filed by the writ petitioner under Sec.63(a) of the Act seeking a declaration that the temple does not fall under the purview of the Act.

10. An appeal was preferred in A.P.No.32 of 1979 against the abovesaid order of the Deputy Commissioner before the Commissioner, H.R. & C.E. (Admn.) Department, Madras-34. The Commissioner has also dismissed the appeal preferred under Sec.69(i) of the Act and confirmed the finding of the Deputy Commissioner that the institution known as Sri Mahalakshmi Temple, Besant Nagar, Madras-90, is a religious institution within the meaning of Sec.6(20) of the Act.

11. The writ petitioner thereafter filed a suit in O.S.No.5 of 1980 on the file of the Sub Court, Chengalpattu, which was later transferred to the City Civil Court, Madras and numbered as O.S.No.3510 of 1981. The suit was disposed of on merits by T.N.Singaravelu, J. as he then was, by his judgment dated 17.8.1981. While referring to the evidence of the writ petitioner M.R.Srinivasa Varadachariar as P.W.1 in the suit, the learned Judge says that the petitioner hails from the village of Mukkoor and has no other occupation or avocation and that he has taken up this occupation as the means of the livelihood from 1942 onwards and that he is not an income-tax assessee and he never submitted returns to the Income-tax Department. Therefore, the learned Judge has found *prima facie* that the petitioner is not in a position to contribute any amount towards the temple and in any event, there is no acceptable evidence showing his financial contribution to the temple. While referring to his chief-examination, the learned Judge states that the petitioner has admitted that from the sale proceeds of the Ashtalakshmi Pictures, he discharged the bank loan of Rs.40,000. It was also elicited from him that Sri Mahalakshmi Trust, which came into existence in 1972, had no funds of its own and that he purchased the site for the temple only from out of the donations from the public and through the sale of the Ashtalakshmi Pictures to the devotees. The other admissions elicited from P.W.1, the

petitioner herein, is that the temple had been constructed according to Agama Sastras and it is a Vaishnava temple of Vadagalai cult following Pancharathra Agamam and that the temple was built only for the worship of the public.

12. The above answers given by the writ petitioner as P.W.1 in the civil suit speak for themselves and no further comments, in my view, are necessary. These admissions further bear out that the temple is dedicated for public religious worship and for the benefit of the Hindu community. P.W.1 was the solitary witness to speak to his case and none of the other trustees or other witnesses has chosen to support his claim. D.W.5, G.K.Sundaram, Managing Director of Lakshmi Mills Group, Coimbatore, who contributed major donation, has given evidence also denying the claim of P.W.1, the petitioner herein. It is useful to extract the findings of the learned Judge in paragraph 53 of his judgment:

"Now, the action of the Trustee in filing this suit is nothing but a retrograde step which is likely to hurt the sentiments and feelings of the large number of worshipping public, especially those who have made large donations in cash and kind to this Deity. In other words, this is a luxurious suit launched by the *defacto* trustee, which is neither beneficial to the public nor to the Trust, of which P.W.1 claimed to be the founder."

Thus, on a deep consideration of law and facts, the learned Judge dismissed the suit.

13. The fourth proceeding is the appeal filed by the writ petitioner in A.S.No.853 of 1981 and C.M.P.No.2812 of 1992. E.J.Bellie, J., on an elaborate consideration of the facts and law, has confirmed the judgment and decree of the Principal Judge, City Civil Court, Madras and dismissed the appeal and C.M.P.No.2812 of 1992 which was filed to amend the cause title.

14. The matter was taken up on further appeal by way of L.P.A.No.115 of 1992, which was dismissed by P.S.Mishra and Padmini Jesudurai, JJ., at the time of admission itself. It is relevant to reproduce the judgment of the Division Bench in this context:

"Heard. The findings with regard to the character of a deity and the temple based on such evidence that was adduced by the parties, in our opinion are unassailable. Faced with this situation, learned counsel for the appellant

has argued that taking shelter under the impugned judgment, some of the officers of the Hindu Religious Endowments Department of the State have interfered with their right of administration of the properties of the temple in question. Since there has not been any such controversy either in the suit or before the learned single Judge, who had disposed of the appeal, we do not think it will be possible for the appellant to show anything in this regard at the stage of the appeal invoking Clause 15 of the Letters Patent of this Court. If there is any such right of administration and if there is any interference in the said administration by any of the authorities of the respondent-Endowment Board, it shall be open to the appellant to raise the dispute in accordance with law. Any further dispute, however shall not be allowed with respect to the character of the temple in question. Since we do not find any merit in this appeal, it is dismissed."

Thus, it is seen from the legal proceedings referred to above, that the character of the temple in question has been finally adjudicated upon and decided.

15. The temple in question is admittedly of a recent origin and the office of the trusteeship of the temple cannot be claimed to hereditary. In fact, the petitioner has not claimed the said office to be hereditary. That apart, even assuming that the petitioner is to make a claim in this regard, until the same is finally established in a manner known to law, it cannot be assumed that the temple is under the management of hereditary trustee. The findings rendered by the authorities constituted under the Act, the City Civil Court and this Court go to show that the temple in question had been built by raising funds from the public. Having regard to the above facts, I am of the firm view, that it would be perfectly within the powers of the 1st respondent to appoint an Executive Officer for the temple in question and hence, I reject the contention of the writ petitioner raised on this ground.

16. In fact, the Department has waited patiently for the litigation initiated by the writ petitioner under Sec.63(a) of the Act reading its finality and then only the matter was considered by the Department and the impugned order appointing an Executive Officer came to be passed. In fact, the matter was considered by the Department and it

was felt necessary that an Executive Officer should be appointed to the temple in question in the interest of the temple as well as the public. In the impugned order it is stated that since large number of pilgrims used to visit the temple and that there were reasons to believe that the income of the temple from various sources are not properly accounted for and after the disposal of the cases in the Civil Courts, there was an attempt not to account for the income of the temple from various sources, it was felt necessary that the appointment of an Executive Officer was in the interest of the institution as well as the devotees. Therefore, the 1st respondent, by the impugned proceedings, appointed an Executive Officer to the petitioner temple. It is also seen from the records that the petitioner, though undertook to submit the audited accounts by a registered auditor to the Board on 10th April of every year, has miserably failed to comply with the said order of this Court in C.M.P.No.13806 of 1981 in A.S.No.853 of 1981. When once the petitioner has failed to comply with a solemn undertaking given before this Court in A.S.No.853 of 1981, on which ground he was allowed to manage the trust properties, the Department is justified in raising a presumption that the income might be misused for the personal ends of the petitioner and certain other interested persons. In fact, this is one of the reasons which compelled the 1st respondent to appoint an Executive Officer and this reason has also been explicitly stated in paragraph 6(v) and (vi) of the impugned order. Further, Mr.G.Subramaniam, learned Senior Advocate for the petitioner, at the time of hearing, produced the accounts books said to have been maintained and audited by the registered auditor, and requested this Court to verify the correctness of the accounts, etc. I refused to look into the same since it has not been submitted to the Board by 10th April of every year. I am of the view, that person like the petitioner, who has violated and disobeyed the orders of this Court, is not entitled to any indulgence at the hands of this Court. The Department, in my view, is right in appointing an Executive Officer to manage the temple in the interest of the temple in question and the public at large, who have contributed sizable amount for the construction of the temple and for its maintenance.

17. Mr.G.Subramaniam, learned Senior Advocate for the petitioner, at the time of hearing the writ

petition and the writ miscellaneous petitions, while referring to the letter given by the petitioner on 20.7.1992 to the 2nd respondent, submitted that the letter was written by the 2nd respondent himself and the petitioner was forced to sign the same. According to him, in this letter it has been mentioned that the petitioner has commenced to hand over charge of the temple properties to the Executive Officer, that the charge has not been fully handed over and that the completion of handing over charge will be done on 22.7.1992 without any hesitation. Before 22.7.1992, the writ petition was moved in this Court on 21.7.1992 and interim stay was obtained on 21.7.1992 itself. Hence, according to the learned Senior Counsel for the petitioner charge was not fully handed over to the 2nd respondent. I am straightaway reject this contention as wholly baseless. This argument has been invented only at the time of hearing. There is absolutely no whisper about this argument in the affidavit filed in support of the main writ petition. The same affidavit has been filed in the stay petition also. Nowhere in the affidavit it is stated that the petitioner was compelled or forced to hand over management and charge of the temple to the 2nd respondent and that the petitioner was threatened and coerced to hand over charge.

18. It is true that the petitioner has signed in English in this letter dated 20.7.1992 written by the 2nd respondent, in English. It is useful to reproduce this letter.

“From
Sri Mukkoor Srinivasa Varadachariar,
Person in Management,
A/M. Mahalakshmi Temple,
Besant Nagar,
Madras-90

To
The Executive Officer,
A/M. Parthasarathy Temple,
Madras-5.

I am to state that to-day I have commenced to hand over charge of A/M. Mahalakshmi Temple, Besant Nagar, Madras-90 to the Executive Officer of A/M. Parthasarathy Temple, Triplicane. I shall complete the charge on Wednesday the 22nd day of July without any hesitation. This is for your information.
For Sri Mahalakshmi Trust,

(Sd.) M.R.Srinivasa Varadachariar,
Founder & Managing Trustee,
20.7.1992.

Witness:

M.S.Srinivasa Raghavan,
20.7.1992.
33, Mahalakshmi Colony,
Besant Nagar,
Madras-90."

This letter has been witnessed by the petitioner's son M.S.Srinivasa Raghavan, residing at No.33, Mahalakshmi Colony, Besant Nagar, Madras-90. He has also put the date as 20.7.1992. The petitioner has only stated in paragraph 7 of the affidavit filed in support of the writ petition that the 2nd respondent armed with the impugned order has come to his temple and making attempt to take over the management ignoring his right in the temple as its founder. In the circumstances, the petitioner has prayed this Court to stay the operation of the impugned order of the 1st respondent in appointing the 2nd respondent as its Executive Officer pending disposal of the writ petition. This Court also, on the basis of the allegation contained in paragraph 7 of the affidavit filed in support of the writ petition, has granted interim stay only for two weeks on 22.7.1992. But the fact remains otherwise.

19. The original letter and the other records pertaining to take over of the temple on 20.7.1992 and 21.7.1992 have been produced before me for perusal. The petitioner having commenced to hand over charge on 20.7.1992 to the 2nd respondent without any protest or demur, has however, filed an affidavit before this Court (sworn to on 21.7.1992 and filed in this Court on the same date) with an entirely different version. Hence, I do not find any merit in the contention of Mr.G.Subramaniam, that the process of handing over was only commenced and not completed. Once possession is handed over voluntarily, the petitioner has no right to be in management of the temple and its properties any further even assuming that the petitioner was a person in management of the temple. Hence, on the facts and circumstances of the case and on a perusal of the records produced before me, I hold that the 2nd respondent has commenced to take charge on 20.7.1992 and the petitioner had voluntarily handed over charge on the same date and the interim order, which was

granted only for two weeks and expired by now, cannot continue. Accordingly, I dismiss W.M.P. No.14296 of 1992 and allow W.M.P.No.14925 of 1992.

20. It is also seen from the records produced by the 2nd respondent that he has taken a list of items of properties and has also made arrangements for sale of archana tickets and prasadam tickets and tickets for other ceremonies in the temple. The Hundials were sealed on 3.7.1992 and all the Bhatachariars have given the list of articles entrusted to them in their respective sub-shrines. The 2nd respondent has also made payment to third parties through cheque and the balance amount available in bank deposit is Rs.1,965 as on 24.7.1992, the date of signing the affidavit. The 2nd respondent also reports that the daily collection from the institution is nearly Rs.2,000 which is apart from the collections through Hundials, and on verification of the accounts, it is seen that the petitioner is keeping only a very small sum in the bank account. According to the 1st respondent, the temple is getting a sum of about Rs.2,000 per day as on 24.7.1992 by way of sale of archana and prasadam tickets and after meeting the expenses, a sum of Rs.1,965 was remitted to the bank on 21.7.1992 and that therefore, one can reasonably apprehend that the minimum income of the temple would be about Rs.2 lakhs per month through the collection of hundials, sale of archana tickets and prasadam tickets, etc. The amount outstanding in the bank was also very negligible.

21. Mr.G.Subramaniam, learned Senior Counsel for the petitioner has also produced before this Court a true copy of the petition filed by the writ petitioner under Sec.63(b) of the Act before the Deputy Commissioner, H.R. & C.E. (Admn.) Department, Madras-34, praying to enquire into the matter and declare that the petitioner is a person entitled to hold office as founder-cum-hereditary trustee of Sri Mahalakshmi Temple, Besant Nagar, Madras-90, controlled by Sri Mahalakshmi Trust, which has been registered under the Societies Registraion Act, within the meaning of Secs.6(11) and 63(b) of the Act, and pass suitable orders. The said petition has been filed on 26.7.1992, i.e., after the judgment of this Court in L.P.A.No.115 of 1992 dated 9.7.1992 and after the admission of the present writ petition and grant of stay by this Court on 22.7.1992. The said petition is still pending. Unless and until the

said petition filed under Sec.63(b) of the Act is finally adjudicated upon by the Board, the petitioner cannot raise any claim to be in management of the temple. As stated above, he has failed before all the statutory authorities constituted under the Act and before the City Civil Court and this Court. This Court has categorically held that the institution in question is a religious institution within the meaning of Sec.6(20) of the Act. Hence, the petitioner has absolutely no right to claim that he is entitled to a notice under Sec.45(i) of the Act before the appointment of an Executive Officer.

22. It is also seen from the order impugned in the writ petition that the 1st respondent has specifically stated in that order that the power has been exercised for the better and proper administration of the temple in question, which in my view, is a relevant consideration. In my view, the power under Sec.45(i) of the Act has been exercised by the 1st respondent only in accordance with the provisions of the Act. Since the 1st respondent has exercised his power under Sec.45(i) of the Act only on relevant considerations, I am of the view, that the exercise of such power cannot be challenged by the petitioner as being outside the purview of Sec.45 of the Act. The only circumstance under which the 1st respondent cannot appoint an Executive Officer for a temple is where there is a hereditary trustee, in which case, the 1st respondent has to give notice of the proposed appointment and consider the objections of the hereditary trustee regarding such appointment. In the instant case, the petitioner has miserably failed to prove that he is the hereditary trustee and hence he is entitled to notice preceded by the appointment of the Executive Officer.

23. Strong reliance was placed by Mr.G.Subramaniam, learned Senior Advocate for the petitioner on the decision of a Division Bench of this Court reported in *Commissioner, H.R. & C.E. (Admn.) Department, Madras v. K. Jothiramalingam, A.I.R. 1985 Mad. 341*, to show that show cause notice against such appointment is essential under Sec.45 of the Act. That was a case of a hereditary trustee, having been so declared by the judgment of this Court in A.S.No.157 of 1961 dated 27.11.1963. According to the respondent in the above decision (K.Jothiramalingam), he had been in his capacity as such hereditary trustee submitting budgets, dhittam, etc., as contemplated under the

provisions of the Act and had been looking after the administration and management of the temple and maintaining its accounts, which has also been duly audited by the appropriate authorities under the Act. While matter stood thus, proceedings were initiated by the Assistant Commissioner, H.R. & C.E. Department, Cuddalore, to associate non-hereditary trustees with the respondent under Sec.49 read with Sec.47(2) of the Act on certain grounds and though the respondent submitted his objections, without affording any opportunity to him, the Assistant Commissioner called for applications for appointment of non-hereditary trustees, which led to the filing of R.P.No.242 of 1974 by the respondent and his obtaining stay of the notification calling for applications for appointment of non-hereditary trustees. Ignoring the order secured by the respondent, the Assistant Commissioner proceeded to appoint two non-hereditary trustees to be associated with the respondent and that led to the filing of another application R.P.No.41 of 1975 before the Commissioner, wherein also the respondent secured an order of stay. Later, the order of appointment of non-hereditary trustees was set aside by the Commissioner on the ground that the respondent was not given adequate opportunity to set out his objections. Despite these proceedings, the Commissioner in the purported exercise of the powers vested in him under Sec.45(1) of the Act, initiated proceedings for the appointment of an Executive Officer on the ground that such appointment will pave the way for the better administration of the temple. The writ petition filed by the respondent to quash the order of the Commissioner was allowed on the ground that no opportunity was given to the respondent. The Department filed writ appeal. The Division Bench held that the Commissioner exercised his power under Sec.45(i) of the Act by straightaway appointing an Executive Officer without issuing notice to the respondent therein and after giving him opportunity to show cause against such appointment. Under those circumstances, the Division Bench held that the order of the Commissioner deserves to be quashed and was rightly quashed by the learned single Judge, and no case for interference with that order was made out and dismissed the writ appeal with costs. In my view, the above decision will be of no assistance to the writ petitioner herein, for, that decision was rendered on the basis that the

respondent therein is a hereditary trustee. Admittedly, the respondent therein is a hereditary trustee and the Department proceeded to appoint non-hereditary trustees and Executive Officer without giving notice or opportunity or even holding an enquiry as to the need for the appointment of such an Executive Officer. Hence, the Division Bench was of the view that any appointment of an Executive Officer or a non-hereditary trustee should be preceded by the issue of a notice to the hereditary trustee to show cause why an Executive Officer should not be appointed. They also refer to the decision in *Nagarajan v. Commissioner, H.R. & C.E., Madras, (1970) 2 M.L.J. 599: A.I.R. 1971 Mad. 295*, which has considered the very question arising in the writ appeal, wherein it has been laid down in no uncertain terms that notice is necessary for a hereditary trustee before the appointment of a non-hereditary trustee under Sec.45 of the Act. Hence, the decision in *Commissioner, H.R. & C.E. (Admn.) Department, Madras v. K.Jothiramalingam, A.I.R. 1985 Mad. 341*, is not applicable to the facts and circumstances of the present case, which is distinguishable on facts.

24. The next decision relied on by Mr.G. Subramaniam is an unreported judgment of a Division Bench of this Court in W.P.No.5474 of 1982, etc. batch dated 21.6.1983 (K.B.N.Singh, C.J. and S.Padmanabhan, J.). This judgment was cited for the proposition that the trustees who are functioning already should not be displaced during the pendency of the proceedings before the Commissioner. This judgment is not applicable to the present case for more than one reason, viz., (i) The writ petitioner was not appointed as trustee by any one including the Department; (ii) He is only a self-styled trustee; and (iii) The question of allowing the petitioner to function does not arise.

25. Mr.G.Subramaniam next contended that the properties of the temple should be recovered from the petitioner by taking steps under the appropriate provisions of the Act. In support of his contention he cited paragraph 10 in the decision reported in *Roopalunga Chettiar v. Deputy Commissioner, H.R. & C.E., Madras, 97 L.W. 424*, which is as follows:

"The question then for consideration is what shall be the date from which the non-hereditary trustees appointed under the Act would hold office. In all such cases, there should be a procedure under which the new appointee who

is appointed as a trustee of a religious institution acknowledges in writing that he has assumed charge of his office. In cases where persons appointed by H.R. & C.E. authorities themselves, are holding the office, it is expected that they should also acknowledge in writing that they had handed over charge and the newly appointed trustees should equally acknowledge in writing that they have taken charge of their office. There may however be cases where non-hereditary trustees are appointed and the hereditary trustees who are already holding the office may not be willing to hand over charge to the newly appointed trustees. In such situations, it is expected that the newly appointed trustees should acknowledge in writing to the authorities concerned that they have assumed charge of their office and thereafter taking appropriate proceedings as provided in the Act for the recovery of the possession of the properties and records of the concerned institution. It is not clear from the counter affidavit whether such a procedure is being followed or not followed by the H.R. & C.E. Department. In all the cases before us it is not disputed that a fit person appointed by the Department itself was holding the office by the time when the petitioners were appointed as non-hereditary trustees. In such circumstances, there must be something in writing to show that the fit person who is in charge of the affairs of the religious institution handed over charge of his office to the newly appointed trustee and that the newly appointed trustee took over charge from the fit person. The date of such handing over charge and taking over charge would be the date from which normally the newly appointed trustee would commence to hold office and he shall be eligible to hold office under Sec.47 for a period of three years from the date of assumption of office. We make it clear that in future as and when new trustees are appointed the authorities should have it recorded in writing that the newly appointed trustees have taken over charge from the persons already holding the office and the latter had handed over the charge. In cases where hereditary trustees in whose place or along with him the newly appointed trustees are appointed refuse to hand over charge, the newly appointed trustees should record that

they have assumed office notwithstanding the refusal of the existing trustees to hand over charge and that they would be taking appropriate steps to recover possession of the properties of the institution. This is implicit in Sec.47(3) itself where it provides that a trustee shall hold office for a term of three years."

This does not arise in the instant case since the petitioner herein has handed over charge without any protest. In view of this, the stay sought for, which had been granted on 22.7.1992, had become infructuous. The petitioner has suppressed the fact that the charge has been handed over by him and taken by the 2nd respondent on 20.7.1992. The 2nd respondent is functioning as Executive Officer with effect from 20.7.1992.

26. For the foregoing reasons, I dismiss the writ petition. However, there will be no order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam and Somasundaram, JJ.

C.M.P.No.14049 of 1990 in App.No.730 of 1987
14th October, 1992.

Sri-la-Sri Sivasubramanyananda Swami ...Petitioner v.

Sri-la-Sri Arunachalasamy Chidambaram and another ...Respondents.

Civil Procedure Code (V of 1908), Sec.151 and O.39, Rule 2-A - Exercise of inherent powers under Sec.151 - Scope - Civil Courts if can issue directions to police to extend their aid in the execution of decrees and orders or to implement orders of injunction passed by civil courts.

Sec.151 of the Civil Procedure Code confers power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. Every court is constituted for the purpose of doing justice according to law and must be deemed to possess as a necessary corollary and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo the wrong in

the course of the administration of justice.

[Para 21]

There is no provision in the Code providing for the implementation of the order of temporary injunction or decree for perpetual injunction granted by the courts. Therefore, when a party has obtained an order of temporary injunction from a court under O.39, Rule 1 of the Code and the other party against whom the order of injunction is passed disobeys the same, the aggrieved party can certainly approach the court invoking the power of the Court under Sec.151 and pray for police aid for the enforcement of the order of temporary injunction.

[Para 22]

In view of the above position of law it has to be held that in appropriate cases, directions under Sec.151 of the Civil Procedure Code can be issued by the civil courts to the police authorities to extend their aid and assistance in the execution of decrees and orders or to render aid to aggrieved parties for the due and proper implementation of injunction orders granted by civil courts.

[Paras 23 and 30]

G.Krishnan v. Smt.Thulasi Ammal, (1991)1 L.W. 513, overruled.

View of Shanmukham, J. in C.M.P.No.352 of 1986 in A.S.No.297 of 1980, Approved.

Cases referred to:

Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Mirala, A.I.R. 1962 S.C. 527. [Paras 6, 10]

Padam Sen v. The State of Bihar, (1961)1 S.C.R. 884. [Paras 7, 21]

M/s.Jaipur Mineral Development Syndicate, Jaipur. v. The Commissioner of Income-tax, New Delhi, A.I.R. 1977 S.C. 1348. [Para 8]

Century Flour Mills Ltd. v. Suppiah, (1975)2 M.L.J. 54. (F.B.) [Paras 9, 22]

Vidya Charan Shukla v. Tamil Nadu Olympic Association, A.I.R. 1991 Mad. 323. [Para 10]

Bhagat Singh Bugga v. Devan Jagbir Sawhney, A.I.R. 1941 Cal. 670. [Para 10]

Hari Nandan v. S.N.Pandita, A.I.R. 1975 All. 48. [Para 10]

Magna v. Rustom, A.I.R. 1963 Raj. 3. [Para 10]

Surjit Pal v. Prabin Kumar Sin, A.I.R. 1986 Cal. 220. [Para 10]

K.G.Gopal v. Lillybai by Power of Attorney Agent, A.C.Baktham, (1991)1 L.W. 559. [Para 11]

Kudiyar v. B.Ranganathan, (1991)1 L.W. 504. [Para 12]

Rayapati Audemma v. Pothineni Narasimhan, A.I.R.

1971 A.P. 53. [Paras 15, 27]
Subol Chandra Dutta v. Chimai Charan Nandy,
A.I.R. 1980 Cal. 126. [Para 16]
Saudamini Roy Chowdhury v. Satyendranath Sekar,
85 C.W.N. 958. [Para 16]
Sujit Pal v. Prahir Kumar Sen, *A.I.R. 1986 Cal. 220*.
 [Para 17]
Mohammed v. Mohammed Haji, *1986 K.L.T. 134*.
 [Para 18]
Jaishi v. Salig Ram, *A.I.R. 1981 N.O.C. 88*. [Para
 19]
Subal Kumar Dey v. Purna Chandra Giri, *A.I.R.*
1989 Ori. 214. [Para 20]
N.S.Mills v. Union of India, *A.I.R. 1976 S.C. 1152*.
 [Para 21]
Manoharlal v. Seth Hiralal, *(1962)1 S.C.R. (Supp.)*
450. [Para 21]
Sundaram Chetti v. The Queen, *I.L.R. 6 Mad. 203*.
 [Para 24, 27]
M.Viswanatha Rao v. Emperor, *38 L.W. 406*. [Para
 24, 27]
K.Murugappa v. Kuppuswami, *(1948)2 M.L.J. 458*.
 [Para 24]
G.Krishnan v. Smt.Thulasi Anmal, *(1991)1 L.W.*
513. [Para 25, 29]
R. v. Metropolitan Police Commissioner, *(1968)1*
All E.R. 763. [Para 25]
Varadachariyar v. The Commissioner of Police,
Egmore, Madras, *(1969)2 M.L.J. 1*. [Para 25]
Viswanatha Rao, In re., *I.L.R. 51 Mad. 1006*; *A.I.R.*
1928 Mad. 1049. [Para 29]
Goswami Gordhan Lalji v. Goswami Maksudan
Ballabh, *I.L.R. 40 All. 648*. [Para 29]
Narasimhappa v. Hanumanthappa, *(1976)2*
Karn.L.J. 33 S.N.C. 40. [Para 29]
 Petition praying that in the circumstances stated
 therein and in the affidavit filed therewith the
 High Court will be pleased to pass an order direct-
 ing the Deputy Superintendent of Police,
 Thiruthuraipoondi, to afford police protection in
 order to preserve the movable properties situated
 in Sri Arunachala Gnanadesika Swamigal Vedan-
 tha Sravana Mutt, Panchanadikulam in order to
 prevent the stelthy cutting of casurina trees over
 the property forming subject matter of O.S.No.36
 of 1984 on the file of the Court of the Subordinate
 Judge, Nagapattinam, pending A.No.730 of 1987
 preferred against the decree of the court of the
 Subordinate Judge Nagapattinam, dated 8.7.1987
 passed in O.S.No.36 of 1984.
G.Subramaniam for B.Kumar, for Appellant.

A.Ilango, for Respondent.

The Judgment of the Court was delivered by
Somasundaram, J.:- This C.M.P. has been referred
 to the Bench in as much as the view taken by
 Srinivasan, J., in *G.Krishnan v. Tmt. Thulasi Anmal*,
(1991)1 L.W. 513, with regard to the scope of the
 inherent powers of the court under Sec.151, C.P.C.
 (hereinafter called the Code), is in conflict with
 the view taken by Shanmukham, J. in C.M.P.No.352
 of 1986 in A.S.No.297 of 1980.

2. The petitioner filed a suit O.S.No.36 of 1984 on
 the file of Sub-Court, Nagapattinam for declara-
 tion that he is the Madathipathi and Adheenakartha
 of Shri Arunachala Gnanadesika Swamigal Ve-
 danta Sravana Mutt, Panchanadikulam and for a
 consequential permanent injunction. After trial,
 the trial court came to the conclusion that the
 petitioner is entitled to the relief of declaration
 and permanent injunction and decreed the suit
 O.S.No.36 of 1984. As against the judgment and
 decree in O.S.No.36 of 1984, the respondents have
 preferred, A.S.No.730 of 1987 before this Court
 and the same is pending. In the said appeal the
 petitioner filed the present C.M.P. requesting this
 Court to direct the Deputy Superintendent of
 Police, Thiruthuraipoondi to afford police pro-
 tection in order to preserve the movable proper-
 ties situated in Sri Arunachala Gnanadesika
 Swamigal Vedanta Sravana Mutt, Panchanadikulam
 and to prevent the cutting of casurina trees in the
 property forming subject matter of O.S.No.36 of
 1984 on the file of Sub-Court, Nagapattinam pending
 disposal of A.S.No.730 of 1987.

3. When the C.M.P. came up for hearing before
 Srinivasan, J., the learned Judge on 13.12.1990,
 passed the order of reference in the following
 terms:

"This is an application under Sec.151, C.P.C.,
 for directing the Deputy Superintendent of
 Police, Thiruthuraipoondi to afford police
 protection in order to preserve the movable
 properties of the Mutt and trees situated on
 the land. In my judgment dated 12.12.1990 in
 C.R.P.No.2853 of 1990, I had taken a view that
 civil courts cannot issue directions to the
 police officials in order to execute the orders of
 civil court or implement the orders of injunc-
 tion passed by civil courts. In that judgment, I
 have made a reference to the judgment of
 Shanmukham, J. in C.M.P.No.352 of 1986 in
 A.S.No.297 of 1980 wherein he had held that

such orders could be passed. In my judgment in the civil revision petition, I had stated that the case before Shanmukham, J., arose in this Court in an appeal and the case in the civil revision petition arose in the lower court. Hence, I thought that there was no necessity to refer the matter to a Bench, though I had expressed a different view from that of Shanmukham, J., 2. But in this case the question arises directly for consideration. If I take the same view as I had taken in C.R.P.No.2853 of 1990, it will be in conflict with the view taken by Shanmukham, J. In the circumstances, I think it is better to refer the matter to a Division Bench for an authoritative pronouncement.

3. My order in C.R.P.No.2853 of 1990 dated 12.12.1990 may be treated as part of this order for referring the matter to a Bench. Hence the office is directed to place the papers before my Lord the Chief Justice for constituting a Bench to decide this question which arose for consideration in this case."

In these circumstances, the matter is referred to us and the short but important question we have to examine here is this.

"Whether the civil courts can issue directions to the Police Officials in order to execute the order of the civil courts or to implement the order of injunction passed by the civil courts."

4. Mr.G.Subramaniam, the learned counsel for the petitioner contended that there being no provision in the Code in this behalf, the civil court has inherent powers under Sec.151 of the Code to issue directions to the police officials in order to execute the orders of the civil courts or to implement the order of injunction passed by the civil court. On the other hand, Mr.Ilango, the learned counsel for the respondent submitted that the civil court has no jurisdiction to grant police aid particularly, with regard to the implementation of the orders of injunction granted by the civil courts. The learned counsel for the respondents further contended that O.39, Rule 2-A of the Code provides for the disobedience or breach of injunction and O.21, Rule 32 of the Code provides for execution of the decree for injunction; therefore, by invoking the inherent powers under Sec.151, the court cannot issue directions to the police officials in order to execute the decree of injunction or to implement the order of temporary injunction granted by them.

5. To appreciate the contention of the learned counsel for the parties, it is necessary to refer to Sec.151 of the Code which reads thus:

"151. *Saving of inherent powers of court:* Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

In the first place, we have to examine the back drop of law as laid down by the decisions of courts with regard to the scope of the inherent powers of the court under Sec.151 of the Code for the purpose of deciding the question referred to us.

6. In *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Mirala*, A.I.R. 1962 S.C. 527, the Apex Court of the land, while dealing with the powers of the civil court under Sec.151 of the Code has observed as follows:

"The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court: it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognises the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code."

7. In *Padam Sen v. The State of Bihar*, (1961)1 S.C.R. 884, the question arose about the powers of the court to issue commission in the exercise of its powers under Sec.151 of the Code in circumstances not covered by Sec.75 and O.26 of the Code. The Supreme Court while holding that the court can issue a Commission in such circumstances observed thus:

"The inherent powers of the court are in Addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that the court is free to exercise them for the purpose mentioned in Sec.151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the code or against the intentions of the

Legislature.”

8. In *M/s. Jaipur Mineral Development Syndicate, Jaipur v. The Commissioner of Income-tax, New Delhi*, A.I.R. 1977 S.C. 1348, the Supreme Court dealt with the inherent powers of the High Court as follows:

“The courts have power, in the absence of any express or implied prohibition, to pass an order as may be necessary for the ends of Justice or to prevent the abuse of the process of the court. To hold otherwise would result in quite a number of cases in gross miscarriage of justice.”

9. In *Century Flour Mills Ltd. v. Suppiah*, (1975)2 M.L.J. 54, a Full Bench of this Court took the view that where in violation of a stay order or injunction against a party, something has been done in disobedience, it is the duty of the court as a matter of judicial policy to undo the wrong done in disobedience of the Court's order. The Full Bench, while holding that such power is available under Sec.151 of the Code observed thus:

“In our opinion, the inherent powers of this Court under Sec.151 of the Code of Civil Procedure are wide and are not subject to any limitation. Where in violation of a stay order or injunction against a party, something has been done in disobedience, it will be the duty of the court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. In our view, the inherent power will not only be available in such a case, but it is bound to be exercised in that manner in the interest of justice. Even apart from Sec.151, we should, observe that, as a matter of judicial policy, the court should guard against itself being satisfied in circumstances like this by holding that it is powerless to undo a wrong done in disobedience of the court's orders. But in this case it is not necessary to go to that extent as we hold that the power is available under Sec.151 of the Code of Civil Procedure.

9. Mr. Panchapakasa Ayyar for the respondents, however, contends that our view as indicated above, would prevail only as between the parties in Court, but when third parties have acquired rights by reason of something happening, though it is in contravention or in disobedience of the orders of Court, the legal position would be different. He says that, since the resolutions had been passed at the meeting on

14th September, 1974, which had vested rights in third parties, it would be beyond the power of this Court to make an order, which will have the effect of affecting or interfering with or setting aside such rights in third parties. In our opinion, the question of third parties rights being affected does not arise in the context. We are concerned with a meeting which had been prohibited and not with what happened at the meeting. If the meeting held was in violation of the Court's order and the parties affected approach this Court and ask for relief on the ground that what happened at the meeting would be destructive of their stand point, this Court on a consideration of the entire circumstances and facts will have to put back the parties in the position where they stood prior to the holding of the meeting. That is not to say that, in doing so, the court interferes with third parties' rights. All that this Court would do in such circumstances is that, since the meeting was prohibited, but all the same it was held, in violation of the order of this Court, it would refuse to recognise the holding of the meeting as a legal one.”

10. In *Vidya Charan Shukla v. Tamil Nadu Olympic Association*, A.I.R. 1991 Mad. 323, another Full Bench of this Court while holding that in that case of violation disobedience of temporary injunction besides the remedy provided under O.39, Rule 2-A of the Code, the court can also exercise the inherent powers to undo the wrong, has observed as follows:

“.....We have already noticed that there are provisions in O.39, Rule 2-A of the Code of Civil Procedure as a remedy for the violation of temporary or interim injunction. Besides what is contemplated under O.39, Rule 2-A of the Code of Civil Procedure, Courts have found another source of power in Sec.151 of the Code of Civil Procedure and if that is also ignored for a moment, this Court's power as Court of Record and a court of Special Jurisdiction is preserved under Arts.215 and 225 of the Constitution of India. There have been cases before several courts in which when faced with situations that some order or direction was violated and the violation resulted in grave and serious injury, the courts took the view that the Code of Civil Procedure is not exhaustive. There are cases which say that if remedy to

do justice is not provided for in the Code or any other Act, the High Court must not fold its hands and allow injustice to be done.

In *Bhagat Singh Dugga v. Devan Jagbir*, A.I.R. 1941 Cal. 670, a learned Judge of the Calcutta High Court observed that the law cannot make express provisions against all inconveniences and that the court had, therefore, in many cases where the circumstances warranted it, and the necessities of the case required it, acted upon the assumption of the possession of an inherent power to act *ex debito justiae* and to do that real and substantial justice for the administration of which alone it exists.

In *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Mirala*, A.I.R. 1962 S.C. 527, the Supreme Court approved the above statement of law.

"In *Hari Nandan v. S.N. Pandita*, A.I.R. 1975 All. 48, the Allahabad High Court has taken the same view, namely that when a party has been dispossessed in disobedience of the order of injunction, the court can, in exercise of its inherent power, pass such order for ends of justice as would undo the wrong done to the aggrieved party. A similar view has been expressed in *Magna v. Rustom*, A.I.R. 1963 Raj 3. Kerr on Injunctions, 6th Edition, page 41 has said:

"But where the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case, or the defendant has been guilty of sharp practices or unfair conduct, or has shown a desire to steal a march upon the plaintiff, or to evade the jurisdiction of the Court, the injunction will issue, notwithstanding the amount of inconvenience to the other party, and though the expense thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it."

In one of the recent judgments in *Surjit Pal v. Prabin Kumar Sin*, A.I.R. 1986 Cal. 220, a Division Bench of the Calcutta High Court has reiterated this view and stated that "no technicality can prevent the court from doing justice in exercise of its inherent power. O.39, Rule 2-A lays down a punitive measure for the purpose of compelling a party to comply with the order of injunction. The process as contem-

plated by the said provision may or may not be ultimately effective but, in any event, the procedure laid down in O.38, Rule 2-A is incapable of granting an immediate relief to a party who has been forcibly disposed in violation of an order of injunction. In such a case, the court is not powerless to grant relief to the aggrieved party in exercise of its inherent power."

11. In *K.G. Gopal and others v. Lillybai by power of Attoreey Agent, A.C. Baktham*, (1991) 1 L.W. 559, one of us (Ratnam, J.,) while upholding the invocation of the powers of the Court under Sec.151 of the Code to resort to the law enforcement machinery to see that its order is obeyed has held as follows:

"By ordering the police help to the respondent, the court below had merely taken the follow-up steps to implement its earlier order of injunction. When the court finds that a litigant, who had secured an order from court is not in a position to have its full benefit owing either to obstruction or non-co-operation of the other side, it is always open to the court to resort to the law enforcement machinery to see that its order is obeyed and there is nothing illegal or irregular in that."

12. A similar view is expressed by one of us (Ratnam, J.,) in *Kuriyan and five others v. Ranganathan*, (1991) 1 L.W. 604, in the following terms:

"By ordering police help the court below had merely taken the follow up steps to implement its earlier order of injunction. The objection that a direction of that nature cannot be issued to the police authorities, who are not parties to the proceedings, raised by the petitioners has no substance. When the court finds that a litigant, who had obtained an order from its is not in a position to have its full benefit owing to either the obstruction or non-cooperation of the other party to the proceedings, it is always open to the court to resort to the law enforcement machinery to see that its order is obeyed and I do not see anything illegal or irregular about it. The civil revision petition is dismissed with costs."

13. In C.M.P.No.352 of 1986 in A.S.No.297 of 1980, Shanmukham, J. passed an order on 22.1.1986 granting the prayer made by the petitioner for a direction to the Superintendent of Police, Vellore and Sub-Inspector of Police, Virinjipuram,

Vellore Taluk, North Arcot District to give police aid and protection to the petitioner to enforce and implement the injunction order passed by this Court on 30.10.1980 in C.M.P.No.10914 of 1980 restraining the respondents from interfering with the petitioner's possession and cultivation of suit properties. The learned Judge relied on the Judgment of the Andhra Pradesh High Court in *Rayapati Audemma's case*. The learned Judge observed as follows:

"The power enshrined in Sec.151, Code of Civil Procedure, are rather unlimited. At any rate, the court shall not abdicate its rights to see that its orders are obeyed strictly according to their terms. As rightly pointed out by the Andhra Pradesh High Court, this Court in exercise of the powers under Sec.151, is competent to pass any orders so that its orders are duly complied with and obeyed. In this case, the petitioner apprehended that there will be an interference by the respondents with reference to the petitioner's enjoyment of the properties notwithstanding the order of injunction made by this Court. According to the petitioner, such interference will prevent the petitioner from enjoying the properties. In that event, the order passed by this Court will be of no assistance to the petitioner. In other words, what the petitioner apprehends is, a breach of peace if he were to enjoy the properties in respect of which an injunction has been granted. In the above circumstances, it is no answer to say that the petitioner shall wait till the order is disobeyed and then resort to the remedy prescribed under O.39, Rule 2-A, Civil Procedure Code. What he really wants by means of this application is that there should not be any breach of peace because, in his view, the respondents would high-handedly interfere with his enjoyment of the properties notwithstanding the order of injunction."

14. Now, we have to examine the views expressed by other High Courts, with regard to the inherent powers of the court under Sec.151 of the Code to order police aid for effective implementation of the order of injunction. The High Courts of Andhra Pradesh, Calcutta, Himachal Pradesh, Kerala and Orissa have taken view that directions can be issued under Sec.151 of the Code of the Police officials by the civil court to protect the possession of one party against the another private party

against whom an order of injunction had been made by the civil court. The contrary view is taken by Allahabad High Court and Karnataka High Court.

15. In *Rayapati Audemma v. Pothineni Narasimhan*, A.I.R. 1971 A.P. 53, a Division Bench of the Andhra Pradesh High Court, while holding that the Civil Court can give appropriate directions to the police authorities under Sec.151 of the Code to render aid to the aggrieved parties for the due and proper implementation of the orders of the courts, held as follows:

"It has to be noticed that O.39, Rule 2(3), Civil Procedure Code provides only for punishment by attachment of the property or by detention in civil prison of the person who committed breach. But it does not further provide for implementation of the order of injunction itself. O.39, Rule 2(3) cannot be said to be an express provision with respect to implementation of the order of injunction, but is only a provision which provides penalty for disobedience of the order. In such a case there being no other express provision in the code for enforcement of the order, it is not only proper but also necessary that the courts should render all aid to the aggrieved party to derive full benefits of the order. Though the order of injunction under O.38, Civil Procedure Code is only interim in nature, still it clothes the person who obtained the order with certain rights and he is entitled to enforce the aforesaid right against the party who is bound by the order. No doubt in such a case, the aggrieved party himself could approach the police authorities to prevent the obstruction to the enforcement of the order or to exercise of the right which he derives under the order of court. But we do not see why when the same person brings to the notice of the court that enforcement of the order is sought to be prevented or obstructed, the court should not exercise its inherent power under Sec.151, Civil Procedure Code and direct the police authorities to render all aid to the aggrieved party in the implementation of the court's order.

In our opinion the exercise of such power is necessary for the ends of justice or to prevent abuse of the process and the civil court has ample jurisdiction to pass such order under Sec.151, Civil Procedure Code."

16. The Calcutta High Court in *Subol Chandra Dutta and others v. Chimai Charan Nandy and others*, A.I.R. 1980 Cal. 126, held that there being no express provision in the Code for enforcement of the order of injunction, it was not only proper but also necessary the courts should render all aid to the aggrieved party to derive full benefit of the order. A similar view was taken by the Calcutta High Court in *Saidamini Roy Chowdhury v. Sayendranath Sekar*, 85 C.W.N. 958.

17. In *Sujit Pal v. Prahir Kumar Sen and others*, A.I.R. 1986 Cal. 220, a Division Bench of the Calcutta High Court held that the police could be directed to restore possession to the plaintiff when the defendants forcibly dispossessed the plaintiff in utter violation of an order of interim injunction passed by the court. The Bench referred to the observations of the Supreme Court in *Manoharlal v. Seth Hiralal*, (1962)1 S.C.R. (Supp.) 450, as regards the inherent powers of court and observed as follows:

"Thus it is apparent from the said observation of the Supreme Court that no technicality can prevent the court from doing justice in exercise of its inherent power. O.39, Rule 2-A lays down a punitive measure for the purpose of compelling a party to comply with the order of injunction. The process as contemplated by the said provision may or may not be ultimately effective but, in any event, the procedure laid down in O.39, Rule 2-A is incapable of granting an immediate relief to a party who has been forcibly dispossessed in violation of an order of injunction. We do not think that in such a case the court is powerless to grant to the aggrieved party in exercise of its inherent power. The very object for which O.39, Rule 2-A has been enacted will be fulfilled by the grant of a temporary mandatory injunction and restoration of possession of the aggrieved party. The inherent power of the court as recognised in Sec.151 of the Code is in addition to the power conferred on the court under the provisions of the Code. All that the court is concerned is to prevent abuse of the process of court and to do justice by immediately intervening under circumstances which required such intervention by the court."

18. The Kerala High Court in *Mohammed v. Mohammed Haji*, 1986 K.L.T. 134, held that though action can be taken by the High Court for viola-

tion of the injunction under O.39, Rule 2-A of the court, it is open to the court to implement its order by exercising its inherent powers under Sec.151 of the Code and give directions to the police authorities to render aid to the aggrieved parties with regard to the implementation of the orders of the court or the exercise of the rights created under orders of the court.

19. The Himachal Pradesh High Court in *Jaishi v. Salig Ram*, A.I.R. 1981 N.O.C. 88, (Himachal Pradesh), took a similar view that the civil court in exercise of its inherent powers under Sec.151 can issue directions to the police authorities for enforcement of the order of injunction.

20. In *Subal Kumar Dey v. Purna Chandra Giri*, A.I.R. 1989 Ori. 214, the Orissa High Court taking a similar view has observed as follows:

"Inherent power is wide in its nature to protect the interest of the parties in a given case. It is not a power to be exercised for implementation of an order of the court. Where violation of the order would be so prejudicial to a party that remedies or penalty for violation of the order available under the statute would not be sufficient, inherent power may be exercised. Therefore, a Court is to be careful before taking external help of police for implementation of the order."

21. The position of law which emerges from the principles laid down by the decisions referred to above is this; Sec.151 of the Civil Procedure Code confers power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of court. Every court is constituted for the purpose of doing justice according to law and must be deemed to possess, as a necessary corollary, and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo the wrong in the course of the administration of justice. As pointed out by the Apex Court of the land in *N.S.Mills v. Union of India*, A.I.R. 1976 S.C. 1152, the inherent power of the court has its roots in necessity and its breath is co-extensive with the necessity. Sec.151 does not confer any powers, but only indicates that there is a power to make such orders as may be necessary for the ends of justice and to prevent the abuse of process of court. As observed by the Supreme Court in *Manoharlal v. Seth Hiralal*, (1962)1 S.C.R. (Supp.) 450, the inherent power has not been conferred on the court; it is a power inherent in the

court by virtue of its duty to do justice between the parties before it. As pointed out by the Supreme Court in *Padam Sen v. The State of Bihar*, (1961) 1 S.C.R. 884, the inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore, it must be held that the court is free to exercise them for the purpose mentioned in Sec.151 of the Code, when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. The language of Sec.151 of the Code is wide enough to clothe the civil courts with inherent powers to do the right and undo the wrong in the course of administration of justice.

22. We must bear in mind that when an order of temporary injunction is granted by the court under O.39, Rule 1 of the Code or when a decree for permanent injunction is passed by the civil court, it involves the following three stages:

The first stage is the issue of an order of temporary injunction or passing of a decree for permanent injunction. When a petition under O.39, Rule 1 of the Code is filed by a party, the court being satisfied that the conditions prescribed under O.39, Rule 1 of the Code are satisfied, may issue an order of temporary injunction in favour of the party, who has applied for the same. Similarly, the court after full trial of a suit and upon the merits of the case, may pass a decree for permanent injunction in favour of a party. There is specific provision in the Code namely O.39, Rule 1 dealing with the grant of the order of temporary injunction. Sec.38 of the Specific Relief Act deals with the circumstances under which a decree for perpetual injunction can be passed by the courts.

The second stage is the implementation of the order of temporary injunction or decree granting perpetual injunction. There is no specific provision under the Code dealing with the implementation of the order of temporary injunction or a decree for perpetual injunction.

The third stage is the punishment for disobedience of the order of injunction. O.39, Rule 2-A of the Code deals with the consequences of disobedience or breach of injunction or other orders made under O.39, Rule 1 of the Code. O.21, Rule 32 of the Code says that where a party against whom a decree for injunction has been passed, has had an opportunity of obeying the decree but has

willfully failed to obey it, the decree for injunction may be enforced by his detention in civil prison or by the attachment of his property or by both. Thus, the Code contains specific provision with regard to the grant of an order of temporary injunction and for punishing the party who disobeys the order of temporary injunction and the decree for perpetual injunction. However, there is ~~no~~ provision in the Code providing for the implementation of the order of temporary injunction or decree for perpetual injunction granted by the courts. When there is no specific provision of law which is sufficient to implement the order of temporary injunction or the decree for perpetual injunction granted by the court, we do not see why the provisions of Sec.151 of the Code cannot be invoked for the said purpose to render justice or to redress the wrong, because, the courts should not only have the power to pass an order, but also should have the power to implement the said order. Therefore, when a party has obtained an order of temporary injunction from a court under O.39, Rule 1 of the Code and the other party against whom the order of injunction is passed disobeys the same, the aggrieved party can certainly approach the court invoking the power of the court under Sec.151 and pray for police aid for the enforcement of the order of temporary injunction. When it is brought to the notice of the court that the enforcement of the order of temporary injunction is sought to be prevented or obstructed, the court in exercise of the inherent powers under Sec.151, can direct the police authorities to render all aid to the aggrieved party in the enforcement of the order of the injunction granted by the court in order to render complete justice. It must be remembered, by ordering police help to the party who has obtained an order of temporary injunction, the court merely takes the follow-up steps to implement its earlier order of injunction. In appropriate cases, where the court finds that a party who had secured an order of injunction from the court is not in a position to have its full benefit owing either to obstruction or non-co-operation of the other side, it is always open to the court to direct the police authorities to see that its order is obeyed. As observed by the Full Bench of this Court in *Century Flour Mills Ltd. v. Suppiah*, (1975) 2 M.L.J. 54, when there is a violation of an order of injunction granted by the civil court, or when something has been done in

disobedience of such an order of injunction, it is the duty of the court as a matter of judicial Policy to undo the wrong done in disobedience of the court's order and the power to enforce the order of injunction by ordering police aid is available under Sec.151 of the Code.

23. In view of the above position of law, it has to be held that in appropriate cases, directions under Sec.151 of the Civil Procedure Code can be issued by the civil courts to the police authorities to extend their aid and assistance in the execution of decrees and orders or to render aid to aggrieved parties for the due and proper implementation of the order of temporary injunction or a decree for permanent injunction granted by civil courts.

24. Then we have to examine the contrary view taken by Srinivasan, J., in *G.Krishnan v. Smt. Thulasi Ammal*, (1991)1 L.W. 513. In the above case, the petitioner filed an injunction petition before the lower court for restraining the respondent from interfering with his possession and enjoyment of the suit properties, and it was ordered after contest. The petitioner filed another petition with a prayer that the District Munsif should order police protection to him with appropriate direction to see that the order of injunction passed was not violated. The lower court dismissed the application taking the view that the order of injunction ceased to have effect on the filing of the appeal by the respondent in the District Court. C.R.P.No.2853 of 1990 was preferred against that order. The learned Judge took the view that the civil court cannot issue directions to the police officials in order to execute the orders of the civil courts or to implement the orders of injunction passed by the civil courts and consequently held that the petitioner's application filed before the trial court with a prayer that the trial court should order police protection is not maintainable and on that ground, dismissed the C.R.P. The learned Judge gives the following three reasons for holding that civil courts cannot issue directions to the police officials in order to execute the orders of the civil court or to implement the orders of injunction passed by the civil court:

(a) The order or judgment up-holding the claim of a party to be in possession of a particular property and granting injunction restraining the opposite party, from interfering with such possession, is only a judgment *in personam* and not a judgment *in rem*. It is binding

only on the parties thereto. Hence in a suit for injunction against a particular party, the court is not entitled to pass any order or issue any direction against the police officer who is a stranger to the suit and who has nothing to do with the parties to the suit.

(b) The civil court cannot fetter the discretion of the police officials or the Magistrates in such matters. If it is only a question of protecting the possession of a party concerned, it is for him to apply to the police officials for necessary safeguard and if they fail to do their duties, he shall approach the High Court with a petition under Art.226 of the Constitution of India.

(c) In view of the fundamental principles set out in *Sundaram Chetti v. The Queen*, I.L.R. 6 Mad. 203, and in *M.Viswanatha Rao v. Emperor*, 28 L.W. 406 and the reasoning of Yahya Ali, J. in *K.Murugappa v. Kuppuswami*, (1948)2 M.L.J. 458, the inherent powers of the court preserved under Sec.151 of the Code will not enable the courts to issue directions to the police officials in order to execute the orders of civil courts or implement the order of injunction passed by the civil courts.

25. With due respect to the learned Judge, we are unable to agree with the reasons given by him for coming to the above conclusion. The learned Judge in para-8 of the order in *G.Krishnan v. Smt. Thulasi Ammal*, (1991)1 L.W. 513, has observed as follows:

"It should not be forgotten that in a writ petition under Art.226 of the Constitution of India, the Police Officials are impleaded as parties and directions are sought against them. The basic requirements of a writ of *mandamus* are that there should be public duty on the part of the Officials and there is failure to perform the duty in spite of their being called upon to do so. Both the requirements will be absent if in a civil proceeding, to which the police officials are not parties, a direction is sought from the court to the police officials without any approach to them in the first instance by the party who seeks relief."

26. We must remember that the police authorities owe a legal duty to the public to enforce law. The above position is clear from the decision of the court of appeal reported in *R. v. Metropolitan Police Commissioner*, (1968)1 All E.R. 763, where

Lord Denning, M.R. observed at page 769 as follows:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable to enforce the law of the land..... but in all these things he is not the servant of anyone, save of the law itself. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

27. In *Varadachariyar v. The Commissioner of Police*, (1969) 2 M.L.J. 1, Kailasam, J., as he then was, referred to the above view of Lord Denning, M.R. in *R. v. Metropolitan Police Commissioner*, (1968) 1 All E.R. 763, observed as follows:

"The plea of the Commissioner that it is within him discretion to take action or not has no basis in law. It is his duty to enforce the law of the land. As ruled by Edmund Davies, L.J., this plea should never have been advanced."

28. When the police authorities owe a legal duty to enforce law and when the public are entitled to seek directions under Art. 226 of the Constitution for discharge of such duties by the police Authorities, as pointed out by the learned Judge himself, we see no reason to hold that the civil courts cannot in an appropriate case issue directions under Sec. 151 of the Code for the proper implementation of the order of injunction granted by the court. In view of the above position, we are unable to share the view of Srinivasan, J. that a direction to the police authorities cannot be issued under Sec. 151 of the Code to enforce the order of temporary injunction the proceedings where an order of temporary injunction was passed.

29. Secondly, the learned Judge has taken the view that the party who has obtained an order of injunction from a civil court can himself approach the police authorities directly for necessary safeguards for the purpose of enforcing the orders of injunction obtained by him. When a party himself can approach the police authorities directly for necessary safeguards for the purpose of enforcing the orders of injunction obtained by him, we do not see any reason why the court should not exercise its inherent powers under Sec. 151 of the Code and direct the police authorities to implement the order of injunction passed by it, when such party who has obtained the order of injunction seeks the aid of the court for issue of necessary direction to the police authorities for the proper implementation of the order of injunction. The view of ours

derive support from the decision in *Rayapati Audemma v. Pothineni Narasimhan*, A.I.R. 1971 A.P. 53.

30. In *Sundaram Chetti v. The Queen*, I.L.R. 6 Mad. 203 and in *M. Viswanatha Rao v. Emperor*, 28 L.W. 406, the Full Benches of this Court while dealing with the powers of the police and Magistrate to enforce law and order, have taken the view that in the event of a conflict between private right declared by the Civil Court and public order, the police authorities and the Magistrates can take such steps for the preservation of public order uninfluenced by the civil court's decree or order. The Full Bench in *M. Viswanatha Rao v. Emperor*, 28 L.W. 406, observed that where there was a conflict between public interest and private right, the former must prevail. The ratio of the above Full Bench decisions has no bearing to the question which we are called upon to decide namely whether the civil court can issue directions to the police officials in order to execute the orders of civil court or implement the orders of injunction passed by the civil court.

31. The learned Judge, in para 40 of the judgment in *G. Krishnan v. Smt. Thulasi Ammal*, (1991) 1 L.W. 513, concludes by observing as follows:

"If the reasoning of Yahya Ali, J., in *K. Murugappa v. Kuppuswami*, (1948) 2 M.L.J. 458, which was based on the judgment of the Full Bench, is applied, there is no escape from the conclusion that the petitioner's application in the court below was not maintainable."

32. With due respect to the learned Judge, the ratio of the decision in *K. Murugappa v. Kuppuswami*, (1948) 2 M.L.J. 458, is wrongly applied to the facts of the case dealt with by him. In the above case, Yahya Ali, J., was disposing of a criminal revision filed against the order passed by the Magistrate under Sec. 144, CrI.P.C., prohibiting the performance of certain festival in respect of which the revision petitioners had obtained a decree for injunction. Yahya Ali, J., observed in that context that in exercise of their power under Sec. 144, CrI.P.C. the police shall have due regard to the orders of the civil courts, but, the paramount consideration should be that of maintenance of law and order. It is in that context, Yahya Ali, J., refers to the decision in *M. Viswanatha Rao*, *In re.*, I.L.R. 51 Mad. 1006; A.I.R. 1928 Mad. 1049, and observed as follows:

"It was then conceded that it is not the duty of

the authorities who are responsible for the preservation of the public peace to enforce a civil court decree in all circumstances and at all costs."

33. It was also pointed out by Yahya Ali, J., that preservation of public peace is the function of the police authorities and the Magistracy and in the performance of that function it may be necessary for them, to over ride temporarily private rights and that where there is a conflict between the public interest and a private right the former must prevail. We must remember that in the present case and in the case dealt with by Srinivasan, J., we are not concerned with the question what the police authorities and the Magistrates should do in the event of conflict between public interest and private rights, but we are concerned with the question whether the civil courts can issue directions to the police officials in order to execute the order of civil courts or implement the orders of injunction passed by the courts. Therefore, we are unable to agree with the view taken by Srinivasan, J. in *G. Krishnan v. Smt. Thulasi Ammal*, (1991) 1 L.W. 513. For the same reasons, we do not agree with the view expressed by the Allahabad High Court in the case reported in *Goswami Gordhan Lalji v. Goswami Maksudan Ballabh*, I.L.R. 40 All. 648 and by the Karnataka High Court in *Narasimhappa v. Hanumanthappa*, (1976) 2 Kar.L.J. 33 S.N.C.40.

34. In the light of the above discussion of ours, the question referred is answered as follows:

"In appropriate cases, the civil court has the power and is indeed under a duty, to issue suitable directions to police officials, as servants of law, to extend their aid and assistance in the execution of decrees and orders of the civil courts or in implementing an order of injunction passed by it."

35. We accordingly approve of the view taken by Shanmukham, J. in the order dated 22.1.1986 in C.M.P.No.352 of 1986 in A.S.No.297 of 1980 and further hold that the decision in *G. Krishnan v. Smt. Thulasi Ammal*, (1991) 1 L.W. 513, has not been correctly decided. Since the entire matter has been referred to the Bench for its opinion we are disposed to do away with the formality of again placing the proceedings for further orders before the learned single Judge. The petition is, therefore, allowed as prayed for. There will be no order as to costs.

V.K.

Petition allowed.

[Full Bench]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam, Srinivasan and
Somasundaram, JJ.

W.A.No.73 of 1992

31st July, 1992

R.Paramasivam

...Appellant

v.

The Tamil Nadu Industrial Investment Corporation Limited and others

...Respondents.

(A) Practice and Procedure - Reference to a Full Bench - When can be made - Writ Petition dismissed in limine - L.P. Appeal admitted - Notice ordered to Respondents - Matter referred to Full Bench without giving opportunity to respondents to state their case - If justified - No pre-existing conflict of opinions - Order not stating that even if there was no conflict of opinions, the question arising in the case was of such importance that it should be decided by a Full Bench - No formulation of any question of law - Reference to Full Bench, held improper.

(B) State Financial Corporations Act (LXIII of 1951), Sec.29 - Agreement between Corporation and debtor concern - Terms of Agreement authorising seizure of hypothecated assets without notice - Non-issue of notice whether opposed to principles of natural justice.

(C) State Financial Corporations Act (LXIII of 1951), Sec.48 - Legal Manual containing instructions to Officers of Corporation - Binding nature of.

(D) State Financial Corporations Act (LXIII of 1951), Sec.2(c)(iv) - 'Industrial concern' - Meaning of - Lorry or motor vehicle, whether an 'Industrial concern'.

Held:- The writ petition was dismissed in limine without notice to the Respondents and there was no opportunity to the Respondents to place the facts before the Court. When the Letters Patent appeal was admitted and notice was directed for the Respondents in the normal course, the Court should have waited for the service of notice and given an opportunity to the Respondents to state their case before deciding the scope of the *lis* or formulating the questions which arise for consideration in the appeal. Without doing so, the Division Bench has chosen to make a reference straightway to a Full Bench observing that an

authoritative judgment should be given in this appeal. A reference to a Full Bench can be made if there is a conflict of opinions already between the judgments of this Court or if a question of law of general importance arises which requires to be decided by a Bench comprising more than two Judges. Here, there was no pre-existing conflict of opinions. The observations contained in the judgment in W.P.No.12959 of 1989 made by a Single Judge and referred to in the order of reference were *obiter dicta* and unnecessary to the judgment in that case. In the said case, there was a seizure of R.C. book of a hypothecated vehicle by a Tahsildar of the Corporation which was held by the learned Single Judge to be not an action falling under Sec.29 of the State Financial Corporations Act. The learned Judge said clearly that he was bound by the pronouncement of the Bench in W.A.No.530 of 1990 (*K.Vidhya Kumari v. Managing Director, The Tamil Nadu Industrial Investment Corporation and another*). There was no conflict between the judgment of the Division Bench in W.A.No.530 of 1990 and any other judgment of this Court. A reference was made to the judgment of the Orissa High Court in *M/s.Kharavela Industries Pvt. Ltd. v. Orissa State Financial Corporation*, A.I.R. 1985 Ori. 153, in the Order made in W.P.No.12959 of 1989. If the Division Bench in the present case had opined that the view taken by this Court in W.A.No.530 of 1990 was in conflict with the view taken by the Orissa High Court and that the Division Bench preferred to agree with the view of the Orissa High Court, it should have stated so in the order of reference. No such statement is found either in the Order of reference or in the Order of the Single Judge in W.P.No.12959 of 1989. In the absence of an expression of opinion which would run counter to the decision taken in W.A.No.530 of 1990 by a Division Bench of this Court which is binding on this Court until it is overruled by a larger Bench, no question of reference to a Full Bench will arise. It is also not stated in the Order of reference that even if there is no conflict of opinions, the question which arises for consideration in the present case is one of such great importance as to be decided by a Bench comprising of more than two Judges. The Division Bench has neither decided the facts of the case nor formulated any question of law. Without considering the question whether the finding of the learned single judge is correct or not, it is difficult

to understand how a reference to a Full Bench can be made by a Division Bench. The proper course for the Division Bench would have been to wait for the respondents to appear before court on receipt of notice and after ascertaining their stand, to decide whether the decision given by the learned single Judge was correct if they had differed from the view taken by the learned single Judge, then only the Division Bench could have made a reference to a larger Bench. [Paras 12, 13 and 14] Clause 10 of the hypothecation deed provides expressly for seizure of the hypothecated assets in the event of default in the payment of amounts due to the Corporation. The Corporation is certainly entitled to exercise its powers and enforce the terms of the contract. There is nothing in Sec.29 of the State Financial Corporations Act which would prevent the Corporation from enforcing the terms of the contract by seizure of the hypothecated assets, without notice of seizure. [Paras 17 and 18] Sec.29 of the Act enables the financial Corporation to take over the management or possession or both of the industrial concern which is under a liability to the Corporation under an agreement and which makes a default in repayment of loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given to the Corporation. The section also provides that the Corporation has a right to transfer by way of lease or sale and realise the property mortgaged, hypothecated or assigned to it. Sec.30 of the Act provides that notwithstanding anything in the agreement to the contrary, the Financial Corporation may, by notice in writing require any industrial concern to which it has granted any loan or advance to discharge forthwith in full its liabilities to the Financial Corporation. Under Sec.31 of the Act, the Corporation may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more reliefs set out in the section. Such a right to apply to the District Judge is without prejudice to the provisions of Sec.29 of the Act and Sec.69 of the Transfer of Property Act. The right may be exercised where an industrial concern in breach of any agreement makes any default in repayment of any loan or advance or instalment thereof or otherwise fails to comply with the terms of the agreement or where the financial Corporation requires an industrial concern to make immediate repayment

of any loan or advance under Sec.30 of the Act and the latter fails to make such repayments. In all, Sec.31 of the Act shows that if a notice is issued under Sec.30 of the Act and not complied with, the Corporation is empowered to exercise (1) its rights under Sec.29 of the Act (2) its rights under Sec.69 of the Transfer of Property Act and (3) its rights under Sec.31 of the Act. The Corporation may choose any one of them. [Para 20]

It is seen from the facts of the present case that a notice of foreclosure has been issued under Sec.30 of the Act and the impugned auction has been held only after sufficient time has elapsed after the receipt of such notice by the appellant. Hence, there is no illegality whatsoever in the auction held by the respondents. There was no necessity for a notice of seizure before the lorry was seized. But, actually there was a notice calling upon the appellant to pay the amount due as on 1.9.1991. In spite of the notice to pay, the appellant did not move his little finger. Naturally, the Corporation was obliged to take action in order to protect the interests of the Corporation by seizing the lorry. There was no violation of any principle of natural justice in the seizure of the lorry, particularly when the Corporation was only enforcing the terms of the contract and exercising its power under Clause 10 of the hypothecation deed.

[Paras 21 and 22]

It cannot be stated as an absolute proportion of law that in every case an action taken by the Corporation under Sec.29 of the Act without notice to the borrower is contrary to the principles of natural justice and vitiated thereby. It has to be decided in each case by the Court whether the particular action taken by the Corporation required the issue of a prior notice to the borrower. Such decision will naturally depend on the exigencies of the situation and the nature of the hypothecated assets. It is futile to contend that though Sec.29 of the Act does not provide for issue of notice before taking action thereunder, principles of natural justice require such a notice to be issued in every case before any kind of action is taken. The fact that the legislature has made a provision for notice in Sec.30 but has omitted to do so in Sec.29 is not without significance.

[Paras 23 and 25]

The Legal Manual containing instructions to the Officers of the Corporation is not admittedly a regulation framed under Sec.48 of the Act by the

Board. It was not published in any official gazette. It is conceded that they are not regulations as contemplated under Sec.48 of the Act. But, however, it is contended that the instructions contained in the Manual confer a right on the borrowers and they are enforceable at the instance of the borrowers. The Court does not agree. The instructions are merely guidelines to be generally followed by the officers in order to avoid any legal tangles. Moreover, the paragraphs in the Legal Manual which are relied on by learned counsel relate only to taking over of industrial units and taking possession of immovable properties do not apply to seizure of vehicles or the sale thereof.

[Para 27]

The expression used by Sec.2(c)(iv) of the Act is 'concern'. The Act does not define that expression. One of the meanings of 'concern' is a 'business'. A lorry or motor vehicle is not a business though it may be a business asset. Hence, the contention that a lorry is an 'industrial concern' within the meaning of the Act cannot be accepted.

[Para 28]

Cases referred to:

M/s.Kharavela Industries Pvt. Ltd. v. Orissa State Financial Corporation, A.I.R. 1985 Ori. 153. [Paras 13, 16]

Alka Ceramics v. Gujarat State Financial Corporation, Ahmedabad, A.I.R. 1990 Guj. 105. [Para 24]

Union of India v. Tulsiram Patel, A.I.R. 1985 S.C. 1416. [Para 25]

Mahesh Chandra v. Regional Manager, U.P. Financial Corporation, Jt. (1992) 2 S.C. 326. [Para 26]

Appeal under Clause 15 of the Letters Patent against the Order of Raju, J., dated 7.1.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.85 of 1992 presented under Art.226 of the Constitution of India to issue a Writ of Mandamus directing respondents 1 and 2 to accept the outstanding amount due from the petitioner i.e., Rs.2,15,140-91 and release the Ashok Layland Lorry bearing Registration No.TCY 5425 in favour of the petitioner by declaring the auction conducted by the second respondent as null and void and illegal. *R.Singaravelan*, for Appellants.

R.Vidudhalai, for Respondent.

The Judgment of the Full Bench was delivered by *Srinivasan, J.*:- Though in our view the reference to the Full Bench is unnecessary in this case, we have proceeded to hear the appeal, as the entire

case is placed before us. We have also taken into account the fact that the parties would be put to unnecessary hardship, if we return the reference.

2. The appellant borrowed a sum of Rs.2,10,000 from the first respondent Corporation for the purchase of a lorry to be plied as a public carrier with a National Permit. The loan was sanctioned subject to the terms and conditions specified and the appellant accepted the same. The entire loan

was disbursed in three instalments as follows:

1. 5.3.1987	Rs.1,71,500.00
2. 13.3.1987	Rs. 28,564.25
3. 24.4.1987	Rs. 9,935.75

The amount was to be repaid in 56 monthly instalments commencing after three months from the date of first disbursement. A Schedule of repayment was stipulated in the sanction order as follows:

First 10 monthly instalments of Rs.4600	Rs. 46,000
Next 10 monthly instalments of Rs.4300	43,000
Next 10 monthly instalments of Rs.4200	42,000
Next 10 monthly instalments of Rs.4100	41,000
Next 10 monthly instalments of Rs.3200	32,000
Next 6 monthly instalments of Rs.1000	6,000

	2,10,000

It was agreed that interest at the rate of 14.5% per annum with a rebate of 2% per annum for prompt payment, should be paid along with the principal. The repayment commenced from 1.7.1987 and was to end on 1.3.1992. The vehicle which was purchased, bearing registration number TCY 5425 was given as security under a hypothecation bond dated 23.2.1987.

3. The appellant admittedly did not adhere to the schedule of repayment. He was making payments irregularly. The lowest payment was Rs.413.90 and the highest payment was Rs.20,000. He was not making payments every month. He chose to pay as and when he pleased. Thus, the appellant had been committing default from the beginning. But the Corporation had not taken any steps to enforce the repayment schedule. By notice dated 29.8.1991, the Corporation informed the appellant that a sum of Rs.1,93,601.81 was due towards principal and a sum of Rs.25,756.25 was due towards interest as on 20.8.1991 and he was required to pay the same. The notice also called upon him to intimate the Corporation within a fortnight of the receipt thereof, if there was any discrepancy in the figures mentioned as per his records, failing which it would be construed that the liability to the Corporation as stated in the notice had been accepted by him. There was no response and admittedly the appellant did not make any payment after that notice. The Corporation seized the lorry on 1.10.1991 by exercising its

powers under Clause 10 of the hypothecation agreement, which empowered the Corporation to take possession of the hypothecated assets in default of payment of moneys and/or instalments due to the Corporation. Therefore, the appellant made a payment of Rs.15,000 on 4.10.1991. According to the Corporation, he promised to pay the entire amount due within one month therefrom. The appellant gives a different version to which we will make a reference a little later. The fact remains that no amount was paid thereafter by the appellant to the Corporation. A notice was issued on 14.11.1991 by the Corporation styling itself as foreclosure notice. The appellant was called upon to pay the entire amount due under the transaction within 15 days from the receipt thereof. The appellant was informed that if there was a failure on his part to clear the dues, the Corporation would, without any further intimation or reference to him, proceed to enforce the rights reserved under the hypothecation deed including the right to exercise the power of sale etc., under the provisions of the State Financial Corporations Act. The last paragraph of the notice read thus:

"Please note that we will be constrained to take action under Sec.29 and/or 32-G of the S.F.C.'s Act without prejudice to our other rights of recovery of your failure to repay the amount as indicated above."

4. The appellant claims to have sent a letter by registered post on 26.11.1991 praying for grant of

one month's time to pay the balance and close the account. According to the Corporation it did not receive such a letter. The Corporation made a newspaper publication on 6.12.1991 that the lorry would be sold in public auction on 12.12.1991. The auction was held on 12.12.1991 and the third respondent herein was the highest bidder for Rs.2,58,500. His bid was accepted by the Corporation and the sale was confirmed in his favour as he had complied with the terms of auction and paid the entire amount.

5. The writ petition, out of which this appeal arises, was presented in this Court by the appellant on 6.1.1992. In the affidavit filed in support of the petition, the appellant admitted that he had not been paying the instalments within the stipulated time limits. According to him, the lorry was seized on 3.10.1991 without any prior notice of seizure or a memo calling upon him to repay the amount due within a stipulated time limited. He proceeded to state in the affidavit as follows:

"However, immediately after seizure, I had gone to the office of the second respondent and met him personally on 4.10.1991. I had explained my inconvenience and grievances in detail and requested him to release the vehicle on payment of Rs.15,000. He had agreed to release the vehicle on payment of the said amount and I paid the amount on 5.10.1991. After the payment of Rs.15,000 made by me, the second respondent refused to release the vehicle and asked me to pay a further sum of Rs.50,000 for the release of the vehicle granting me 3 weeks time. Accordingly, I had gone to the office of the second respondent with a sum of Rs.50,000 and met him on 17.11.1991. But, he refused to accept the said amount and asked me to bring a further sum of Rs.35,000. Thus he asked me to pay a total sum of Rs.85,000 for the release of the vehicle. I requested him to accept the amount of Rs.50,000 at first. But, for no reasons stated, he had refused to accept it. Hence, I turned back vexatiously. While I was making arrangement for collecting a further sum of Rs.35,000 a notice dated 14.11.1991 in Ref.No.TIIC/TRY/Bo/Legal/91-92 was served on me by registered post with acknowledgment due foreclosing the loan and calling upon me to pay to the first respondent within 15 days from the date of receipt of the said notice, a sum of Rs.2,12,337-16 being the entire

principal amount of the loan and the interest etc., thereon upto 13.11.1991 and other charges and dues amounting to Rs.200 aggregating to Rs.2,12,537.16 with further interest and additional interest at the prevailing rates till the date of payment and other charges and dues. In the said notice it had been stated that a sum of Rs.1,90,601.81 being the instalments of principal and a sum of Rs.18,735.35 being the interest upto 13.11.1991 were over due besides commitment charges, sundry dues, expenses and other charges.

I humbly submit that the above said notice was served on me on 19.11.1991 and immediately after receiving the same I had forwarded a letter dated 26.11.1991 by registered post with acknowledgment due to the second respondent herein agreeing to repay the entire amount due to be paid to the first respondent within 30 days as 15 days time granted by the second respondent was not sufficient. I have not yet received the acknowledgment from the second respondent. After forwarding the above dated letter, I had been making arrangements for the entire payment due to the first respondent Corporation."

6. He claimed to have gone to the office of the second respondent on 16.12.1991 to make the entire payment due and get the vehicle released, where he was informed that the vehicle was sold in public auction on 12.12.1991. According to him, he requested the second respondent to cancel the auction accepting the entire amount from him, but the latter refused to do so. It was stated in the affidavit that he went again on 20.12.1991 and 23.12.1991 to meet the second respondent. According to him, on 23.12.1991, the second respondent refused to accept his offer of payment and directed the third respondent to pay the balance due as per the auction terms.

7. A reference was made thereafter to the petition given by the appellant to the General Manager (followup) of the first respondent Corporation on 31.12.1991 requesting him to accept the balance of money and return the lorry to him. According to him, his offer was not accepted and hence he moved this Court with the writ petition under Art.226 of the Constitution of India. The prayer in the writ petition was to issue a writ of *mandamus* directing respondents 1 and 2 to accept the outstanding amount due from the petitioner and

release the lorry by declaring the auction conducted by the second respondent as null and void and illegal.

8. Before proceeding further, it is necessary to point out that the averments made by the appellant in the affidavit filed in support of the writ petition were not true as is evident from the records placed before us. The passage in the affidavit extracted above is one relating to the happenings between 4.10.1991 and 17.11.1991. According to the aforesaid portion, when a sum of Rs.15,000 was paid by him after the seizure of the lorry, he was directed to pay a sum of Rs.50,000 in the first instance and then a further sum of Rs.35,000 when he took the sum of Rs.50,000 to be paid to the second respondent. He had given a different story in his letter dated 3.12.1991 written to the General Manager (follow up) of the first respondent. A copy of the letter has been produced by the appellant himself and included in his typed set. According to the said letter, the payments made by him before 3.10.1991 were sufficient only to meet the interest. After the seizure of lorry on 3.10.1991, he met the Branch Manager, who wanted him to pay a sum of Rs.25,000 and he paid the same. He was directed to pay a further sum of Rs.75,000 and before he could make the money ready, the lorry was sold for a low price and that the Branch Manager was not willing to give the lorry in spite of his offer to pay the entire balance. The letter bears the date 31.12.1991 and the affidavit in the writ petition bears the date 6.1.1992. Within an interval of a week, the appellant has chosen to give two different versions contradictory to each other. Hence, the appellant is not entitled to invoke the extraordinary jurisdiction of this Court under Art.226 of the Constitution of India, as he has failed to disclose the facts truthfully and correctly.

9. The writ petition was dismissed *in limine* by a learned single Judge of this Court on 7.9.1992. The learned Judge held that the foreclosure notice dated 14.11.1991 issued by the Corporation was sufficient in law for the purpose of Sec.29 of the State Financial Corporations Act, 1951 and rejected the contention of the appellant that the principles of natural justice had been violated. It was also held by the learned Judge that after the third respondent had purchased the vehicle in the auction, it was not for this Court to interfere with the exercise of rights of parties flowing from the bilateral contracts, merely because one of the

parties happens to be a State Undertaking and the remedy of the appellant was only to vindicate his rights, if so advised, before some other forum in accordance with law. Obviously, the learned Judge meant that the appellant had to approach only the civil Court, if he had any right to be vindicated.

10. Aggrieved by the dismissal of the writ petition, the appellant preferred this appeal. When it came for admission, a Division Bench of this Court admitted the same and ordered notice to the respondents. But, at the same time, the Division Bench passed an order referring the appeal to a larger Bench and directed the records to be placed before the Hon'ble the Chief Justice for posting the case before a Full Bench. The order made by the Division Bench reads as follows:

"Sitting alone to dispose of W.P.No.12959 of 1989, *R.Kailasanathan v. The Managing Director, Tamil Nadu Industrial Investment Corporation Ltd., Madras-14 and two others*, one of us observed with reference to Sec.29 of the State Financial Corporation Act as follows: "Whether action has been taken under Sec.29 of the Act or not however is a different question. But without giving any formal notice to the loanee in default and thus without complying with the requirements of principles of natural justice, a contention may naturally arise, whether the Corporation infringed any legal right of the petitioner or not. This question however has been answered by a Division Bench of this Court in W.A.No.520 of 1990 (judgment dated 11.6.1990. (*K.Vidhya Kumari v. Managing Director, The Tamil Nadu Industrial Investment Corporation*)) saying that the very terms of the borrowing impelled the borrower to make payment and it will not be proper to insist that there should be a formal notice before action is taken. I am however bound by the said pronouncement of the Bench, but, feel like observing that it is one thing to say that the terms of the borrowing contemplate action in the event of default under Sec.29 of the Act, but it will be against the rules of a fair play, if it is always assumed that the corporation committed no wrong even if it ignored the defence of the borrower and decided to take action under Sec.29 of the Act. Proper procedure to be adopted for the purpose of realisation of its claims from the borrower would be to first give a notice and if default is unexplainable take

action under Sec.29. The case in hand is one in which such a plea may arise. Parties are at dispute as to whether there has been any default in the payment of the instalments or not. However to assume that Corporation is right and the borrower is wrong in asserting that there has been a default or there has been no default? On a notice being given to the petitioner informing him that he had fallen in default and that corporation intended to proceed against him under Sec.29 of the Act, the petitioner would have brought to the notice of the competent authorities in the corporation that there was no deliberate default and that the Financial Corporation would not be justified in taking action against the petitioner in accordance with Sec.29 of the Act. While some Courts in India have taken the view that Sec.29 excludes the application of the principles of natural justice, some courts have taken the view that Sec.29 does not exclude the application of principles of natural justice (see *M/s.Kharavela Industries Pvt. Ltd. v. Orissa State Financial Corporation*, A.I.R. 1985 Ori. 153). In view of the conflict arising on account of the Bench decision of this Court, I would have decided to refer the case to a Division Bench, had I been satisfied that the Corporation's action fails under Sec.29 of the Act.....".

The instant appeal is one, in our opinion, in which this Court should give an authoritative judgment. Accordingly, we refer the appeal to a larger Bench..."

11. Frankly speaking, we are unable to appreciate the course followed by the Division Bench. The writ petition was dismissed *in limine* without notice to the respondents and there was no opportunity to the respondents to place the facts before the Court. When the appeal was admitted and notice was directed for the respondents, in the normal course, the court should have waited for the service of notice and given an opportunity to the respondents to state their case before deciding the scope of the *lis* or formulating the questions which arise for consideration in the appeal. Without doing so, the Division Bench has chosen to make a reference straightaway to a Full Bench observing that an authoritative judgment should be given in this appeal. A reference to a Full Bench can be made if there is a conflict of opinions already between the judgments of this Court or if

a question of law of general importance arises, which requires to be decided by a Bench comprising more than two Judges.

12. Here, there was no pre-existing conflict of opinions. The observations contained in the judgment in W.P.No.12959 of 1989 made by a single Judge and referred to in the order of reference were *obiter dicta* and unnecessary to the judgment in that case, there was a seizure of R.C. Book of a hypothecated vehicle by a Tahsildar of the Corporation, which was held by the learned Single Judge to be not an action falling under Sec.29 of the State Financial Corporations Act. The learned Judge said clearly that he was bound by the pronouncement of the Bench in W.A.No.530 of 1990 (*K.Vidhya Kumari v. Managing Director, The Tamil Nadu Industrial Investment Corporation and another*). He proceeded to dispose of the writ petition on the footing that Sec.29 of the said Act was not applicable to the action taken by the Tahsildar of the Corporation and the same was without jurisdiction. Consequently, he allowed the writ petition and directed the return of the R.C. book to the writ petitioner therein without delay. There was an appeal against the said order in W.A.No.104 of 1991. A Division Bench, one of the members of which was a party to the earlier judgment in W.A.No.530 of 1990, dismissed the appeal on 19.3.1991 without admitting it, holding that there was no dispute before them, that there was no sanction in law for the seizure of the R.C. book of the vehicle. As the proposition of law laid down by the learned single Judge that the seizure of R.C. book of a vehicle did not fall under Sec.29 of the Act, was not challenged before the Bench, the latter dismissed the appeal after recording the fact that the direction given by the learned single Judge to return the book had been complied with by the appellants before them.

13. Thus, there was no conflict between the judgment of the Division Bench in W.A.No.530 of 1990 and any other judgment of this Court. A reference was made to the judgment of the Orissa High Court in *M/s.Kharavela Industries Pvt. Ltd. v. Orissa State Financial Corporation*, A.I.R. 1985, Ori. 153, in the order made in W.P.No.12959 of 1989. If the Division Bench in the present case had opined that the view taken by this Court in W.A.No.530 of 1990 *K.Vidhya Kumari, Proprietrix, M/s.K.R.Engineering v. The Managing Director, The Tamil Nadu Industrial Investment Corporation Ltd.*,

Madras-14 and another was in conflict with the view taken by the Orissa High Court and that the Division Bench preferred to agree with the view of the Orissa High Court, it should have stated so in the order of reference. We do not find any such statement is found either in the order of reference or in the order of the single Judge in W.P.No.12959 of 1989. In the absence of an expression of opinion which would run counter to the decision taken in W.A.No.530 of 1990 by a Division Bench of this Court, which is binding on this Court, until it is overruled by a larger Bench, no question of reference to a Full Bench will arise.

14. It is also not stated in the Order of reference that even if there is no conflict of opinions, the question which arises for consideration in the present case is one of such great importance as to be decided by a Bench comprising of more than two Judges. The Division Bench has neither decided the facts of the case, nor formulated any question of law. It is seen from the facts that a notice had been admittedly issued on 14.11.1991 to the appellant calling upon him to pay the entire amount due within 15 days therefrom and informing him in unmistakable terms that on his failure to do so, action will be taken under Secs.29 and 32-G of the State Financial Corporations Act without prejudice to the other rights of recovery of the Corporation. The learned single Judge, who has dismissed the writ petition *in limine*, has given a clear finding that the said notice dated 14.11.1991 satisfies the requirements of the provisions of the Act. Without considering the question whether the finding of the learned single judge is correct or not, we are at a loss to know how a reference to a Full Bench can be made by a Division Bench. The proper course for the Division Bench would have been to wait for the respondents to appear before court on receipt of notice and after ascertaining their stand, to decide whether the notice dated 14.11.1991 satisfies the requirement of the Act and if they had differed from the view taken by the learned single Judge, then only the Division Bench could have made a reference to a larger Bench.

15. However, as stated earlier, we were not inclined to return the reference as such a course would only delay the disposal of the matter and cause hardship to the parties. Thus, as the entire appeal has been preferred to us by the Hon'ble the Chief Justice we have heard counsel on both sides fully on the merits of the appeal.

16. The main contention urged by learned counsel for the appellant is that the principles of natural justice had been violated and before any action under Sec.29 of the State Financial Corporation Act, a notice should be given to the borrower as to the proposed action and adequate opportunity should be given to him to make his representations. Reliance is placed on the judgment of the Orissa High Court in *M/s.Kharavela Industries Pvt. Ltd. v. Orissa State Financial Corporation*, A.I.R. 1985 Ori. 153, for the proposition that Sec.29 of the Act does not exclude the application of the principles of natural justice and unless the said principles are complied with in a particular case, the action taken by the Corporation is null and void. According to him, the seizure of the vehicle in this case was without any notice and it was, therefore, illegal. It is argued that as the seizure was illegal, the auction sale of the vehicle is null and void and the respondents are bound to hand over the vehicle to the appellant after accepting the entire amount due. It is also submitted that the instructions contained in the Legal Manual issued by the Corporation have not been followed in the present case and, therefore, the auction held by the respondents is vitiated. It is further submitted that the appellant has been repeatedly making attempts to pay the amounts due, after the seizure of the vehicle and the respondents had high-handedly refused to accept the same and proceeded with the auction sale and confirmation of the same.

17. We have already referred to the facts chronologically and also pointed out that the version given by the appellant in the affidavit filed in support of the writ petition is not true. We have referred to the notice dated 29.8.1991 informing the appellant the amount due as on 20.8.1991 and calling on him to pay the arrears as well as the instalments due on 1.9.1991. The appellant was also told by the notice that if he disputed the figures mentioned therein on the basis of his records, he should intimate the Corporation within a fortnight of the receipt thereof. In spite of the receipt of such notice, the appellant did not take steps to make any payment. That is an admitted fact. It is only thereafter, the respondents seized the vehicle on 1.10.1991. While in the affidavit filed in support of the writ petition the appellant has stated that the vehicle was seized on 3.10.1991, in a letter dated 18.2.1992 written by him to the

Motor Vehicles authority, he has given the date as 2.10.1991. A copy of that letter is included in the typed set by the appellant himself. That letter is written after the admission of the writ appeal. There is no explanation for the discrepancy in the dates given by him. However, it does not matter whether the vehicle was seized on 1.10.1991 or 2.10.1991 or 3.10.1991. The grievance of the appellant is that the vehicle was seized without a notice of seizure. As rightly pointed out by learned counsel for the respondents, if a notice of seizure had been given, the vehicle would have disappeared from the normal area of operation. The appellant would have taken it beyond the reach of the respondents, anywhere in the country as he is holding a national permit. There is no substance in the contention that the seizure is illegal in the absence of notice of seizure. Clause 10 of the hypothecation deed provides expressly for seizure of the hypothecated assets in the event of default in the payment of amounts due to the Corporation. The Corporation is certainly entitled to exercise its powers and enforce the terms of the contract.

18. There is nothing in Sec.29 of the State Financial Corporations Act which would prevent the Corporation from enforcing the terms of the contract by seizure of the hypothecated assets, without notice of seizure.

19. It should be remembered at this stage that one of the objects of the State Financial Corporations Act is to enable financial institutions to recover the money invested by an advancement of loans as speedily as possible. Before the Act was passed, financial institutions were finding it difficult to freely invest their money in industrial concerns, as they were required to adopt lengthy and cumbersome procedure of sale through Courts in cases of defaults by the borrowers. Thus, the funds of the financial institutions were getting locked up for a long time and were not available to as many industrial concerns and as quickly as possible. For the purpose of quick industrial progress, it was felt necessary that the flow of credit remained smooth, unimpaired and quick. It was for that reason, the Parliament enacted that State Financial Corporations Act and incorporated Secs.29 to 31 conferring certain rights on the Corporation. The scheme of the Act shows that the Parliament wanted special financial institutions to be established for giving financial accommodations to industrial concerns and at the same time confer on them

special rights for recovery of their dues in case of defaults by the borrowers. Such recovery is made possible even without an adjudication by judicial authorities. Sec.29 of the Act confers particular rights to take over the management or possession or both of the industrial concern and to realise the property pledged, mortgaged, hypothecated or assigned by transfer either by lease or sale.

20. In our view, Secs.29 to 31 of the Act should be read together. Sec.29 thereof enables the financial Corporation to take over the management or possession or both of the industrial concern, which is under a liability to the Corporation under an agreement and which makes a default in repayment of loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given to the Corporation. The section also provides that the Corporation has a right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to it. Sec.30 of the Act provides that notwithstanding anything in the agreement to the contrary, the Financial Corporation may, by notice in writing, require any industrial concern to which it has granted any loan or advance to discharge forthwith in full its liabilities to the Financial Corporation. The contingencies in which such notice may be issued are set out in clauses (a) to (f). Suffice it to refer to clauses (b) and (f) thereof. Clause (b) reads,

"if the industrial concern has failed to comply with the terms of its contract with the Financial Corporation in the matter of the loan or advance?"

Clause (f) reads,

"if for any reason it is necessary to protect the interests of the Financial Corporation."

Under Sec.31 of the Act, the Corporation may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more reliefs set out in the section. Such a right to apply to the District Judge is without prejudice to the provisions of Sec.29 of the Act and Sec.69 of the Transfer of Property Act. The right may be exercised where an industrial concern in breach of any agreement makes any default in repayment of any loan or advance or instalment thereof or otherwise fails to comply with the terms of the agreement or where the Financial Corporation requires an industrial concern to make

immediate repayment of any loan or advance under Sec.30 of the Act and the latter fails to make such repayments. In all, Sec.31 of the Act shows that if a notice is issued under Sec.30 of the Act and not complied with, the Corporation is empowered to exercise (1) its rights under Sec.29 of the Act (2) its rights under Sec.69 of the Transfer of Property Act and (3) its rights under Sec.31 of the Act. The Corporation may choose any one of them.

21. It is seen from the facts of the present case that a notice of foreclosure has been issued under Sec.30 of the Act and the impugned auction has been held only after sufficient time has elapsed after the receipt of such notice by the appellant. The notice was admittedly received by the appellant on 19.11.1991. The auction sale was announced and advertised by publication in newspapers on 6.12.1991. The auction was fixed to take place on 12.12.1991. The appellant had 23 days after the receipt of the foreclosure notice, to pay the amount and stop the auction. Even according to him, he wanted only a month's time for payment of the entire amount and he wrote a letter praying for grant of such time on 26.11.1991. If he had made an attempt to pay the money or a substantial part thereof before 12.12.1991, the Corporation would certainly have accepted the same and stopped the auction. Even after the publication of the notice of public auction, the appellant did not take any step to pay the amount due. Hence, there is no illegality whatever in the auction held by the respondents on 12.12.1991.

22. As pointed out already, there was no necessity for a notice of seizure before the lorry was seized. But, factually there was a notice calling upon the appellant to pay the amount due as on 1.9.1991. That notice was dated 29.8.1991. In spite of the notice to pay, the appellant did not move his little finger. Naturally, the Corporation was obliged to take action in order to protect the interests of the Corporation by seizing the lorry. There was no violation of any principle of natural justice in the seizure of the lorry, particularly when the Corporation was only enforcing the terms of the contract and exercising its power under Clause 10 of the hypothecation deed.

23. The judgment of the Orissa High Court cited by the appellant's counsel does not lay down any absolute proposition of law as contended by him. The facts in that case were somewhat peculiar. A notice was given by the Financial Corporation to

the industries as to the default position and its decision to take over possession on failure of the industries to pay the instalments. Subsequently, the industries made some payments and the earlier order to take over possession was not given effect to. Again another order for taking possession of the industrial was passed, without giving any notice, though substantial payments had been made by the industries. In those circumstances, the Division Bench held that the Corporation had failed in its duty to give reasonable notice to the industries that it was going to take over the concerns and a minimum opportunity to the concerns to put forth their case before the Corporation ought to have been given. It was held that the earlier order of the Corporation complied with the principles of natural justice, but the subsequent order failed to give any opportunity whatsoever and therefore, the action taken by the Corporation was struck down. However, the Bench took care to observe that in a given case, whether the rules of natural justice have been complied with or not depends upon the facts and circumstances of that case. Hence, it cannot be stated as an absolute proportion of law that in every case an action taken by the Corporation under Sec.29 of the Act without notice to the borrower is contrary to the principles of natural justice and vitiated thereby. It has to be decided in each case by the Court whether the particular action taken by the Corporation required the issue of a prior notice to the borrower. Such decision will naturally depend on the exigencies of the situation and the nature of the hypothecated assets.

24. Referring to the Judgment of the Orissa Bench, a Division Bench of the Gujarat High Court in *Alka Ceramics v. Gujarat State Financial Corporation, Ahmedabad, A.I.R. 1990 Guj. 105*, observed as follows:

"However, we wish to make it clear that merely because there is some subsequent payment, it would not nullify the earlier notice and action u/s. 29 unless the payment is substantial, say about one third of the outstanding and there is concrete and reasonable proposal and promise to pay the balance within a reasonable period. If such substantial payment and proposal are made, the Corporation has to consider afresh whether to proceed under Sec.29 after taking into account the reasonableness and reliability of the offer."

Therefore, it is clear that the Orissa Bench has not laid down any proposition of law in the abstract without any reference to the facts of the case.

25. At this stage it is worthwhile referring to the dictum of the Supreme Court in *Union of India v. Tulsiram Patel*, A.I.R. 1985 S.C. 1416, on the principles of natural justice. The relevant passages are as follows:

"Though the two rules of natural justice namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are none the less not statutory rules. Each of these rules yields to an changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible.

... ..

So far as the *audi alteram partem* rule is concerned, both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. This right can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the *audi alteram partem* rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in *Maneka Gandhi's case*, at page 681 of (1978) 2 S.C.R. 621: A.I.R. 1978 S.C. 597 at p. 629".

Therefore, it is futile to contend that though Sec.29 of the Act does not provide for issue of notice before taking action thereunder, principles of natural justice require such a notice to be issued in every case before any kind of action is taken. The fact that the legislature has made a provision for notice in Sec.30 but has omitted to do so in Sec.29 is not without significance.

26. Reliance is placed by learned counsel on the judgment of the Supreme Court in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and others*, Jt. (1992) 2 S.C. 326. It was a case in which the Financial Corporation did not disburse

the loan fully and when the industrial concern was in need of funds, the Corporation acted indifferently and took action under Sec.29 of the Act. Condemning the action taken by the Corporation in the context of the facts of the case, the Supreme Court laid down that the basic philosophy enshrined in Sec.24 of the Act should be kept in mind before any action is taken under Sec.29 of the Act. The Court also prescribed the guideline for exercising the power under Sec.29 of the Act. Sec.24 of the Act to which reference was made by the Supreme Court requires the Board of Directors of the Financial Corporation to discharge its functions on business principles, due regard having been had to the interests of industry, commerce and the general public. It was held by the Court that on the facts of the case it was clear that the interest of the industry were completely ignored by the Financial Corporation. The following passage is referred to by learned counsel:

"15. Sec.29 confers very wide power on the Corporation to ensure prompt by arming it with effective measure to realise the arrears. But the simplicity of the language is not an index to enormous power stored in it. From notice to pay the arrears, it extends to taking over management and even possession with a right to transfer it by sale. Every wide power, the exercise of which has far reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise the discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is *ultra vires*. It does not become *bona fide* and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is *mala fide* if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the

authority is found to have acted contrary to reason. Power under Sec.29 of the Act to take possession of a defaulting unit and transfer it by sale requires the authority to act cautiously, honestly fairly and reasonably. Default in payment of loan may attract Sec.29. But that alone is insufficient either to assume possession or to sell the property. Neither should be resorted to unless it is imperative. Even though no rules appear to have been framed nor any guideline framed by the Corporation was placed, yet the basic philosophy enshrined in Sec.24 has to be kept in mind. Rationale has to be judged in the light of it. Lack of reasonableness or even fairness at either of the two stages renders the take over and transfer invalid."

Nothing in the above passage suggests that a special notice should be issued under Sec.29 of the Act. On the other hand, the Court has referred only to a notice to pay arrears. Nowhere in the judgment of the Apex Court we find any prescription of a special notice being issued under Sec.29 of the Act before taking action. The ruling does not help the appellant in any manner, particularly when in this case a notice to pay has been issued on 29.8.1991 before the seizure of the lorry and a foreclosure notice has been issued on 14.11.1991 before the auction sale informing clearly the appellant that action will be taken under Secs.29 and 32-G of the Act.

27. Learned counsel for the appellant places reliance on the instructions contained in the Legal Manual issued to the Officers of the Corporation. According to him, they are Regulations within the meaning of Sec.48(2) of the Act. Under Sec.48 of the Act, the Board of Directors after consultation with the Development Bank and with the previous sanction of the State Government, may make regulations not inconsistent with the Act and the rules made thereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. Certain categories have been set out in Sub-sec.(2) thereof, without prejudice to the generality of the power given in Sub-clause (1) of Sec.48 of the Act. Clause (1) of Sub-sec.(2) of Sec.48 of the Act provides for taking over of the management of any industrial concern on a breach of its agreement with the Financial Corporation. Sub-sec.(3) enjoins that all regulations made under the Section shall be published in the Official Gazette

and any such regulation shall have effect from such earlier or later date as may be specified in the regulations. Thus, if the Board makes any regulations, they shall be published in the Official Gazette in order to be treated as Regulations. The Legal Manual containing instructions to the Officers of the Corporation is not admittedly a regulation framed under Sec.48 of the Act by the Board. It was not published in any Official Gazette. It is conceded that they are not regulations as contemplated under Sec.48 of the Act. But, however, it is contended that the instructions contained in the Manual confer a right on the borrowers and they are enforceable at the instance of the borrowers. We do not agree. The instructions are merely guidelines to be generally followed by the officers in order to avoid any legal tangles. Moreover, the paragraphs in the Legal Manual which are relied on by learned counsel relate only to taking over of industrial units and taking possession of immovable properties. We agree with the view taken by the learned single Judge in this case that the instructions contained in the Legal Manual referred to by learned counsel for the appellant do not apply to seizure of vehicles or the sale thereof.

28. Learned counsel submits that a lorry or a motor vehicle is also an industrial concern as defined by the Act. We do not find any substance in the contention. According to him, Sec.2(c)(iv) of the Act would mean a motor vehicle. The said sub-section reads thus:

"industrial concern" means any concern engaged or to be engaged in---

.... and

(iv) the transport of passengers or goods by road or by water or by air or by ropeway or by life."

The expression used by Sec.2(c)(iv) of the Act is 'concern'. The Act does not define that expression. One of the meanings of 'concern' is a 'business'. A lorry or motor vehicle is not a business though it may be a business asset. Hence, the contention that a lorry is an 'industrial concern' within the meaning of the Act cannot be accepted.

29. Nothing has been placed before us to show that the auction is not conducted fairly or properly. On the other hand, the records show that proper public notice was given by publication in the newspapers and several members of the public had taken part in the auction. Ultimately, the vehicle has been sold for a sum of Rs.2,58,500

which is more than the amount due to the Corporation. The Corporation has stated in its counter affidavit filed here before us that a sum of Rs.30,000 is remaining as a surplus, which is payable to the appellant herein. Thus, the appellant cannot make any grievance against the auction as such. There is absolutely nothing to show that the Corporation had acted vindictively or arbitrarily against the appellant. He was given more than ample opportunity to discharge the debt due by him. Yet, he had not availed of the same.

30. We find no merit whatever in the appeal. We are entirely in agreement with the view taken by the learned single Judge. The facts of the case fully justify the dismissal of the writ petition *in limine*. In fine, the writ appeal suffers dismissal. In view of the fact that the appellant has made false statements in his affidavit filed in the writ petition, we direct him to pay costs in this appeal. Counsel's fee Rs.1,000.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Thanikkachalam, J.

C.R.P.No.2184 of 1989

17th June, 1992.

V.K.Veeraraghava Reddiar ...*Petitioner*
v.
Urudu Madarasa (Arabic School) by Secretary and another ...*Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(2)(ii)(a) - Subletting - What is - Premises let out for partnership business - Partnership dissolved - Business allotted to a partner - Tenancy, if amounts to subletting.

Where a tenant took the petitioner premises for the purpose of conducting his business and in the course of his business, if he formed a partnership and doing partnership business in the rented premises, it would not amount to subletting the premises because there is no parting with the possession of the premises. So also, if the premises was

let out for a partnership business and after the dissolution of the partnership, if the business is allotted to an erstwhile partner, then also there is no subletting. If on a stoppage of business, one of the partners is handed-over the entire business premises in which he carries on his business, thereafter, it is not a case of subletting. [Paras 9 and 12]
Cases referred to:

Sunkur Subramanian Chetty v. V.K.R.Gurusami Chetty and Co., (1972)1 M.L.J. (S.N.) 37. [Para 12]
Subba Chetty v. Madras Stainless Emporium, (1979)1 M.L.J. 504. [Paras 5, 12]

K.V.Sankaran, Senior Counsel, for *R.Mohan* and *T.K.Sadagopan*, for Petitioner.

R.Krishnamoorthy, Senior Counsel, for *R.Muthukumarasamy*, for Respondent No.1.

K.Krishnaswamy, for Respondent No.2.

The Court made the following

ORDER:- The second respondent in the eviction petition is the petitioner herein. The petition for eviction was filed under Sec.10(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), hereinafter referred to as 'the Act'. Urudu Madarasa (Arabic School), represented by Secretary is the owner of the petition premises. The first respondent in the eviction petition is the tenant in respect of the shop No.1 in Madras Building Shopping Complex, Shanmugham Road, Tambaram. The case of the landlord is as under:

The petition premises was let out to the first respondent in the year 1971. The building is a non-residential one and the tenancy is monthly tenancy. Originally the rent was at Rs.80 per month, later on it was enhanced to Rs.100 per month and at present the rent is at Rs.120 per month. The first respondent paid an advance of Rs.8,000 and this has to be adjusted from a portion of the monthly rent payable by the tenant. Thus, at present out of Rs.120 per month payable by the tenant, Rs.60 per month is adjustable towards the advance amount and the tenant is to pay a sum of Rs.60 per month. According to the landlord, the first respondent without the written consent of the landlord sublet the petition premises to the second respondent. Hence, the landlord gave notice dated 24.11.1980 calling upon the tenant to quit and deliver vacant possession of the petition premises since the same was let out unauthorisedly without prior permission of the landlord to the second respondent. The first respondent sent a reply, denying the

sub-tenancy. The second respondent sent a notice to the landlord dated 12.12.1980 alleging that there was no sub-tenancy in this case, since the petition premises was let out to the partnership firm, in which the second respondent was a partner.

2. The case of the first respondent is as under: The petition premises was let out to a partnership concern. The partnership consisting of one Lakshminarayanan, Gengadara Naicker and Veeraraghava Reddy and one minor Harikrishnan was admitted to the benefit of the partnership. It is not correct to state that the petition premises was let out to the first respondent. The name of the firm is "Govindasamy Reddiar Rice Mundy". The partnership business has been now dissolved and the business is now being carried on by the second respondent. Therefore, there is no subletting in this case as alleged by the landlord.

3. The case of the second respondent is as under: Mr.M.K.N.Mohammed Gani is not the authorised agent of the alleged Urudu Madarasa (Arabic School). Mr.M.K.N.Mohammed Gani is not entitled to represent the Urudu Madarasa. The petition premises was let out to the partnership concern, Govindasamy Reddiar Rice Mundy. It is not correct to state that the property was let out to the first respondent. The partnership was started in the year 1970 and it was carrying on business under the name and style of "Sri Govindasamy Reddiar Rice Mundy". A sum of Rs.8,000 was paid as advance on behalf of the partnership firm by the first respondent. Therefore, the sum of Rs.8,000 was not paid by the first respondent in his individual capacity. The partnership firm was paying the rent ever since the inception of the tenancy. Now the partnership is dissolved and the second respondent is carrying on the business. Therefore, there is no subletting as alleged by the petitioner in this case. The petitioner is a public trust and hence the rent controller has got no jurisdiction to entertain the petition.

4. The petitioner filed as many as thirty documents and the respondents filed 190 documents. Mohammed Gani examined himself as P.W.1. V.K. Veeraraghavan examined himself as R.W.1. One Ariyappa was examined as R.W.2. Considering the facts arising in this case, the Rent Controller dismissed the petition for eviction. On appeal, the Rent Control Appellate Authority considering the facts arising in this case held that the first

respondent sublet the petition premises to the second respondent without the written consent of the landlord. Accordingly, the Rent Control Appellate Authority set aside the order passed by the Rent Controller, allowed the appeal and ordered eviction. It is against this order, the present revision has been preferred by the second respondent.

5. The learned counsel appearing for the second respondent/petitioner herein submitted as under: The Appellate Authority was not correct in coming to the conclusion that since two cheques were issued by Govindasamy Reddiar, the tenancy is in favour of the said Govindasamy Reddiar in his individual capacity. There is no evidence on record to show that the advance were paid by Govindasamy Reddiar in individual capacity. The partnership firm Govindasamy Reddiar Rice Mundy was formed in August, 1970 as evidenced by Ex. B-7. Since the partnership firm desires to have a branch, the petition premises was taken on lease and the advance was paid. The petition premises itself was constructed in April, 1971 as can be seen from Ex.B-190. The firm started functioning in the premises soon after the construction was over in April, 1971 as evidenced by Ex.B-3, dated 26.3.1971. The firm applied for registration of the firm. Ex.B-4 is the application for registration with the Income-tax authorities. It is not correct to state that the firm did not do any business in the petition premises. The account books, licences, telephone bills, salary books, registers maintained under the Labour Act, Income-tax Assessment Order and other correspondence like Exs.B-12 to B-190 would go to show that the firm was doing business in the petition premises. The Appellate Authority misdirected itself in interpreting the documents filed by the petitioner herein. In Ex.B-1 and Ex.B-2, it is shown that the business is known as Thiru Govindasamy Reddiar Rice Mundy. Because of the word "Thiru", the Appellate Authority came to the conclusion that the tenancy is in the individual name of Govindasamy Reddiar. Therefore, the first Appellate Authority held that the lease was in favour of Govindasamy Reddiar in his individual capacity. The partnership firm was recognised as a tenant in March, 1980. Therefore, it cannot be said that the second respondent is an unauthorised sub-tenant on the dissolution of the partnership as it has been held in 99 L.W. 741. There cannot be any sub-tenancy when a

dissolution of the partnership takes place or when a partner retires, as per the decision of this court in *Subba Chetty v. Madras Stainless Emporium*, (1979)1 M.L.J. 504. Ex.A-10 was not proved in accordance with law. In Ex.A-12, the second respondent intimated about the dissolution and that he has been doing the business after the dissolution. Therefore, there cannot be any sub-tenancy as alleged by the landlord. It is not correct to state that on the basis of Exs.A-10 to A-14 and A-30, that the original tenancy was in favour of Govindasamy Reddiar in his individual capacity. Ex.A-16 reply was not considered by the Appellate Authority. The first respondent was not examined as a witness. P.W.1 in his Chief-examination has clearly stated that he let out the premises to the partnership firm. It was therefore pleaded that the Rent Control Appellate Authority was not correct in reversing the well considered decision of the Rent Controller. It was therefore pleaded that the order of the Rent Control Appellate Authority is liable to be set aside.

6. On the other hand, the learned counsel appearing for the respondent/landlord submitted as under: The petition premises was let out to the first respondent in his individual capacity. It was not let out to the partnership firm as alleged by the petitioner herein. A sum of Rs.8,000 was paid by the first respondent in his individual capacity. There is no mention at the time of payment that this was paid on behalf of the partnership firm. The possession was parted with by the first respondent in the eviction petition in favour of the second respondent, hence there is subletting. The advance of Rs.8,000 was paid by way of cheque by the first respondent. It is not correct to state that the partnership was started in the year 1970. The partnership was not doing its business in the petition premises. The first respondent was doing the business in the petition premises and sublet to the second respondent without the written consent of the landlord. In order to prove their case, the first respondent was not examined. The first respondent requested the landlord to transfer the tenancy in favour of the second respondent. Till 4.10.1980, the rent was received from the first respondent. In Ex.B-2 the name of Govindasamy Reddiar is mentioned as tenant. His name was preceded by the word "Thiru" and the initial. Therefore, it cannot be said that the petition premises was taken on lease by the partnership firm.

The second respondent was not consistent in saying under what mode the advance of Rs.8,000 was paid. It was therefore pleaded that the Rent Control Appellate Authority was correct in ordering eviction.

7. I have heard the rival submissions.

8. The petition for eviction was filed under Sec.10(2)(ii)(a) of the Act. According to the landlord, the petition premises was originally let out to the first respondent in his individual capacity and the first respondent without any written consent of the landlord sublet the petition premises to the second respondent. Therefore, the respondents are liable to be evicted. According to the second respondent/petitioner herein, the petition premises was let out to a partnership concern, in which first and second respondents and others were partners and after the dissolution of the partnership, the second respondent is now carrying on the business and therefore there is no subletting as alleged by the landlord. The first point for consideration this revision is to whom does the petition premises was let out, whether to the first respondent in his individual capacity or to the partnership firm as alleged by the second respondent. There is no written lease agreement in this case. Ex.A-30 is the copy of the current statement of account furnished by the Indian Overseas Bank, Tambaram Branch. This document shows the account maintained by Mr.T.G.Govindasamy Reddiar No.48, Mudichur Road, Tambaram. According to this document, a cheque for Rs.6,000 dated 9.3.1970 was given. So also on 14.12.1970, another cheque for Rs.2000 was given. The landlord accepted that these sums were paid by Govindasamy Reddiar towards advance. The advance was paid even before the construction was completed with regard to the petition premises. After the construction was completed in 1971, the petition premises was let out to the first respondent according to the landlord. According to the second respondent, this advance was paid by Govindasamy Reddiar on behalf of the partnership firm "Thiru Govindasamy Reddiar Rice Mundy". A partnership was in existence from 7.8.1970 under the name and style of "Govindasamy Reddiar Rice Mundy". T.G.Lakshminarayanan, Veerarghava Reddiar, Gengadara Naicker are partners and Harikrishnan who was a minor was admitted to the benefit of the partnership firm. The principal place of business is shown as No.48, Mudichur

Road, Tambaram, Madras-45. According to the landlord, this partnership firm was not functioning in the petition premises. It was functioning at No.48, Mudichur Road, Tambaram, Madras-45. Though the partnership came into existence, on 7.8.1970, the partnership deed was written on 16.5.1970. This firm was dissolved by a deed of dissolution dated 10.9.1980. The firm was dissolved on 30.4.1980. According to the dissolution deed, the business carried on at No.1 Urudu Madarasa Building, Shanmugham Road, Tambaram was allotted to Veeraraghavan. Ex.A-10 is the letter dated 11.6.1980. This letter was written by Govindasamy Reddiar in which he asked the Secretary to furnish particulars about the amount due from his upto 31.5.1980. In the said letter, it is stated as under:

“இப்பவும் 31580 முடிய என் பேரில் உள்ள கடைக்காக நான் கொடுத்துள்ள வாடகை விபரம் அட்வான்ஸ் வரவு போக எவ்வளவு தொகை மீதி உள்ளது என்ற விபரத்தை தயவு செய்து தெரியப்படுத்துமாறு மிக்க தாழ்மையுடன் கேட்டுக் கொள்கிறேன்.”

The first respondent avoided the witness box. In view of these facts, the learned Appellate Authority pointed out that the partnership business was not carried on in the petition premises. Ex.A-11 is the reply to Ex.A-10. There was no reply for this from the first respondent. Instead of that the second respondent gave a reply Ex.A-12 dated 8.8.1980. From this letter, the landlord came to know that the petition premises was sublet by the first respondent to the second respondent. Thereafter, under Ex.A-13, the landlord sent a notice dated 23.8.1989, for which Ex.A-14 reply dated 25.9.1980 was given by the first respondent, wherein it is stated that he was doing the business along with the second respondent. Under Ex.A-14, the first respondent required the landlord to change the tenancy in favour of the second respondent. So also under Ex.A-12 the second respondent requested the landlord to change the tenancy in his favour. Upto March, 1980, according to the landlord the rent was received from the first respondent as a tenant. Exs.B-1 to 83 are pocket note books showing the payment of rent by Govindasamy Reddiar Rice Mundy for the petition premises.

9. It is significant to note that where a tenant took

the petition premises for the purpose of conducting his business and in the course of his business, if he formed a partnership and doing partnership business in the rented premises, it would not amount to subletting the premises, because there is no parting with the possession of the premises. So also, if the premises was let out for a partnership business and after the dissolution of the partnership if the business is allotted to an erstwhile partner, then also there is no subletting. But in the present case, the petitioner herein submitted that the partnership business though started in Mudichur Road, it was also functioning in the petition premises. Therefore, it is for the petitioner herein to establish that the partnership started in the year 1970 and dissolved in July, 1980 was functioning in the petition premises. If the petitioner herein established this fact, then he can escape from the eviction. Now the petitioner herein is conducting the business under the name and style of “Gangadaram Mundy” in the petition premises.

10. In order to support his contention that the partnership firm Govindasamy Reddiar Rice Mundy was functioning in the petition premises ever since the petition premises was let out, the petitioner herein filed 190 documents. Ex.A-9 is the copy of the telephone directory at page No.64, wherein the telephone number 48610 was allotted to Govindasamy Reddiar Rice Mundy, No.1 Shanmugham Road, Madras-45. Ex.A-12 is the letter written by Karur Vysaya Bank, Tambaram Branch. According to this letter, the current account No.150 is in the name of M/s.Govindasamy Reddiar Rice Mundy, Tambaram, Madras, from 1976 to 1981. Ex.B-18 is the professional tax receipt issued by the Municipality. According to the said letter Govindasamy Reddiar Rice Mundy is situate No.1, Shanmugham Road, Tambaram, Madras-45. Ex.B-20 is the licence for industries and factories dated 13.2.1973. According to this document, Govindasamy Reddiar Rice Mundy is functioning at No.1, Shanmugham Road, Tambaram, Madras-45. Ex.B-25 is the receipt issued by the Municipality. According to this receipt, Govindasamy Reddiar Rice Mundy is functioning at No.1, Shanmugham Road, Tambaram, Madras-45. Ex.B-26 is the receipt for collection of fee for issue of licence for Industries and Factories. According to this document, Govindasamy Reddiar Rice Mundy was functioning at No.1, Shanmugham Road, Tambaram, on 29.2.1976.

Ex.B-27 is the receipt issued by Tambaram Municipality dated 23.12.1977, where it is stated that in 1977-78 Govindasamy Reddiar Rice Mundy was functioning at No.1, Shanmugham Road, Tambaram. Ex.B-59 is the National Holidays Register maintained by Govindasamy Reddiar Rice Mundy Mosque Building, Shanmugham Road and Ex.B-60 is the salary register maintained by Govindasamy Reddiar Rice Mundy under Shops and Establishments Act. Ex.B-61 is National Holidays register. Ex.B-62 is the register maintained by Govindasamy Reddiar Rice Mundy under the Shops and Establishments Act. Ex.B-63 is the labour inspector's notebook. Ex.B-65 and Ex.B-66 are receipts for collection of fees for Industries and Factories in the year 1971 from Govindasamy Reddiar Rice Mundy. Ex.B-76 is the Income-tax assessment order for the year 1979-80. Ex.B-79 is the chalan for payment of tax for the assessment year 1977-78. Ex.B-83 is the assessment order for the assessment year 1980-81 for the registered firm M/s.Govindasamy Reddiar Rice Mundy, No.1, Mosque Building, Shanmugham Road, Tambaram. Ex.B-88 is the statement of account for Govindasamy Reddiar Rice Mundy Mosque Building, Shanmugham Road, Tambaram Prepared by a chartered Accountant. Ex.B-90 is the current account passbook issued by the Karur Vysya Bank, Tambaram Branch. This passbook is issued in the name of Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. The accounts begins from the year 1977. Ex.B-92 is the receipt for payment of salestax for Govindasamy Reddiar Rice Mundy, Shanmugham Road, dated 9.11.1976. Ex.B-94 document is series of 'C' Forms and 'F' Forms under General Sales Tax Act in the name of Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, Ex.D-99 is the letter dated 25.7.1981 issued by the Commercial Tax Officer to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Ex.B-100 is the notice of final assessment refund order to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Ex.B-10 is the proceedings of the Assistant Commercial Tax Officer dated 1.8.1981 relating to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Ex.B-103 is the letter from the Deputy Commissioner, Commercial Tax Office, to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 8.1.1982. Ex.B-106 is the receipt for payment of sales tax for

Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 14.4.1976. Ex.B-109 is also receipt for payment of sales tax by Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Ex.B-112 is the summons under the Tamil Nadu General Sales Tax Act to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 6.11.1976. Ex.B-113 is the summons under the Sales Tax Act to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 13.12.1976. Ex.B-116 is the letter from the Tamil Nadu Government to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 18.11.1974. Ex.B-117 is the licence issued to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 6.1.1975. Ex.B-118 is the Quality Certificate issued by T.N.G.S.C. to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram, dated 19.5.1977. Exs.B-124 and B-125 are the letters from the Assistant Commissioner to the District Supply Officer for issue of licence to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Ex.B-127 is the letter issued by Reserve Bank of India, Madras dated 11.1.1978 to Govindasamy Reddiar Rice Mundy, Shanmugham Road, Tambaram. Likewise upto Ex.R-190 there are numerous documents to show that Govindasamy Reddiar Rice Mundy was functioning at the petition premises. Therefore, till the notice was issued by the landlord, for eviction, no objection was taken for functioning of the abovesaid partnership business in the petition premises.

11. Thus it remains to be seen that all the governmental authorities addressed there communication to Govindasamy Reddiar Rice Mundy to the shop at Shanmugham Road, Tambaram, where the petition premises is resituate. In fact, up to 1979, the landlord was receiving the rent from the second respondent in the eviction petition. In the oral evidence, R.W.1 himself accepted that the petition premises was let out to the partnership firm. Therefore at this stage the landlord cannot say that the partnership business was not functioning in the petition premises. According to the petitioner herein after dissolution of the partnership firm, the erstwhile partner, to whom the business was allotted to his share is now conducting the business.

12. If on a stoppage of business, one of the partners is handed-over the entire business premises in

which he carries on his business, thereafter, it is not a case of subletting (See *Sunkur Subramanian Chetty v. V.K.R. Gurusami Chetty and Co.*, (1972) 1 M.L.J. (S.N.) 37. So also in the case of *Subba Chetty v. Madras Stainless Emporium*, (1979) 1 M.L.J. 504, it was held that the occupation of the premises by the new partnership in which one of the partners was admittedly a partner of the dissolved partnership, which was the original tenant cannot be said to be as a result of subletting by the quandum dissolved firm.

13. Thus in the present case, even according to P.W.1 the premises was let out to the partnership firm. Further the fact that the partnership firm was functioning in the petition premises before dissolution was proved by filing overwhelming documentary evidence. After dissolution, one of the erstwhile partner is carrying on the business in the petition premises. Therefore there is no subletting by the first respondent to the second respondent as alleged by the petitioner in the eviction petition. On the facts available on record the Rent Control Appellate Authority filed to apply the correct legal principles on this point. Hence the order of eviction passed by the Rent Control Appellate Authority is liable to be set aside. Accordingly, I do so.

14. In that view of the matter, the order of eviction passed by the Rent Control Appellate Authority is set aside and that of the Rent Controller restored, and the petition for eviction is dismissed.

15. In the result, the revision is allowed. However, there will be no order as to costs.

B.S.

Revision allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Swamidurai, JJ.

L.P.A.Nos.73 and 74 of 1988 13th March, 1992.

Ramadoss Motor Transport, Kakinada

...Appellant

v.

New India Assurance Company, Kakinada and others

...Respondents.

Motor Vehicles Act (IV of 1939), Sec.95 - Motor accident - Persons travelling with their goods carried in lorry - Dying in accident caused by rash and negligent driving - No proof that owner had forbidden owner of the goods to travel with the goods or that driver had not authorised it - Liability of insurer and owner to pay compensation.

A lorry bearing registration number MSM 6072 collided with a stationary lorry on 3.7.1979 at about 3.00 a.m. Two persons who were travelling in the lorry along with their goods died. Alleging that the accident took place due to rashness and negligence on the part of the driver of the lorry the widows and parents of the deceased filed claim petitions before the Motor Accident Claims Tribunal. The tribunal held that the Insurer appealed. A learned single Judge held that the insurer had no liability under Sec.95 of the Motor Vehicles Act as the victims were not covered by the insurance and that the owner of the vehicle was liable to compensate and pay the amounts fixed as compensation by the Tribunal. In appeal,

Held:- It is not a case in which it can be said that the driver had not authorised or the owner of the vehicle had forbidden the owner of the goods to travel with the goods. It is a case, in which the insurer may not have any liability but the owner's vicarious liability cannot be doubted. [Para 14]

Cases referred to:

Commonwealth Assurance Company Ltd. v. V.P.Rahim Khan Sahib, A.I.R. 1971 Mad. 415: 1971 A.C.J. 295: 41 C.C. 727. [Paras 5, 9]

Narayana v. Madras State Palm Gar Sammelan, A.I.R. 1974 Mad. 281: 87 L.W. 39. [Paras 4, 11]

Sitaram Motilal v. Santanuprasad Jaishanker, A.I.R. 1966 S.C. 1697. [Paras 7, 8]

Pushpa Bai v. Ranjig G.&P. Company, A.I.R. 1977 S.C. 1735. [Paras 6, 7]

Young v. Edward Box and Company, (1951)1 T.L.R. 789. [Para 8]

Grarod v. Crosville Motor Services Ltd., (1953)2 All E.R. 753. [Para 7]

The Vanguard Insurance Company Ltd. v. Chinammal, 1969 A.C.J. 226. [Para 8]

South India Insurance Company Ltd. v. P. Subramaniam, (1971)2 M.L.J. 198: A.I.R. 1972 Mad. 49. [Para 8]

Abdul Jabar v. Muniammal, A.I.R. 1981 Mad. 112. [Para 9]

C. Dhyanaand v. Jaamni Bi, (1982)1 M.L.J. 290: A.I.R. 1982 Mad. 311. [Para 11]

Pushparaipurushotham Udeshi v. Ranjit Ginning and Pressing Company, A.I.R. 1977 S.C. 1735: 1977 A.C.J. 345. [Para 10]

M. Kandaswamy v. Chinnaaswami, A.I.R. 1985 Mad. 290. [Para 11]

Appeal under Clause 15 of the Letters Patent against the Order of Swamikannu, J. dated 2.9.1987 and made in the exercise of the Appellate jurisdiction of the High Court in A.A.O.Nos.65 and 64 of 1982 respectively preferred to this Court against the ward of the Motor Accident Claims Tribunal (District Court) Dharmapuri at Krishnagiri, dated 3.7.1981 and made in M.A.C.T.O.P.Nos.47 of 1980 and 2 of 1980 respectively.

The Judgment of the Court was delivered by *Mishra, J.*:- The owner of a lorry which met with an accident and caused the death of two persons, who were travelling with their goods carried in the lorry, has appealed against the judgment of a learned Single Judge of this Court holding it liable to compensate and pay the amount fixed as compensation by the Motor Accident Claims Tribunal in the applications filed under Sec.110 of the Motor Vehicles Act.

2. Facts which have been found to be established and are not disputed before us are as follows:

A lorry bearing registration number MSN-6072 collided with a stationary lorry on 3.7.1979 at about 3.00 a.m. from Krishnagiri in Krishnagiri-Madras Trunk Road. One Velmurugan and another Nagendran, who were travelling in the lorry along with their goods died. The widow and mother of the deceased Velmurugan and the mother and the father of the deceased Nagendran, filed their respective claim petitions before the Tribunal. They alleged that the accident took place due to rashness and negligence on the part of the driver of the lorry.

3. The driver of the lorry filed a counter, which the owner/appellant before us adopted as return to the allegations. The Insurance company filed a separate counter. It appears, however, that the Tribunal found that the accident took place due to rash and negligent driving of the lorry by the driver Mohammed Moosa. It however, held that the insurer was liable to pay the entire amount of compensation. The insurer appealed.

4. A learned single Judge of this Court, found that the victims were not covered by the insurance and that the insurer had no liability under Sec.95 of the Motor Vehicles Act, 1939. He, however found that since the victims suffered death in the accident that was caused on account of the rash and negligent driving of the lorry by the driver, the claimants were entitled to compensation and owner/appellant was liable to compensate and pay the amounts fixed as compensation by the tribunal.

5. The fact that the accident occurred as a result of rash and negligent driving has been questioned before us. A serious contention, however, has been raised on the ground that compensation has been awarded for the death of persons, who travelled without authority in the lorry and sustained injuries due to the negligence of the driver. Reliance has been placed on the judgments of a learned single Judge of this Court in the case of *Commonwealth Assurance Company Ltd. v. V.P. Rahim Khan Sahib*, A.I.R. 1971 Mad. 415: 1971 A.C.J. 295: 41 C.C. 727, and a Division Bench judgment of this Court in the case *Narayana v. Madras State Palm Gar Sammelan*, A.I.R. 1974 Mad. 281: 87 L.W. 39, to suggest that Sec.95 of the Motor Vehicles Act, would not cover the case of a person, who was not in employment or a passenger and it is asserted that the person, who was travelling without authorisation and was not in employment is not entitled to any compensation and if the victim accordingly would not be entitled to any compensation, the claimants are not entitled to claim either from the insurer or the owner of the lorry any compensation for the death of persons, who were travelling without authority in the lorry and sustained injuries due to the negligence of the driver.

6. The sheet-anchor shows the two aforementioned judgments of this Court, however, not more than the well understood principle that a passenger carried by a lorry will not be covered by the insurance policy and thus the insurer will have no

liability and there is no provision in the Act to protect a person, who is not in employment and who travelled without authorisation in a lorry.

7. This Court in several cases and the Supreme Court in the case of *Sitaram Motilal v. Santanuprasad Jaishanker*, A.I.R. 1966 S.C. 1697 and *Pushpa Bai v. Ranjig G. & P. Company*, A.I.R. 1977 S.C. 1735, adopted the rule expressed by Lord Justice Denning in *Young v. Edward Box and Company*, (1951)1 T.L.R. 789, on the question as to whether the owner of the lorry is liable for the unauthorised carrying of a passenger in a lorry by its driver. The observations of Lord Denning are as follows:

"The next question is how far the employee are liable for their servant's conduct. In order to make the employees liable to the passenger it is not sufficient that they should be liable for their servants negligence in driving. They must also be responsible for his conduct in giving the man a lift. If the servant had been forbidden or is unauthorised to give any one a lift, then no doubt the passenger is a trespasser on the lorry so far as the owners are concerned, but that is not of itself an answer to the claim. In my opinion, when the owner of a lorry sends his servant on a journey with it, thereby putting the servant in a position not only to drive it but also to give people a lift in it, then he is answerable for the manner in which the servant conducts himself on the journey, not only in the driving of it, but also in giving lifts in it, provided, of course, that in so doing the servant is acting in the course of his employment."

8. In *Pushpa Bai v. Ranjig G. & P. Company*, A.I.R. 1977 S.C. 1735, the Supreme Court has examined the expression "in the course of the employment" and said,

"the master is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is with the master's consent driving the vehicle as the master's business for the master's purposes."

The Supreme Court has further said:

".....the recent trend in law is to make the master liable for acts which do not strictly fall within the term "in the course of the employment" as ordinarily considered. We have referred to *Sitaram Motilal Jalal v. Santanuprasad Jaishanker Bhati*, A.I.R. 1960 S.C. 1697, where this Court accepted the law laid down by

Lord Denning in *Grarod v. Crosville Motor Services Ltd.*, (1953)2 All E.R. 753, that the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is, with the owner's consent, driving the car on the owner's business of for the owner's purposes. This extension has been accepted by this Court. The law as laid down by Lord Denning in *Young v. B. Edward Box and Company Ltd.*, (1951)1 T.L.R. 789, already referred to, i.e. the first question is to see whether the servant is liable and if the answer is yes, the second question is to see whether the employer must shoulder the servant's liability, has been uniformly accepted as stated in *Salmond Law of Torts*, 15th Edn. Page 606, in *Crown Proceedings Act, 1947* and approved by the House of Lords in *Staveley Iron and Chemical Co., Ltd. v. Jones*, 1956 A.C. 627 and *Imperial Chemical Industries v. Shatwell*, 1965 A.C. 656.

9. In a series of judgments reported in *The Vanguard Insurance Company Ltd. v. Chinnammal*, 1969 A.C.J. 226, *Commonwealth Assurance Company Ltd. v. V.P. Rahim Khan Sahib*, A.I.R. 1971 Mad. 415; 1971 A.C.J. 295; 41 C.C. 727 and *South India Insurance Company Ltd. v. P. Subramaniam*, (1971)2 M.L.J. 198; A.I.R. 1972 Mad. 49, this Court has taken the view that the owner cannot award liability when the passenger travelling in the lorry in pursuance of a contract of employment with himself as the owner of the goods carried met with an accident death or injury. The court has uniformly held that a contract of employment referred to in Sec.95(2)(b) of the Motor Vehicles Act need not necessarily be with the owner of the insured vehicle and that it can also be with the owner of the goods transported in the vehicle.

10. In *Abdul Jabbar v. Muniammal*, A.I.R. 1981 Mad. 112, a Division Bench of this Court, after taking into consideration the various judgments of the Courts in India including the Supreme Court and the courts in England, has held,

"Thus following the decision of the Supreme Court above referred to which in turn approves the decision in *Young v. Edward Box and Company*, (1951)1 T.L.R. 789, we have to hold that the owner of the lorry is vicariously liable for the injuries caused to the appellant

claimant who had travelled in the lorry with the permission of the driver of the lorry. As pointed out by Lord Justice Denning in *Young v. Edward Box and Company*, (1951) 1 T.L.R. 789, if the servant had been forbidden or is unauthorised to give anyone a lift, then no doubt the passenger is a trespasser on the lorry so far as the owners are concerned. But that is not by itself an answer to the claim."

11. In the case of *C.Dhyamand v. Jaamni Bi*, (1982) 1 M.L.J. 290; A.I.R. 1982 Mad. 311, a Bench of this Court has said,

"Lord Justice Denning concluded by observing that the passenger was therefore a trespasser, so far as the employers were concerned but nevertheless the driver was acting in the course of his employment and that is sufficient to make the employer liable. Relying on the decision and on the ostensible authority of the manager as a licensee to permit the deceased to travel with him, the Supreme Court held that the manager was acting in the course of his employment in giving leave to the deceased to travel with him and that the owner of the vehicle is liable. In deciding the liability of the Insurance Company, the Supreme Court after referring to Sec.95 of the Motor Vehicles Act, as amended by Act 56 of 1969 held that the insurance cover is not available to passengers in a case like the present one and that the proviso to Sub-sec.(ii) provides that a policy shall not be required except where the vehicle is a vehicle in which passengers are carried for hire or reward or by a reason of or in pursuance of a contract of employment to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises. In the case reported in *K.R.Sivagami, Prop. Rajendran Tourist v. Mahabobh Niss Bi*, (1981) 94 L.W.1: A.I.R. 1981 Mad. 138, a Division Bench of this Court, to which one of us was a party, in dealing with a case of a driver of a taxi carrying more than the permitted load of passengers which is contrary to the conditions of permit under which the vehicle was allowed to be used as a tourist taxi, held that the non observance of the rules relating to the number of passengers to be carried can only be said to be an improper

performance of the driver's duty. Even assuming that the permit conditions not to take more than the permitted number of passengers is taken as a prohibition, limitation restriction, that relates only to the manner of performance of the driver's duties in the course of his employment and that cannot in any way limit the sphere of his employment. Therefore, the carrying of two excess passengers by the driver of the taxi will only amount to an improper performance of his duties as a driver of the taxi and therefore it cannot be taken to be outside the sphere of his employment and held that the owner of the taxi is vicariously liable for the tort committed by the driver of his taxi. In *United India Fire and General Insurance Co., Ltd., Madurai v. M.S.Durairaj*, A.I.R. 1982 Mad. 287, this Bench had occasion to consider a case where a senior clerk of the State Bank of India, Kodaikanal, while he was returning from Madurai to Kodaikanal in a car MDA 1194, met with an accident resulting in injuries to the said clerk. In regard to the claim for compensation by the injured clerk an objection was taken by the Insurance company that the injured was carried for their which is against the terms of the insurance policy and as such the insurer was not liable. Following the judgment of the Supreme Court reported in *Pushparaipurushotham Udeshi v. Ranjit Ginning and Pressing Company*, A.I.R. 1977 S.C. 1735: 1977 A.C.J. 345, referred to supra, this Court negatived the liability of the insurance company."

12. The above view has been reiterated once again in *M.Kandaswamy v. Chinnaswami*, A.I.R. 1985 Mad. 290, by a Division Bench of this Court. This judgment is relevant, for it has referred to the case of *Narayana v. Madras State Palm Gar Sammelan*, A.I.R. 1974 Mad. 281: 87 L.W. 39, the judgment upon which learned counsel for the appellant has relied on heavily. The Bench has ruled:

"The immediate question is whether either the injured or the deceased who travelled in the lorry a long-with their goods can be said to be employed by a person insured by the policy and either the injury or death arose out of and in the course of his employment. On the evidence in this case, it is not possible to hold that either the injured or the deceased was an employee of the appellant lorry owner who had insured his lorry with the insurance company and that the

injury or the death arose out of and in the course of his employment. We shall emphasise here that on the evidence it is established that both the injured and the deceased got into the lorry..... On the above evidence, it is too difficult to infer even an implied contract of employment between the appellant owner of the lorry and either of the injured or the deceased. Sec.95(1)(b)(i) refers to cases where the accident involves the death or bodily injury of any person or damage to any property of a third party and is also caused by or arising out of the use of the vehicle in a public place; it is needless to state that the vehicle may be a generic term and will include all types of vehicles visualised under the Act inclusive of goods vehicle or lorry and public service vehicle. The said provision does not cover the death of a person travelling in the vehicle itself. A reference to Sec.95(1)(b)(ii) will justify our above view. The same specifically refers to death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Thus, we find that the provisions in the Act do not by themselves support the contention advanced by the learned counsel for the appellant....

Quite rightly therefore the Tribunal held both in law and under the policy of insurance, the insurance company is not liable to the claim made in these proceedings."

13. It is useful, however, to extract the observations of the learned single Judge in the impugned judgment. He has said:

"In the instant case, it is common ground that the owner of the goods was travelling in the lorry along with his goods. As seen from the *ratio decidendi* this view has been taken that since the owner of the goods is not covered by the provisions of Sec.95 of the Motor Vehicles Act, on his death, during the transit along with the goods, his legal representatives cannot claim any compensation and as such, the insurance company is liable. In the instant case, Mr.G.Venkataraman, learned counsel for the owner of the vehicle also contends that the owner of the vehicle is not liable. Then is the owner of the goods, who was under the *bona fide* impression that he should protect the goods travelling in the very same goods vehicle in which his goods are being transported, to be

considered as one which is not at all contemplated by the provisions of the Act at the time when he met with the death in such circumstances? Certainly not. The Motor Vehicles Act, 1939, cannot be said to be bereft of any provision relating to the death of the owner of the goods travelling along with the goods in a goods vehicle and the plight of the legal representatives of such owner. When the Act can be considered as one which comprehensively deals with the claims of the legal representatives of others travelling in a goods vehicle why not the same benefit be given to the legal representatives of the owner of the goods who meets his death while accompanying his own goods in a goods transporting vehicle, is the question, which can be legitimately asked by the legal representatives of such owner of the goods. There is no prohibition in law for the owner of the goods accompanying his own goods during the time of the transit by the goods vehicle. Perhaps, he may be over enthusiastic in his attempt to protect the goods that are being transported and accompanying the goods either sitting in the cabin or even along with the goods by keeping hold of the same during the time of transit."

14. We do not think any further elucidation of the legal position is necessary. It is not a case in which it can be said that the driver had not authorised or the owner of the vehicle had forbidden the owner of the goods to travel with the goods. It is a case in our opinion, in which the insurer may not have any liability, but the owner's vicarious liability cannot be doubted. The learned appellate Judge has taken the correct view of the law, which needs no interference. No question as to the quantum of compensation has been raised before us. There is no merit in the appeals. The appeals are accordingly dismissed. No costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *A.R.Lakshmanan, J.*

A.A.A.O.No.22 of 1992 2nd December, 1992.

G.Kaliyaperumal ...Appellant
v.

V.Annamalai Mudaliar ...Respondent.

(A) Tamil Nadu Agriculturists Relief Act (IV of 1938), Sec.20 (as amended by Act VIII of 1973) and Sec.19 - Judgment-debtor, making application under Sec.20 for stay of decree passed in respect of debt prior to 1.3.1972 - Duty of Court and judgment-debtor.

A reading of Sec.20 of the Act clearly discloses that stay under the said section is a must. The word used in the section is 'shall'. Hence, when an application is made by a judgment-debtor that he is an agriculturist coming under the definition of the Act and that a decree has been passed against him in respect of a debt which arose prior to 1.3.1972 and that the said decree is not in accordance with law as it has not taken note of the fact that the judgment-debtor is an agriculturist debtor entitled to the benefits of scaling down under the Act, then, the only thing that can be done by a Court which passed the decree is to stay the decree. It has nothing more to do or probe into the truth of what the judgment-debtor says. That has to be done only when a judgment-debtor files a petition under Sec.19 of the Act before the Court which is to execute the decree. Sec.20 of the Act also enjoins that within 60 days of obtaining the order for stay, the judgment-debtor shall apply to the executing Court under Sec.19 at the risk of the stay being vacated. [Para 3]

(B) Tamil Nadu Agriculturists Relief Act (IV of 1938), Sec.25-A as amended by Act (VIII of 1973) - Orders passed under the Act - Appeals against - Provisions of Civil Procedure Code - Applicability. Act IV of 1938 is a self-contained enactment providing for appeals being laid under the Orders passed under the Act. There is no need for invoking any statutory provision under the Code of Civil Procedure, namely, O.43 because Sec.25-A of Act IV of 1938 as amended by Act VIII of 1973 itself provides for appeal. It is, therefore, idle to discover any provision under O.43, C.P.C. for an

appeal being laid, as no such provisions can possibly be found in that Act when already there is a provision in the Act itself for appeals. [Para 5] *K.Jayaraman*, for Appellant.

Mrs.Hema Sampath, for Respondent.

The Court made the following

ORDER:- This civil miscellaneous second appeal is against the order of the learned Additional Subordinate Judge, Cuddalore, in C.M.A.No.47 of 1991, dated 31.1.1992, which appeal was filed against the order dated 11.4.1991 in unnumbered execution application in O.S.No.507 of 1973 by the learned District Munsif, Cuddalore, rejecting the execution application filed by the appellant herein under Sec.20 of Act IV of 1938, as amended by Act VIII of 1973.

2. Sec.20 of Act IV of 1938, which is the relevant section for the purpose of deciding the dispute as follows:

"20. *Stay of execution proceeding every court executing a decree:* A decree passed against a person entitled to the benefits of the Act shall on application stay the proceedings until the Court which passed the decree has passed orders on an application made under Sec.19:

Provided that where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under Sec.19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary."

3. A reading of Sec.20 of the Act clearly discloses that stay under the said section is a must. The word used in the section is 'shall'. Hence, when an application is made by a judgment-debtor that he is an agriculturist coming under the definition of the Act and that a decree has been passed against him in respect of a debt which arose prior to 1.3.1972 and that the said decree is not in accordance with law as it has not taken note of the fact that the judgment-debtor is an agriculturist debtor entitled to the benefits of scaling down under the Act, then the only thing that can be done by a court which passed the decree is to stay the decree. It has nothing more to do or probe into the truth of what the judgment-debtor says. That has to be done only when a judgment-debtor files a petition under Sec.19 of the Act before the court which is to execute the decree. Sec.20 of the Act also enjoins

that within 60 days of obtaining the order for stay, the judgment-debtor shall apply to the executing court under Sec.19 at the risk of the stay being vacated.

4. In this state of law, it is rather unfortunate that the learned District Munsif rejected the application without even numbering the same with a laconic order stating that he does not find any reason to stay the proceedings. I need hardly to state that orders of this kind have been deprecated in several proceedings by the Apex Court and also by this Court. It is fundamental that whatever the order, it must contain the reasons therefor so as to enable the Court in appeal to understand why the application has been rejected and the order is tenable.

5. Against this order, when an appeal was filed in the Sub Court, Cuddalore, in C.M.A.No.47 of 1991, the learned Sub Judge dealt with the matter foreign to the scope of the questions involved in the appeal before him. The learned Sub Judge has dealt with Sec.47, C.P.C., as to how it was prior to 1976 Amending Act and how it has come to after the Amending Act, etc. The learned Sub Judge should have seen that Act IV of 1938 is a self contained enactment providing for appeals being laid under the Orders passed under the Act. There is no need for invoking any statutory provision under the Code of Civil Procedure, namely O.43, because Sec.25-A of Act IV of 1938 as amended by Act VIII of 1973 itself provides for appeal. It is, therefore, idle to discover any provision under O.43, C.P.C. for an appeal being laid, as no such provisions can possibly be found in that Act when already there is a provision in the Act itself for appeals. Therefore, I am constrained to state that the courts below have not bestowed any thought over the matter or satisfactorily dealt with the matter by taking into consideration appropriate and relevant provisions of law in regard thereto.

6. It is unfortunate that a debtor should knock about from one court to another and also incur needless expenditure. It has also to be taken note of that a great delay in determination of rights take place when the courts do not take pains to deal with a matter in accordance with relevant provisions of statute. In the instant case, in particular, this delay could have been avoided.

7. In the circumstances, the civil miscellaneous second appeal is allowed and the matter is remitted back to the court which passed the decree to

determine the application filed by the appellant before it under Sec.20 of Act IV of 1938 in accordance with law, within two months from the date of receipt of a copy of this order after hearing both parties. There will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- K.S.Bakthavatsalam, J.

W.P.No.13392 of 1991

7th February, 1992.

Thirumuruga Kirupananda Variyar Thavathiru Sundaraswamigal Medical Educational and Charitable Trust

...Petitioner

v.

Tamil Nadu Dr.M.G.R. Medical University and another

...Respondents.

(A) Practice and Procedure - Law Officer of High Court making a statement before Court - Statement made without instructions from Government - Government if can, contend that it was not binding on Government.

(B) Tamil Nadu Dr.M.G.R. Medical University Act (XXXVII of 1987) as amended by Act (XXXII of 1990) - Provision requiring prior permission of State Government for starting a private medical college - High Court passing order to amount that prior permission of Government should not be insisted upon - Right crystallised in favour of the party - State Government, if can insist on prior permission being obtained in view of the amended provision.

The petitioner, a Charitable Trust decided to start a private self-financing Medical College at Salem. It submitted an application to the Madras University in October, 1988. It was not considered on the ground that prior approval of the State Government was not obtained. The petitioner preferred a writ petition to quash that order. The then Government Pleader made a statement before the court that the respondent university would not insist upon prior permission of the Government.

A consent order was passed that if the petitioner applied for affiliation in the prescribed form, it would be considered by the university on merits without insisting upon prior permission of the Government. But the university rejected it on the ground that the application was a belated one. It was again challenged in a writ petition. The writ petition was allowed and the first respondent university was directed to reconsider the application. Once again the application was rejected by the University on the basis of the recommendations of the Inspection Commission. The petitioner filed the present writ petition to quash the order. On behalf of the State it was contended that the representations made before the High Court by the then Government Pleader would not bind the Government since it was not made on instructions from the Government and that in view of the amendment to the Tamil Nadu Dr.M.G.R. Medical University Act, 1987, by the amendment Act, 32 of 1990, prior permission of the State was mandatory.

Held:- When the responsible law officer of the High Court, who represents the Government, makes a statement before the Court, the same cannot be brushed aside so lightly by the Court. It is true that the same counsel represented both the Dr.M.G.R. Medical University and the Government in the abovementioned case. If the Government had really felt that at that point of time the law officer of the court had accepted an order without getting the instructions of the Government, it should have preferred an appeal against the said order. The Government Pleader in the High Court cannot be equated to a Government Pleader of a mofussil Court. The Government Pleader in the High Court has certainly got more responsibility than a Government Pleader in a mofussil Court. In *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala*, A.I.R. 1990 S.C. 2192, the Supreme Court was concerned about a Government Pleader in a mofussil court. The Government Pleader in the High Court has to be held as a responsible officer and his statement cannot be equated with a statement made by a Government Pleader in the trial Court. The court is equally of the view that the Government Pleader in the High Court is responsible for the Government and he is equally a responsible officer of the court also. It could even be said that all law officers of the High Court are responsible for the statements so made to the High Court.

[Paras 14 & 16]

The learned Advocate General cannot rely upon the amending Act to set at naught the right which has crystallised in favour of the petitioner. The University or the State cannot now build up an argument supported by the Amending Act XXXII of 1990, which came into force in the year 1990.

[Paras 14 & 16]

(C) *Constitution of India (1950)*, Art.226 - *No mandamus can issue against a statute*. [Para 20]

Cases referred to:

Madan Mohan Pathack v. Union of India, A.I.R. 1978 S.C. 803; 1978 Lab.I.C. 612; (1978)2 S.C.C. 56; (1978)1 Lab.L.J. 496; (1978)3 S.C.R. 334. [Paras 9, 11, 14]

State of Kerala v. K.G.Madhavan Pillai, A.I.R. 1989 S.C. 49. [Paras 9, 20]

M/s.VIJ Resins (P) Ltd. v. State of J.& K, A.I.R. 1989 S.C. 1629. [Para 9]

A.V.Nachane v. Union of India, A.I.R. 1982 S.C. 1126; 1982 Lab.I.C. 181; (1982)1 S.C.C. 705; (1982)1 Lab.L.J. 110. [Paras 11, 14, 15]

K.P.Doctor v. State of Bombay, A.I.R. 1955 Bom. 220. [Para 11]

Periyar and Pareekanni Rubbers Ltd. v. State of Kerala, A.I.R. 1990 S.C. 2192. [Para 12]

Rajah Muthiah Medical College Students Council v. State of Tamil Nadu, 1991 W.L.R. 959. [Para 12]

Life Insurance Corporation of India v. D.J.Bahadur, A.I.R. 1980 S.C. 2181. [Paras 14, 16]

P.Kasilingam v. P.S.G. College of Technology, 1984 Lab.I.C. 1134. [Para 15]

Madan Mohan Pathak v. Union of India, 1978 Lab.I.C. 612; (1978)2 S.C.C. 56; (1978)1 Lab.L.J. 496; (1978)3 S.C.R. 334; A.I.R. 1978 S.C. 803. [Paras 6, 14, 15]

Adhiyaman Educational and Research Institutions v. State, A.I.R. 1991 Mad. 246. [Para 20]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records, comprised in the proceedings of the respondent dated 16.8.1991 in Lr.No.Affln. (1) 1238 of 1988 and quash the same and consequently direct the respondent to grant permanent affiliation sought for by the petitioner for its Medical College viz., Vinayaka Mission Kirupananda Variyar Medical College, Salem, from the academic year 1991-92. *Mohan Parasaram*, for Petitioner.

P.Sukantharaj for Respondent No.1.

G.Rajagopal, Advocate General (State), for Respondent No.2.

The Court made the following

ORDER:- The above writ petition is preferred by the petitioner Trust challenging the order of Medical University (in short as 'the University') dated 16.8.1991 by which the application of the petitioner seeking affiliation to start the proposed Vinayaka Mission Kirupananda Variyar Medical College at Salem for the academic year 1991-92 has been rejected.

2. On an earlier occasion, Govindasamy, J. in W.M.P.No.20146 of 1991 in this writ petition by order dated 22.10.1991 directed the first respondent University to grant provisional affiliation subject to the petitioner fulfilling all the requirements in a period of two years and pending further orders. Against the said order a writ appeal was filed in W.A.No.1377 of 1991 and a Division Bench of this Court consisting of the Acting Chief Justice and Somasundaram, J. by order dated 26.11.1991 allowed the writ appeal setting aside the order of Govindasamy, J. in the above mentioned W.M.P.No.20146 of 1991, dated 22.10.1991 and further directed that the main writ petition itself be listed for hearing. That is how the petition is before me.

3. W.M.P.No.24518 of 1991 has been filed by the State praying to implead itself as a party in the writ petition and by order dated 17.12.1991 it has been impleaded as the second respondent in the writ petition.

4. The facts leading to the filing of the writ petition are:

The petitioner is a Charitable Trust which has been imparting education in the fields of medicine and engineering by starting various educational institutions. A pharmacy College, an Engineering College, a Dental College, a polytechnic, a Homeopathy Medical College and Industrial Training Institute and certain other institutions are being run by the petitioner Trust. The petitioner desired to start a private self-financing Medical College at Salem. The petitioner Trust is already running a hospital at Salem Town under the name and style 'Vinayaka Mission's Hospital'. Originally the petitioner had submitted an application to the University of Madras and subsequently submitted an application to the first respondent University in the month of October, 1988.

However, the said application submitted by the petitioner was not considered by the first respondent University on the ground that the petitioner should obtain prior approval from the State, that is to say, a no objection certificate from the Government of Tamil Nadu. Aggrieved by this, the petitioner preferred a writ petition in W.P.No.2776 of 1989 praying to quash the order of the first respondent dated 28.11.1988 and to direct the first respondent University to discharge its statutory obligations by considering the applications of the petitioner dated 2.12.1987 and 23.10.1988 for starting the Medical College and granting affiliation to it without insisting on any approval of the State Government or prior approval of the Medical Council of India. By order dated 13.4.1989, Venkataswami, J. in the said writ petition directed the first respondent University to consider the application of the petitioner without insisting upon prior permission of the Government and pass orders in accordance with law within eight weeks from the date of receipt of the application to be filed by the petitioner. Consequent upon this order, the petitioner submitted an application for affiliation with necessary fee to the second respondent in the month of October, 1989 with all relevant particulars. However, the first respondent University once again declined to grant the affiliation for the academic year 1989-90 on the ground that the application was a belated one. The said decision was challenged by the petitioner by way of a writ petition in W.P.No.10453 of 1990. Somasundaram, J. by order dated 1.2.1991 allowed the said writ petition setting aside the order of the first respondent University and further directed the first respondent to re-consider the application of the petitioner on merits in terms of the order of Venkataswami, J. dated 13.4.1989 in W.P.No.2276 of 1989. It is alleged in the affidavit filed in support of the petition that the petitioner has been driven from pillar to post for establishing a self-financing private medical college and that the request of the petitioner has been turned down by the first respondent University for some reason or other. It is further alleged in the affidavit that the petitioner being a fairly well known educational Trust wanted to establish a self financing medical college at Salem continuously, that even in the year 1988 the petitioner had purchased vast extent of lands in order to start a self-financing private medical college, that as early as on 10.3.1990 the

petitioner invested a sum of Rs.50 lakhs in the fixed deposit in the joint names of the first respondent and the petitioner in the Vysya Bank Ltd. and that said fixed deposit is valid upto 10.3.2000. It is further alleged in the affidavit that the petitioner started construction of the Medical College in accordance with the prescribed norms, that it had completed construction of a full-fledged Medical College comprising of Lecture Theatres, Demonstration rooms, practical class rooms, Dissection hall, Museum room, Library etc., that sufficient number of rooms have been provided for each of the branches, that it had provided workshop, auditorium, play ground, quarters for staff, hostel facilities, administration block, gas plant, animal house, pharmacy, laundry and kitchen, and that sufficient number of equipments as are required in terms of the specifications of the Medical Council of India for starting a Medical College with a minimum strength of 100 students. It is further alleged in the affidavit that in respect of hospital facilities, the petitioner is running a private hospital at Salem with 60 beds of its own, that it is presently putting up a full fledged hospital with 1000 beds for which construction has already started and to be completed before March 1993, that the petitioner had appointed teaching staff for the first M.B.B.S. course comprising of 33 staff members in various discipline, that the petitioner has been paying salary to all those staff and teaching personnel, that the petitioner has to undergo all such formalities, because as per the University norms, the first respondent University will grant affiliation to a college only when it has already become functional and operational in all respects, that the petitioner has invested huge amounts in the establishment of the college so as to get the grant of affiliation, since the first respondent University will grant affiliation only to a college which has become already functional and not for institutions which are just springing up or likely to spring up and that the investment made by the petitioner is running to several crores of rupees which was obtained from financial institutions for which the petitioner is paying huge interest. It is further stated in the affidavit that the petitioner was very hopeful to get the affiliation from the first respondent University from the academic year 1991-92 onwards in terms of the directions of this Court given by Venkataswami, J. and Somasundaram, J. as it had satisfied all the norms and

prescriptions, that the first respondent University appointed an Inspection Commission to inspect the petitioner College for which the petitioner had paid the necessary fees to the University, that the Inspection Commission has been appointed, that it inspected the petitioner college on 13.7.1991 and that it reliably understands that the report of the Inspection Commission is in favour of the petitioner stating the petitioner Trust satisfied all the norms prescribed for being affiliated. It is stated that at this stage, the petitioner has received the impugned communication. It is also stated in the affidavit that the first respondent University has not even chosen to call for the details from the petitioner before passing the impugned order and that had it been done, affiliation would have been granted to the petitioner in view of the earlier orders of this Court, mentioned hereinabove. It is further stated that the first respondent has acted arbitrarily and in an unreasonable manner without even giving an opportunity to the petitioner to put forth the relevant materials.

5. The petitioner further alleges in the affidavit that the impugned communication is illegal and is in violation of the principles of natural justice. It is stated in the affidavit that the first respondent University, in the impugned communication has pointed out that the application submitted by the petitioner for affiliation has to be rejected on four grounds, that none of the grounds is valid and sustainable in law. It is further alleged in the affidavit that with regard to the first ground that the buildings or administration blocks were not ready, the said buildings were ready several months ago and they were ready even during the month of March, 1991. It is further alleged in the affidavit that with regard to the second ground stating that there is no hostel blocks within the Medical College campus itself, that neither the norms of the Medical Council of India nor any other Statutes in force compels any Medical College to have the hostels within the College campus itself. It is further stated in the affidavit that several professional colleges have hostels elsewhere and some colleges do not have even hostel facilities. It is further stated in the affidavit that Mohan Kumaramangalam Government Medical College run by the Government at Salem and even the Madras Medical College do not have hostel facilities in those colleges is situated away from the college and that the first respondent has failed to

note that the petitioner had already made arrangements for hostel facilities at Fairlands Salem and had also made suitable arrangements for ferrying students from the college to the hostel and back by arranging private buses. With regard to the third ground of deficiency pointed out by the first respondent University, the petitioner alleges that there was sufficient evidence which was made available even before the Inspection Commission that a full-fledged hospital would be ready before March, 1993, that there is sufficient hospital facilities available for the first year students, who are to undergo clinical training, which they have to undertake only after the completion of 18 months course after admission, that the petitioner had already made tie up arrangement with leading hospitals at Salem and that the first respondent University in respect of Self Financing Medical Colleges such as P.S.G. Institute of Medical Sciences, Coimbatore, the Medical College situated at Annamalai University and in respect of Sri Ramachandra Medical College, Madras, did not insist upon them the hospital facilities at the beginning when they were affiliated. It is further pointed out that even as on date some of the abovementioned Colleges still continue with the tie up arrangement only inspite of more than 5 or 6 years have elapsed after their affiliation. It is further stated that in the case of the petitioner, even prior to the affiliation being granted, it had made tie up arrangement with various hospitals, that it had provided facilities for 540 beds in various disciplines required at the end of 18 months and that the petitioner is constructing a big hospital of its own with 1000 beds and the said construction is expected to be finished even before March, 1993, and that it is not in any event essential that a hospital should be ready within 18 months if there is alternate tie up arrangement with other medical hospitals. With regard to the last ground mentioned in the impugned order for rejecting the application of the petitioner, it is alleged in the affidavit that the Inspection Commission did not ask for the encumbrance certificates and that had they been asked they would have been produced. It is pointed out in the affidavit that the petitioner had already obtained encumbrance certificates for a period of 13 years and patta and adangal extracts, that the said lands were purchased after obtaining legal opinion, that the lands had been sold by the kartha of the Hindu undivided family for the benefit

of the minors and that no court permission is necessary since the property is a joint family property and the Kartha was entitled to deal with the property. With regard to the last ground of deficiency that no clearance certificate was obtained from the Authorised Officer under the Tamil Nadu Land Reforms Act, it is stated in the affidavit that the matter is pending with the Government under Sec.37-B of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. According to the petitioner all the grounds shown in the impugned communication as entitled for rejection of the application are not valid in the eyes of law. It is further stated in the affidavit that the action of the first respondent University is liable to be set aside as the first respondent has neither furnished the copy of the inspection report nor has given effective opportunity to rebut the defects pointed out therein. It is also stated that the first respondent has acted arbitrarily and in an unreasonable manner finding out some reason or other to reject the application of the petitioner, that the treatment meted out to the petitioner is totally discriminatory, that several other Medical Colleges which had already been granted affiliation were treated favourably and that the action of the first respondent University is in violation of Art.14 of the Constitution of India. It is further stated that the action of the first respondent University is without any rationale and that it is violative of the principles of natural justice. With these allegations the petitioner Trust has come up to this Court praying for the issue of a writ of *certiorarified mandamus* to call for the records of the first respondent dated 16.8.1991 and quash the same and consequently to direct the first respondent University to grant permanent affiliation for the petitioner's college viz., Vinayaka Missions Kirupananda Variyar Medical College, Salem, for the academic year 1991-92.

6. A counter affidavit has been filed by the first respondent University. It is claimed in the counter affidavit that only on the recommendations of the Inspection Report dated 15.7.1991 and following the Statutes of the first respondent University, the application of the petitioner for affiliation has been rejected, that it is the duty of the petitioner to put forth all necessary and relevant documents to convince University to establish that it had complied with all the requirements required under law and that it is not for the University to give an

opportunity to the petitioner in such matters. It is further claimed in the counter affidavit that the petitioner cannot plead that it has not been given reasonable opportunity, that it is for the petitioner to satisfy the Inspection Commission that the Administration buildings are ready and that the petitioner has not produced any certificate from the architects and engineers. It is further claimed in the counter affidavit that with regard to hostel facilities, it is for the petitioner to prove that it was taking steps to construct hostel within the campus and it had made arrangements for ferrying students from the hostel to the college and back by arranging buses. It is further claimed in the counter affidavit that the Inspection Commission has pointed out that no activity is in evidence about the construction of a hospital which could be ready within 18 months, that there has to be a functioning outpatient department and that the functioning hospital of about 300 beds even at the time of initial inauguration of the college should progressively increase to 600 beds with two or three years and to 800 beds before the first batch reaches final year. It is also claimed in the counter affidavit that it is for the petitioner to prove that it had tie-up arrangements with leading hospitals at Salem and obtained necessary consent letters from the hospital in this regard. It is further claimed in the counter affidavit that with regard to the colleges mentioned by the petitioner in its affidavit, affiliation was granted to those colleges by the University of Madras and not by the first respondent University and that those colleges have obtained prior permission of the Government as per G.O.Ms.No.1196, Health and Family Welfare Department, dated 24.7.1985, that there is no evidence produced by the petitioner that the tie up arrangements with the private hospitals would continue till the construction of its own hospital and that those are only consent letters and there is no binding agreement between the petitioner Trust and tie up arrangements. It is further claimed in the counter affidavit that a functional hospital is needed for teaching, that the first respondent University has acted as per the recommendations of the Inspection Commission which in turn has considered the question from all aspects. With regard to infrastructural facilities, it is claimed in the counter affidavit that it is for the petitioner to prove and that it is not for the University to give an opportunity. With regard to the permission under

Sec.37-B of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 to hold excess lands for running an educational institution for students hospital staff quarters, auditorium etc., no permission has been granted by the Government so far to the petitioner Trust to hold excess lands and that the appointment of the Inspection Commission itself is an opportunity to the petitioner to put forth its pleadings and all the relevant records etc. and that the petitioner cannot now plead that no opportunity was given to it. It is further claimed in the counter affidavit that there is no violation of Art.14 of the Constitution and that the first respondent University has not acted in an arbitrary manner as contended by the petitioner. It is categorically claimed in the counter affidavit that it had acted only on the basis of the recommendations of the Inspection Commission. 7. A counter affidavit has been filed by the State of Tamil Nadu which has been impleaded as a party respondent in this writ petition. It is pointed out in the counter that the Government issued G.O.Ms.No.1196, Health, dated 24.7.1985 prescribing certain conditions for starting private medical colleges, that an amendment was brought to the Tamil Nadu Dr.M.G.R. Medical University Act 1987 (Tamil Nadu Act 37 of 1987) by Act 32 of 1990 that the above Act was given retrospective effect with effect from 24.9.1987, that in view of the amendment as mentioned hereinabove, obtaining prior permission from the Government has been made a condition precedent for affiliation, that inasmuch as the petitioner has not obtained prior permission from the Government, the University cannot grant affiliation and that therefore the present writ petition seeking a writ of *certiorari* and *mandamus* is not maintainable in law. It is further claimed in the counter affidavit that no *mandamus* can be issued against the provision of the Statute and as such this Court should not accede to the request of the petitioner. It is pointed out in the counter affidavit that this Court has upheld that validity of the amended Act made to Act 37 of 1987 in W.P.Nos.10952 and 17075 of 1990. It is further claimed in the counter affidavit that when the petitioner challenged the order of the first respondent University insisting upon the prior approval of the University, by way of a writ petition. In W.P.No.2776 of 1989 an order has been made by Venkataswami, J. on 13.4.1989, and that the earlier order passed in the above writ

petition was based on the statement made by the counsel for the University who was also the then Government Pleader and the order was not made following any earlier decision of the Government. It is further claimed in the counter affidavit that originally there was no provision in the Tamil Nadu Dr.M.G.R. Medical University Madras Act, 1987 (Tamil Nadu Act 37 of 1987) requiring prior approval of Government and as such the petitioner cannot rely upon the judgment of Venkataswami, J. mentioned hereinabove. It is further claimed in the counter affidavit that by the Tamil Nadu Act 32 of 1990 an amendment has here introduced with retrospective effect, that as per the amended provisions of the Act for obtaining affiliation, prior permission from the Government is, mandatory and therefore while disposing of the petition, the statutory authorities are bound in law to take into account the change of position in law. It is further claimed in the counter affidavit that the application of the petitioner seeking for affiliation is still pending and that the petitioner cannot contend that in view of the earlier orders of this Court in W.P.No.2776 of 1989, no prior permission is necessary. It is further claimed in the counter affidavit that the order of Somasundaram, J. in W.P.No.10453 of 1990 dated 1.12.1991 will not bind the State since the State was not a party in that writ petition. It is further claimed in the writ petition that the petitioner Trust applied for prior permission on 29.10.1986, 19.1.1987 and 13.2.1987, that the Government after considering the matter on 3.8.1988 rejected the application of the petitioner, that the petitioner Trust made an application on 6.2.1989 and that even after the disposal of Writ Petition No.2776 of 1989 on 13.4.1989, a letter was addressed to the then Chief Minister by Mr.Kripananda Variyar on 23.7.1990 and that a reply has been given to the petitioner. 8. A reply affidavit has been filed by the petitioner. It is stated that the Tamil Nadu Act 32 of 1990 cannot be made applicable to the petitioner's case in view of the orders passed by Venkataswami, J. in W.P.No.2276 of 1989 dated 13.4.1989 in which the University as well as the Government are parties. It is further stated in the reply affidavit that in view of the orders of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 a right has been crystallised in favour of the petitioner, that both the University and the Government were parties and that once the right is crystallised in favour of the

petitioner, it is not necessary for the petitioner to have made the Government as a party in the subsequent W.P.No.10453 of 1990. It is further stated in the reply affidavit that the facts of the writ petition where the validity of the Act 32 of 1990 has been upheld, are different from the facts of this case, that if the amended Act is applicable then the statutes subsequently framed by the University would also be applicable and that would lead to an anomalous position wherein the very application originally submitted by the petitioner would be defective by subsequent enactment and that the application of the petitioner should be disposed of only in accordance with the provisions of the law which was prevailing as on the date of the application and in view of the orders passed by Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989. It is further stated in the reply affidavit that in the abovementioned case, the learned Government Pleader represented not only the first respondent University, but also the Government, that the orders of Venkataswami, J. became final and that it is not correct to state that the petitioner is estopped since it had already made application because they were all made without prejudice to the rights of the petitioner and that cannot be a ground which would attract the principles of estoppel.

9. Mr.Mohan Parasaran, the learned counsel appearing for the petitioner contends that when Venkataswami, J. has passed an order in W.P.No.2776 of 1989 dated 13.4.1989, both the University and the Government were parties, that order had become final and that it is not open to the State or the University to insist upon the prior permission of the Government for affiliation, taking shelter under the amended Act 32 of 1990. Learned counsel refers to the decision in *Madan Mohan Pathack v. Union of India*, A.I.R. 1978 S.C. 803; 1978 Lab.I.C. 612; (1978)2 S.C.C. 56; (1978)1 Lab.L.J. 496; (1978)3 S.C.R. 334, for the proposition regarding the issue of a writ of *mandamus* and submits that the petitioner has got consent letters from other hospitals for tie up facilities and that the construction of the petitioner's own hospital building is being completed. He further contends that the application of the petitioner should be considered as if the amending Act has not come into force, that the date of submission of the application is the criteria, and that the procedure as on the date of application has to be adopted and

not on the date of the consideration of the application. For this purpose, the learned counsel relies upon the decision in *State of Kerala v. K.G.Madhavan Pillai*, A.I.R. 1989 S.C. 49. The learned counsel also raised contention based on the principle of estoppel relying upon the decision in *M/s.VIJ Resins (P) Ltd. v. State of J.& K.*, A.I.R. 1989 S.C. 1629. He further states that the petitioner Trust has invested huge amounts. He further contends that hostel facilities are provided for, that tie-up arrangements are made with other hospitals, that with regard to title deeds, legal opinions have been obtained and that with regard to clearance under Sec.37-B of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, the matter is pending before the Government. According to the learned counsel, the first respondent University has not considered these matters in the proper perspective.

10. Mr.Sukuntharaj, the learned counsel appearing for the first respondent University refers to statute 4 of the Tamil Nadu Dr.M.G.R. Medical University Act which has been published on 20.3.1991. According to the learned counsel the affiliation to the petitioner College was rejected on the basis of the Inspection Commission report made on 13.7.1991. The application for affiliation was made on 13.10.1989. The application for affiliation was made on 13.10.1989. The learned counsel fairly states that nothing is said in the impugned order about the prior permission of the Government.

11. Learned Advocate General, who appears for the second respondent State, contends that the representations made by the then Government Pleader before Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 will not bind the Government since it was not made on instructions from the Government. It is further stated by the learned Advocate General that representations were made by the then Government Pleader in the above mentioned writ petition only on behalf of the University since same counsel appeared for both the Government and the University. According to the learned Advocate General, how far the representations of the then Government Pleader will bind the Government is a question to be considered by this Court. Learned Advocate General has pointed out that Venkataswami, J. In W.P.No.2776 of 1989 by order dated 13.4.1989 directed the respondent University to pass orders on the

application of the petitioner for affiliation "in accordance with law" and as such the petitioner has to obtain prior permission from the Government as per law stands to-day. Learned Advocate General further argues that assuming any concession has been made by the then Government Pleader, it will not bind the Government and refers to the decision in *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala*, A.I.R. 1990 S.C. 2192, for this proposition. He further points out that the prayer in the writ petition W.P.No.2776 of 1989 has been asked only against the University and not against the State. He further points out that the amending Act came into force on 6.7.1990, that the W.P.No.10453 of 1990 has been filed by the petitioner on 9.7.1990, i.e., only after the amending Act came into force and that since the Government was not a party to the said writ petition the attention of the learned Judge was not drawn to the Amending Act. It is further contended by the learned Advocate General that the prayer in the writ petition is for permanent affiliation for the year 1991-92 and that the writ petitioner has been filed on 23.9.1991. With regard to the decision relied on by the petitioner in *Madan Mohan Pathak v. Union of India*, A.I.R. 1978 S.C. 803; 1978 Lab.I.C. 612; (1978)2 S.C.C. 56; (1978)1 Lab.L.J. 496; (1978)3 S.C.R. 334, the learned Advocate General pointed out that Venkataswami, J. in W.P.No.2776 of 1989 did not issue any rule nisi; that no relief was given and that the principles applied in the abovementioned cases will not apply to the facts of the case. According to the learned Advocate General, the principles laid down in *A.V.Nachane v. Union of India*, A.I.R. 1982 S.C. 1126; 1982 Lab.I.C. 181; (1982)1 S.C.C. 705; (1982)1 Lab.L.J. 110, also will not apply to the facts of the case since no relief was asked for in the earlier writ petition. It is also pointed out by the learned Advocate General that no *mandamus* can issue against the first respondent University not to perform statutory obligations in view of the amending Act. He further points out that this Court has upheld the validity of the Amending Act 32 of 1990 in W.P.No.10952 of 1990 and as such prior permission is necessary for seeking affiliation. The learned Advocate General also relies upon the decision in *K.P.Doctor v. State of Bombay*, A.I.R. 1955 Bom. 220, for hardships.

12. Replying to those contentions Mr.Mohan Parasaran, the learned counsel for the petitioner

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Trust, contends that the relief asked for in the earlier writ petition was in the negative fashion against the Government, that the judgment relied on by the Advocate General in *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala, A.I.R. 1990 S.C. 2192*, is only 'obiter', that the Supreme Court did not narrated. Principle any in the above-mentioned decision. The learned counsel further submits that the Government Pleader in the High Court is a responsible officer than a law officer in the mofussil Courts, that no counter affidavit has been filed even now by the State to the effect that it had not given any instructions to the then Government Pleader, that by order of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 issuing a writ of *mandamus*, a right has accrued and crystallised in favour of the petitioner and that it cannot be taken away when the said order has become final inter parties. The learned counsel further submits that the first respondent University should be asked to consider the application of the petitioner on the basis of law prevailed in the month of October, 1989 and he relies upon an unreported decision of a Division Bench of this Court in *The Tamil Nadu Christian Revival Mission Organisation Rep. By Its Secretary and others v. The State of Tamil Nadu represented by Secretary, Education Department, Madras and others, W.A.No.543 of 1991, dated 16.4.1991*, wherein the Division Bench has held that old Rules are applicable with regard to minority institutions. Learned counsel also relies upon the decision in *Rajah Muthiah Medical College Students Council v. State of Tamil Nadu, 1991 W.L.R. 959*, for the proposition that an application has to be considered as per the law prevailed on the dated of application and that the subsequent change in law could not be considered.

13. I have given my careful consideration to the arguments of Mr.Mohan Parasaran, the learned counsel appearing for the petitioner Trust, Mr.Sukuntha Raj, the learned counsel the learned counsel appearing for the first respondent University and of the learned Advocate, General appearing for the State of Tamil Nadu, the second respondent herein. I have also perused the files produced before me.

14. On the facts and circumstances of the case, the first point to be considered is what is the effect of the order of Venkataswami, J. Passed in W.P.No.2776 of 1989 dated 13.4.1989. In the

abovementioned case, the writ petition was filed by the petitioner Trust praying for the issue of a writ of *certiorarified mandamus* calling for the records comprised in the proceedings of the respondent University dated 8.12.1987 and 28.11.1988 and quash the said proceedings as invalid and 'also to direct the respondent University to discharge its statutory obligations by considering the applications of the petitioner dated 2.12.1987 and 23.10.1988 for starting the Medical College and granting affiliation to it without insisting on any approval of the State Government or the prior approval of the Medical Council of India. In the abovementioned writ petition, Venkataswami, J. on 13.4.1989 passed an order which is to the following effect:

"By consent, main writ petition has been taken up for final disposal.

After hearing Mr.Mohan Parasaran learned counsel for the petitioner and the learned Government Pleader following order is passed in view of the fact that the learned Government Pleader now states that the University will not insist upon prior permission of the Government.

The petitioner will apply for affiliation in the prescribed form, for which purpose, on requisition the second respondent University will supply the same on payment of required fee. As and when the petitioner files the application in the prescribed forms, second respondent University will consider the same on merits, without insisting upon prior permission of the Government and pass orders in accordance with law. The University will dispose of the application as mentioned above within 8 weeks from the date of receipt of the application as mentioned above. The writ petition is ordered accordingly....."

Subsequently, the petitioner came before this Court by way of filing a writ petition in W.P.No.10453 of 1990 and Somasundaram, J. by order dated 1.2.1991 allowed the said writ petition and the operative portion of the order reads as follows:

"The impugned order is set aside and the first respondent is directed to re-consider the application of the petitioner dated 30.10.1989 on merits in terms of the orders of this Court dated 13.4.1989 in W.P.No.2776 of 1989 and pass orders on or before 1.7.1991."

The abovementioned writ petition was filed for

the issuance of a writ of *certiorari* and *mandamus* to call for the records of the respondent University dated 15.12.1989 and to quash the same and to direct the respondent University to reconsider the application of the petitioner dated 30.10.1989 on merits in terms of the orders of this Court made in W.P.No.2776 of 1989 dated 13.4.1989, cited *supra*. So, both the abovementioned writ petitions were filed by the petitioner seeking for affiliation. In both the writ petitions mentioned hereinabove, the relief sought for by the petitioner was one and the same though in the later writ petition, the Government of Tamil Nadu was not a party. Though no relief was sought for by the petitioner against the Government in the earlier W.P.No.2776 of 1989, as pointed out by the learned Advocate General, yet the Government was made a party therein and the then Government Pleader represented the Government in that case before Venkataswami, J. When a responsible law officer of the High Court, who represents the Government, makes a statement before the Court, I do not think that the same cannot be brushed aside so lightly by the Court. It is true that the same counsel represented both the Dr.M.G.R. Medical University and the Government in the abovementioned case. If the Government had really felt that at that point of time the law officer of the court had accepted an order without getting the instructions of the Government, it should have preferred an appeal against the said order of Venkataswami, J. made in W.P.No.2776 of 1989, dated 13.4.1989. It is not as if institutions are started without obtaining permission from the Government at that point of time. As seen from the counter affidavit, self-financing private medical colleges were started only after obtaining prior permission from the Government. The only difference is now the Legislature has enacted a proviso as an Amendment to the section of the Act requiring prior permission as mandatory for getting affiliation which was given earlier by way of an executive order. When the order of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 had become final and no appeal has been preferred against the said order, I do not think the State can rely upon the amendment made in the year 1990 and use, it against the petitioner and contend that the prior permission has to be obtained in view of the amended Act which came into force in the year 1990 with retrospective effect. A similar question was considered

by the Supreme Court in *Madan Mohan Pathak v. Union of India*, A.I.R. 1978 S.C. 803: 1978 Lab.I.C. 612: (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 496: (1978)3 S.C.R. 334. In that case a writ or *mandamus* was issued by the Calcutta High Court directing the Life Insurance Corporation of India to pay annual cash bonus to Class III and Class IV employees in terms of a settlement and that order has become final. Immediately after the said decision, the Parliament passed an enactment. Even after passing the enactment of Legislature whether the issue of the writ of *mandamus* by the Calcutta High Court is effective was the question. The Supreme Court in that case has held that the issue of writ of *mandamus* issued by the Calcutta High Court remain untouched and that the same was not taken away by the enactment passed by the Parliament subsequently. The Supreme Court has further held in that case that the issue of a writ of *mandamus* passed in favour of the employees of L.I.C. had become crystallised in the said judgment and therefore they become entitled to enforce the writ of *mandamus* grants by the Calcutta High Court. It is further held in the said judgment that as the judgment of the Calcutta High Court was allowed to become final and the appeal against it was not pressed, the judgment could not be disregarded or ignored and in any event irrespective of whether the Act was constitutionally valid or not, the Life Insurance Corporation of India was bound to obey the writ of *mandamus* issued by the Calcutta High Court. Speaking for the Bench, Beg, C.J. has observed as follows: (at p.804)

".....The rights of the citizen against the State which had passed in those embodied in a judgment and become the basis of a *mandamus* from the High Court could not be taken away in indirect fashion, by enacting such an ordinary Act of Parliament..."

In *Life Insurance Corporation of India v. D.J.Bahadur*, A.I.R. 1980 S.C. 2181, a writ was issued by the Supreme Court directing the Life Insurance Corporation of India to give effect to the terms of 1974 settlements relating to bonus until superseded by a fresh settlement. The effect of that order came for consideration in *A.V.Nachane v. Union of India*, A.I.R. 1982 S.C. 1126: 1982 Lab.I.C. 181: (1982)1 S.C.C. 705: (1982)1 Lab.L.J. 110, and the question arose in that case was whether Rule 3 of the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and

Dearnness) Allowances can nullify the effect of a writ issued by the High Court in the case of *Life Insurance Corporation of India v. D.J.Bahadur*, A.I.R. 1980 S.C. 2181. In that case it has been held that Rule 3 cannot make the writ issued by the Court nugatory in view of the decision of the majority in *Madan Mohan Pathack v. Union of India*, A.I.R. 1978 S.C. 803: 1978 Lab.I.C. 612: (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 496: (1978)3 S.C.R. 334. In the abovementioned case, Chinappa Reddy, J. has observed as follows: (at p.1137)

“.....The attempt made to supersede the settlements, in so far as they related to the payment of bonus, by enacting the Life Insurance Corporation (Modification of Settlement) Act, 1976 failed, firstly because the Act was held to violate the provisions of Art.31(2) of the Constitution and secondly because the Act could not have retrospective effect so as to absolve the Life Insurance Corporation from obeying the writ of *mandamus* issued by the Calcutta High Court, which had become final and binding on the parties. This was the decision of this Court in *Madan Mohan Pathack v. Union of India*, A.I.R. 1978 S.C. 803: 1978 Lab.I.C. 612: (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 496: (1978)3 S.C.R. 334, all the seven Judges who constituted the Bench agreeing that the Act violated the provisions of Art.31(2) and four out of the seven Judges, namely, Beg, C.J., Bhagawati, Krishna Iyer and Desai, JJ., taking the view that the Act did not have the effect of nullifying the writ of *mandamus* issued by the Calcutta High Court and the other three Judges, Chandrachud, Fazal Ali and Shinghal, JJ., preferring not to express any view on that question....”

In view of the categorical decisions rendered by the Supreme Court which are heavily relied on by Mr.Mohan Parasaran, the learned counsel appearing for the petitioner, I am of the view that in so far as the order of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 has not been touched upon or set aside, I do not think the learned Advocate General can rely upon the amending Act to set at naught the right which has crystallised in favour of the petitioner. In the order of Somasundaram, J. in W.P.No.10453 of 1990 dated 1.2.1991, it is seen that though the State is not made a party therein, yet the prayer in the said writ petition is to follow the directions given by Venkataswami, J. in W.P.No.2776 of 1989 dated

13.4.1989. So, it is clear that the first respondent University is bound by the abovementioned orders of this Court and that is why the first respondent University has conveniently omitted to mention the amending Act in the impugned order. There is no whisper about the amending Act in the impugned order and that the University has not stated therein that prior permission is necessary for getting affiliation. It is only the State Government, which has been impleaded itself in the writ petition subsequently, has taken the stand based upon the amending Act. So I am of the view, that for all practical purposes, the first respondent University has not relied upon the amending act in the impugned order. It is clear that the first respondent University has not applied its mind before passing the impugned order and it has left out purposely the amending Act in the impugned order.

15. I have gone through the files produced by the State. As soon as Venkataswami, J. has passed an order in W.P.No.2776 of 1989 on 13.4.1989, the Registrar of the first respondent University was required to furnish some particulars with regard to the disposal of the said writ petition. For this, the Registrar of the University on 6.12.1989 has written a letter to the then Joint Secretary to Government, Madras, stating regarding the statement of the Government Pleader before the Court with regard to Government Permission the Government Pleader was of the view that permission of the State Government for granting affiliation to Professional Colleges cannot be insisted upon in view of the decisions of the orders of this Court. He mentioned in his letter the orders of a Division Bench of this Court in W.P.No.6930 of 1988, dated 23.2.1989 and also the judgment of another Division Bench of this Court which is reported in *P.Kasilingam v. P.S.G. College of Technology*, 1984 Lab.I.C. 1134. It is also seen from the file that since the Tamil Nadu Amending Act is still awaiting the assent of the President of India all those factors would have prompted the then Government Pleader to make the statement in question. The abovementioned letter has been written by the Registrar of the respondent University to the State as early as 6.10.1989 and the State has kept quiet and allowed the order of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 to become final. So it is not as if the State was not aware of the fact of what has been happened before

Venkataswami, J. and nothing prevented the State from taking the matter on appeal. Having failed to do so in view, the learned Advocate General cannot be allowed to contend that the order of Venkataswami, J. in W.P.No.2776 of 1989 dated 13.4.1989 has become ineffective in view of the amending Act 32 of 1990. Therefore, I am of the view that the contention of Mr.Mohan Parasaran, the learned counsel for the petitioner based on the principles laid down by the Supreme Court in *Madan Mohan Pathak v. Union of India*, A.I.R. 1978 S.C. 803: 1978 Lab.I.C. 612: (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 496: (1978)3 S.C.R. 334, and *A.V.Nachane v. Union of India*, A.I.R. 1982 S.C. 1126: 1982 Lab.I.C. 181: (1982)1 S.C.C. 705: (1982)1 Lab.L.J. 110, has got to be upheld.

16. I do not think the reliance made by the learned Advocate General in *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala*, A.I.R. 1990 S.C. 2192, will apply to the facts of this case. The above mentioned case arose under the Land Acquisition Act. A concession was made by the local Government Pleader in the trial Court with regard to a document which will form the basis for determination of the market value and in such circumstances, the Supreme Court has observed as follows:

".....Any concession made by the Government Pleader in the trial Court cannot bind the Government as it is obviously always unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is in writing on instructions from the responsible officer. Otherwise it would place undue and needless heavy burden on the public exchequer. But the same yardstick cannot be applied when the Advocate General has made a statement across the bar since the Advocate General makes the statement will all responsibility....."

I am of the view that the judgment of the Supreme Court mentioned hereinabove has to be confined to the facts of that case alone. I do not think that any principle is decided in that case. Even otherwise, as I have already said the State Government was aware of the order of Venkataswami, J. passed in W.P.No.2776 of 1989 dated 13.4.1989 and asked the University about it and the University has also replied as to how the learned Government Pleader has made a statement before Venkataswami, J. That apart, as I have already stated the Government Pleader in the High Court cannot be equated

to a Government Pleader of a mofussil Court. The Government Pleader in the High Court has certainly got more responsibility than a Government Pleader in a mofussil Court. In *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala*, A.I.R. 1990 S.C. 2192, the Supreme Court was concerned about a Government Pleader in a mofussil Court. In my view, the Government Pleader in the High Court has to be held as a responsible officer and his statement cannot be equated with a statement made by a Government Pleader in the trial Court. I am equally of the view that the Government Pleader in the High Court is responsible for the Government and he is equally a responsible officer of the Court also. It would even go to the extent of saying that all law officers of the High Court are responsible for the statements so made to the High Court. Moreover, the statement made by the then Government Pleader before Venkataswami, J. in W.P.No.2776 of 1989 is on a point of law and not on facts. I think the law officer is a person who can decide about the question of law and argues when considering the facts and circumstances of a particular case in which he appears before the court. I am also cannot satisfied with the contention of the learned Advocate General in *Madan Mohan Pathak v. Union of India*, A.I.R. 1978 S.C. 803: 1978 Lab.I.C. 612: (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 496: (1978)3 S.C.R. 334, the Supreme Court was considering a case about wages, the principle will be different on the facts of this case. Whether the relief sought for is for wages or for any other reliefs, the principle will be one and the same. The statement made by the then Government Pleader before Venkataswami, J. in W.P.No.2776 of 1989 is that the respondent University will not insist upon prior permission of the Government. As such I do not think the University or the State can now build up an argument supported by the amending Act 32 of 1990 which came into force in the year 1990. But the writ sought for here is to quash the order of the first respondent University refusing the grant of affiliation. Obtaining prior permission of the Government as a mandatory provision, come only at the later stage. As I have already stated, in the impugned order, there is no mention about the amending Act 32 of 1990.

17. As I am concerned only with order of the University, which is impugned before me, I am of the view that the reasons stated in the impugned

order are wholly extraneous. All the reasons which have been stated in the impugned order could have been verified with the petitioner before passing such an order. On a scanning of the affidavit and after having given due consideration to the arguments of Mr.Mohan Parasaran, the learned counsel appearing for the petitioner, I am of the view that all the reasons stated in the impugned order for refusing grant of affiliation are not correct. The buildings are ready and tie up arrangements were made with other hospitals and with regard to encumbrance certificate and clearance certificate under Sec.37-B of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, the respondent University could have easily obtained a reply from the petitioner Trust by asking it to explain. So I am fully satisfied that the reasons stated in the impugned order are not convincing to reject the application of the petitioner dated 30.10.1989 praying for affiliation to start a Medical College for the academic year 1990-91. In the reply affidavit filed by the petitioner, it has been clearly explained as to how the rejection of the application of the petitioner shows that non-application of the mind of the respondent University. In my view, the respondent University has not considered the aspect of granting of affiliation in the correct perspective. So I am of the view that the respondent University has taken irrelevant and extraneous considerations while rejecting the application of the petitioner for affiliation. I am of the view that on this ground alone the impugned order has to go.

18. The contention raised by Mr.Mohan Parasaran, the learned counsel for the petitioner on the basis of an unreported decision of a Division Bench of this Court in *The Tamil Nadu Christian Revival Mission Organisation rep. by its Secretary and others v. The State of Tamil Nadu represented by Secretary, Education Department, Madras and others*, W.A.No.543 of 1991 dated 16.4.1991, has no substance. A reading of the above mentioned Judgment will show that no principle has been decided in that case.

19. With regard to the contention raised by Mr.Mohan Parasaran regarding the principle of estoppel, I do not think that it will apply to the facts of the case on hand, as no promise was given either by the respondent University or by the state that affiliation will be granted. As rightly stated by the learned Advocate General, the application of

the petitioner for affiliation is still pending.

20. Coming to the question regarding statute framed it is necessary to go through some of the provisions of the Dr.M.G.R. Medical University Statutes. Sub-sec.(3) of Sec.67 of the Dr.M.G.R. Medical University Tamil Nadu Act, 1987, reads as follows:

“Notwithstanding anything contained in Sub-sec.(1), all statutes, ordinances and regulations made under the said Acts, and in force on the notified date shall in so far as they are not inconsistent with this act, continue to be in force in respect of the Colleges and institutions referred to in the said Sub-sec.(1) until they are replaced by the statutes ordinances and regulations to be made under this Act.....”

In view of the above said provision, the Statutes framed under the Madras University Act, 1923 will be applicable till now statutes are made. Under Sec.42 of the Dr.M.G.R. Medical University Act, statutes are framed and published in the Gazette dated 20.3.1991 and the University has framed statutes elaborately for affiliation of Medical Colleges. The statutes received the assent of the Chancellor on 19.9.1990 and 14.12.1990. Under statute 1, the statute shall come into force from the date of assent of the Chancellor. As such, factually the statutes are framed now by the Dr.M.G.R. Medical University and the statutes made under the Madras University Act will no longer apply for the purpose of affiliation. It is seen that Sec.42(2)(n) of the Dr.M.G.R. Medical University Tamil Nadu Act, 1987 provides for conditions of affiliation of colleges to the Dr.M.G.R. Medical University. As such, as on date, the statutes framed by the Dr.M.G.R. Medical University have come into force and they have to be followed. Statute 4 is in the following terms:

“.....4(1)(i) Only Educational Trusts/Societies with sufficient financial soundness and which satisfy the conditions stipulated hereunder shall be eligible to apply for certificate of Registration for starting a private medical college.

(ii) Conditions to be satisfied by the Trust/Society applying for Certificate of Registration - (a) The Trust/Society shall be in possession of a hospital being run by it with not less than 300 beds with an administrative block.

(b) The hospital and the administrative block are to have been located in an area of 50 acres in urban agglomeration or 100 acres in other

area.

(2) Application from individuals for Certificate of Registration will not be entertained....”

Statute 44 of the Dr.M.G.R. Medical University in the following terms:

“.....It shall be competent for the University to send an Inspector at any time to inspect the Medical College after two weeks notice to the management of the college and on receipt of report from the Inspector, the University may take any decision which in its opinion deems fit and necessary....”

So I am not convinced with the arguments of Mr.Mohan Parasaran that the law as it stood in the year 1990 has to be followed in granting the affiliation. It is well settled that no mandamus can issue against a statute. I do not think any authority is needed to be cited for this proposition. So when the Tamil Nadu Dr.M.G.R. Medical University to ignore the statutes and grant affiliation. A Division of this Court in *Adhiyaman Educational and Research Institutions v. State*, A.I.R. 1991 Mad. 246, has come down heavily on the Madras University in granting provisional affiliation under Statute 44(a) of the Madras University. In that case, the Division Bench of this Court has observed as follows: (at p.226)

“.....But, admittedly the University of Madras had been following an unhealthy and unwarranted practice of granting affiliation or approval even without satisfying itself that at least the essential conditions prescribed are satisfied or fulfilled by the concerned college. Admittedly, in the recent years, the Syndicate of the University of Madras has been granting provisional affiliation to all the applicants, whether they satisfied the requirements or not, but the grant is made with the direction that the conditions should be complied with by the applicants. By adopting the said practice, the University of Madras has been doing a great disservice to the cause of education as well as the society. The members of the public comprising parents and students are being misled by the grant of provisional affiliation by the University. It is also a matter for regret that the University has been simply winking at the commencement of colleges and courses by the aspirants for affiliation even before the actual provisional affiliation. Invariably, the applicants for affiliation commence the colleges

immediately after sending the applicants for affiliation. Even though the University is fully aware of this illegal practice of commencement of colleges and admitting students therein, it has not taken any steps to prevent the same. If the University has been strictly adhering to the procedure prescribed in Statutes 37 to 41, cases of this type would not have arisen. The University could also have prevented thereby the mushroom growth of private educational institutions by persons who commence such institutions purely as business and now as service to the society....”

The Decision in the abovementioned case, has further observed as follows: (at p.267)

“.....Yet another aspect of the matter has to be referred to in this connection. The University of Madras grants provisional affiliation as a rule for a period of one year only in the first instance and thereafter, extends the same on application by the colleges for such extension. This practice is adopted irrespective of the number of years for which the concerned course is to be conducted. For example, if a course of study, say Bachelor of Arts, is for three years, the University grants affiliation provisionally for one year leaving the matter of extension of affiliation for the second and third years in doubt, or rather reserving its right to exercise the power of refusal to extend the provisional affiliation for the second and third years. What is the fate of the students who get admitted into such colleges and commence their studies, if after their completing the first year are to be told that the college will not have affiliation for the second and third years? Similarly, for Engineering courses which are known to be for four or five years, provisional affiliation is being granted for one year initially with the uncertainty of its extension for the subsequent years. Here again, there will be a hanging sword over the heads of the students who join the colleges which have obtained provisional affiliation for the first year and which may not get extension for the subsequent years. The Madras University does not seem to have given any thought whatever to this aspect of the matter. It is a mystery as to what prevents the University from satisfying itself that all the conditions prescribed for grant of affiliation or approval are fulfilled and then grant

affiliation provisionally or permanently for the entire course of three years, four years or five years as the case may be. That will assure at least one set of students that they can have their education completed in one course in one college without being driven from pillar to post during the course of study. It is very unfortunate that the University of Madras, which is the custodian of education in this State should forego the interests of the students in this manner. It is high time that the University puts an end to this illegal practice of granting provisional affiliation to educational institution even without substantial compliance with the conditions prescribed therefor....."

In view of what the Division Bench of this Court has said in the abovementioned case, I do not think the petitioner can even ask for provisional affiliation, if not a permanent affiliation, as per the statutes. So, I agree with the argument of Mr. Sukuntharaj, the learned counsel appearing for the first respondent University that there are no provisions under the old statutes for giving affiliation without prior permission and only recently Statute 4 has been framed by the University which has been extracted above which will apply to the petitioner's case. The learned counsel for the petitioner relies up the decision in *State of Kerala v. K.G. Madhavan Pillai*, A.I.R. 1989 S.C. 49, where permission was granted for opening of new schools and unilateral action was taken by the Government later. I do not think that this will apply to the facts of the case on hand. In my view, the statutes framed with regard to infrastructural facilities will apply to the case of the petitioner though prior permission of the Government is not necessary.

21. In view of the abovementioned discussion, though prior permission is not necessary on the peculiar facts and circumstances of the case, I am satisfied that the reasons given by the first respondent University in the impugned order rejecting the application of the petitioner for affiliation are extraneous. In my view, had the respondent University verified the factual position with the petitioner Trust, they could have been satisfied with the reply of the petitioner Trust in granting affiliation. On the face of it, the impugned order is not correct and in my view, it has got to be set aside. It is open to the respondent University to consider the matter afresh after giving an opportunity to

the petitioner Trust. Since the petitioner is driven from pillar to post from the year 1987, I do hope that the respondent University will pass orders on merits on or before 1.4.1992. As such, the impugned order of the first respondent University is set aside and the writ petition is allowed and the matter is remitted back to the respondent University with a direction to consider the matter as stated above and pass orders afresh on or before 1.4.1992 after giving notice to the petitioner Trust. However, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Thanikkachalam, J.*

C.R.P.No.2280 of 1990

9th September, 1992.

Saraswathi alias Sasikala

...Petitioner

v.

Syed Ibrahim

...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(iii) - Landlady requiring premises for running a mess to feed about 10 persons - Possession of necessary funds to run the mess, held sufficient to show that she has taken steps in furtherance of starting business.

The petitioner/landlady filed a petition for eviction of the respondent-tenant on the ground that she required the premises for starting a mess to feed about ten persons and that she had the necessary funds to start the mess. The petition was allowed by the Rent Controller, but the Appellate Authority set aside the order holding that the landlady had not taken any steps to buy vessels and other materials to start the mess. In revision, *Held:-* According to the facts arising in the present case, the landlady is not having any other premises for her own in the same town and her husband is also an unemployed person. Even according to the tenant, a major portion of the petition premises is uninhabitable. According to the landlady, she wanted to start a small mess to feed about 10 people so that she can earn some income out of

that and in order to start a petty mess like this, utensils for cooking, tumblers for providing water, mats for providing sitting arrangements to the customers and leaves for serving the food alone are essential. In order to obtain all these materials the cost cannot go beyond Rs.2,000. According to the landlady, she is possessed of sufficient means to start this petty mess. Since the mess which the landlady is going to start is petty in nature, possession of enough funds is itself sufficient to show that the landlady has taken one step in furtherance of starting the mess. [Para 11]

Cases referred to:

Kanakavel Pillai v. Drugs and Chemicals, (1980)2 M.L.J. 392. [Para 10]

R.Sridharan v. Commissioner of Wealth Tax, Madras, (1971)1 M.L.J. 249; A.I.R. 1970 Mad. 308. [Para 10]

S.N.K.Ramaswamy Pillai v. Kamaga Thevar, (1964)2 M.L.J. 89. [Para 11]

Mari Annial v. Kandaswamy, 1977 T.L.N.J. 499. [Para 11]

P.Peppin Fernando S.William, for Petitioner.

M.V.Venkateshan, for Respondent.

The Court made the following

ORDER:- The landlord is the petitioner herein. The landlady filed a petition for eviction against the tenant under Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act. The case of the landlady is as under:

She purchased the petition premises from one Krishnamurthy under a registered sale deed dated 25.6.1986. The petition premises is having three Door numbers namely 7, 8 and 9. For Door No.7 the monthly rent is Rs.100 and for Door Nos.8 and 9 the monthly rent is Rs.100. The tenant is using the entire premises as a godown. The husband of the landlady is an unemployed person. The landlady is looking after her household work. Both the husband and wife now desire to start a mess in the petition premises. They are having sufficient means to start the mess. The landlady is not having any other premises of her own in the same town. Hence the landlady required the petition premises for conducting a mess under Sec.10(3)(a)(iii) of the Act. The landlady sent a notice to the tenant on 10.11.1986, calling upon the tenant to quit and deliver vacant possession. The tenant sent a reply dated 18.11.1986 refusing to vacate the premises.

2. The case of the tenant is as under:

The respondent herein alone is not a tenant in respect of the petition premises. According to the tenant he is a partner in the partnership concern with the other partner and the firm is the tenant in the petition premises. Therefore without impleading the other partners, the petition is not maintainable. The husband of the landlady is doing pawnbroker business. The landlady is having several premises of her own in the same town and it is not correct to state that the husband of the landlady is an unemployed person. Since the tenant refused to pay higher rent as demanded by the landlady she came forward with the present revision petition. The landlady and her husband are not having any previous experience in conducting the mess. Therefore the requirement of the petition premises by the landlady is not *bona fide*. Hence the petition is liable to be dismissed.

3. The husband of the landlady was examined as P.W.1. The tenant was examined as R.W.1. The landlady filed 3 documents. The tenant filed 9 documents. Considering the above facts the rent controller came to conclusion that the requirement of the landlady under Sec.10(3)(a)(iii) of the Act is *bona fide*. Accordingly the Rent Controller ordered eviction. On appeal the Rent Control Appellate Authority set aside the order passed by the Rent Controller, allowed the appeal and dismissed the petition for eviction. It is against this order the landlady has filed this revision before this Court.

4. The learned counsel appearing for the landlady/petitioner herein submitted as under:

The rent control appellate authority was not correct in reversing the well considered order of the rent controller. For starting a mess to feed about 10 people no prior experience is necessary. So also for starting a mess of this nature permission also need not be obtained from the Municipality. To start mess of this nature a capital of Rs.1,000 to Rs.2,000 would be sufficient. The landlady is having sufficient funds to start the mess. In conducting the mess no employees are necessary. Both the petitioner and her husband can conduct the mess by themselves. The Rent Control Appellate Authority pointed out that in order to start the mess the landlady has not taken any steps to buy vessels and other materials. But the fact remains that these small articles can be purchased at any time after possession is obtained from the tenant. Therefore on this score it cannot be said that no

step was taken in furtherance of starting of the mess. The husband of the landlady is an unemployed person and in order to provide employment to her husband the landlady is desirous of starting the mess. The landlady is not having any other premises of her own in the same town. It was therefore pleaded that the order passed by the Rent Control Appellate Authority may be set aside and the order of rent controller be restored.

5. On the other hand the learned counsel appearing for the respondent/tenant submitted as under:- The landlady has not taken any steps to start the mess as desired by her. The tenant is now using the petition premises as a godown. So much of place is not necessary for running a mess as contemplated by the landlady. The landlady has come forward with this petition since the tenant refused to pay the higher rent as demanded by her. The landlady's husband is doing pawn broker business. Therefore it is not correct to state that her husband is an unemployed person. The landlady is having other premises of her own in the same town. No licence was obtained by the landlady for starting the mess. It was therefore pleaded that the rent control appellate authority was correct in dismissing the petition for eviction.

6. I have heard the rival submission.

7. The tenant contended that he is a partner in the partnership firm and the partnership firm is the tenant in respect of the petition premises. In as much as all the partners were not impleaded the petition is liable to be dismissed. But the fact remains that both the authorities below have concurrently come to the conclusion that the partnership firm is not a tenant, but only the individual is the tenant. No fresh material was placed before this Court to dislodge this finding.

8. The petition premises consisting of three portions. The landlady purchased the petition premises on 28.7.1986. Even prior to her purchase the tenant was in the occupation of the petition premises. The tenant is using the petition premises as a godown. The landlady required the same for the purpose of starting a mess. According to the landlady she is desirous of starting a mess to feed about 10 people so that she can provide employment to her unemployed husband. The landlady submitted that she is not having any premises of her own in the same town. But the tenant submitted that the landlady is having several premises in the same town. But there was no evidence on record on the

side of the tenant to prove his version. Further according to the tenant the petition premises is an old one and the portions under Door Nos. 7 and 9 are not fit for human habitation. Even though three door numbers are given, the petition premises is a single unit. The tenant submitted that the landlady has not taken any steps towards starting the mess and according to the tenant a mere desire to start a mess would not be sufficient to show that the landlady required the petition premises *bona fide* for starting a mess. The tenant further pointed out that the landlady has not obtained any licence from the Municipality for running the mess. Again it was pointed out that the landlady has not purchased any vessels or other equipments for running the mess. On the other hand, the land lady pointed out that she is planning to start a mess in a limited scale to provide food for about 10 people for which no licence is required from the Municipality. She further stated that in order to start a mess of this nature a capital of Rs. 1,000 to Rs. 2,000 is sufficient and the landlady is possessed of sufficient means to start the mess.

9. In order to obtain eviction under Sec. 10(3)(a)(iii) of the Act for the purpose of running a business the landlady must prove that either she is already running a business or she has taken one step in furtherance of the starting of that business. The landlady pointed out that for the purpose of starting a mess of this nature possession of enough funds is sufficient, because the articles to be purchased are not of great value. She can purchase the vessels and other equipments like mat, etc., at any time before obtaining possession since she is having sufficient funds for the said purpose. The tenant submitted that the landlady demanded higher rent from the tenant and when he refused to pay the same, the landlady came forward this petition. In order to support this version the tenant pointed out that periodically the rent was increased by the landlady. But the fact remains that there is no evidence on the side of the tenant to show that before filing the petition the landlady demanded higher rent from the tenant. Another submission made by the tenant was that the place in which the petition premises is situated was not conducive to start a mess as desired by the landlady. But the landlady pointed out that the petition premises is situated in Tirunelveli Town in an important business centre and therefore the present place will be advantageous for starting the mess. It also

remains that it is not for the tenant to suggest that the petition premises is either insufficient or unfit for the business which the landlady is going to conduct.

10. The Rent Control Appellate Authority relied upon a decision in the case of *Kanakavel Pillai v. Drugs and Chemicals*, (1980)2 M.L.J. 392, in order to support his conclusion that the landlady has not taken any steps towards starting of the mess and therefore she is not entitled to an order of eviction. But according to the fact arising in this case the landlady wanted to commence plastic business. Therefore this Court pointed out that one step in furtherance of starting the plastic industry was not taken by the landlady. But in the same decision this Court pointed out that in a case where the landlady wanted to start a petty shop, the above said test need not be applied. Yet another decision relied on by the learned Rent Control Appellate Authority was that reported in *R. Sridharan v. Commissioner of Wealth Tax, Madras*, (1971)1 M.L.J. 249: A.I.R. 1970 Mad. 308, in the case of wherein this Court pointed out that the mere intention to carry on business will not enable the landlord to get an order of eviction under Sec.10(3)(a)(iii) of the Act. He must take one step in furtherance of the business which he is going to start.

11. According to the facts arising in the present case the landlady is not having any other premises of her own in the same town and her husband is also an unemployed person. Even according to the tenant a major portion of the petition premises is uninhabitable. According to the landlady she wanted to start a small mess to feed about 10 people so that she can earn some income out of that and in order to start a petty mess like this utensils for cooking, tumblers for providing water, mats for providing sitting arrangements to the customers and leaves for serving the food alone are essential. In order to obtain all these materials the cost cannot go beyond Rs.2,000. According to the landlady, she is possessed of sufficient means to start this petty mess. Since the mess which the landlady is going to start is petty in nature, possession of enough funds is itself sufficient to show that the landlady has taken one step in furtherance of starting the mess. The landlady further submitted that in order to run a petty mess like this, no licence is also needed from the Municipality. In the case of *S.N.K. Ramaswamy Pillai v. Karmega*

Thevar, (1964)1 M.L.J. 89, this Court while considering the provisions of Sec.10(3)(a)(iii) of the Act pointed out that,

"There is no reason why a landlord having the capital ready and the intention as well to do business cannot be said to have commenced his business, though the activity relating to it has to await the securing of accommodation."

In the case of *Mari Ammal v. Kandaswamy*, 1977 T.L.N.J. 499, this Court pointed out that,

"Giving the fullest meaning to the expression, a business which he is carrying on, it is not possible to interpret the expression in the same manner in all cases irrespective of the nature of the business. Certain business may require elaborate preparation and certain other business may not require any preparation at all. For instance, the business with which we are concerned, viz., a betel-nut business does not require any elaborate preparation at all and all that is required is an intention to start the business and possession of capital, which admittedly, will be very small, to start the business. It is not as if, for the purpose of having recourse to the particular statutory provision, a landlord must take a building on lease from a third party and commence his business in that building and thereafter apply under Sec.10(3)(a)(iii) for getting possession of his own building for the purpose of carrying on that business which till then he was carrying on in a rented building. To construe Sec.10(3)(a)(iii) in that manner will be against all notions of common-sense and will not be even in consonance with the object of the Act. Certainly it cannot be the intention of the Act to prevent a landlord who, for the purpose of eking out his livelihood, wants to carry on a business of his own in his own premises from doing so."

Considering the nature of the petty mess the landlady is going to start in her own premises and in the light of the above said judicial pronouncements cited supra I am of the opinion that the landlady in the present case established her *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. For the foregoing reasons I set aside the order passed by the rent control appellate authority and restore the order passed by the rent controller.

12. In the result, the order of eviction passed by the rent controller under Sec.10(3)(a)(iii) of the Act

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is sustained. Accordingly the revision is allowed. However there will be no order as to costs.

B.S. ---- Revision allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: M. Srinivasan, J.

W.P.Nos.7591 and 9423 of 1992

16th September, 1992.

R.Arumugasamy

...Petitioner

v.

The Divisional Development Officer, Cheranmahadevi, Tirunelveli District and others

...Respondents.

Constitution of India (1950), Art.226 - Natural justice - Tamil Nadu Water Supply and Drainage Board installing overhead tank in a village imposing condition that individual house service connections, should not be given - Panchayat passing resolution to provide house service connection and giving connection to certain persons - Beneficiaries filing writ petitions to enforce such right - If maintainable. Under the Rural Water Supply Scheme, the Tamil Nadu Water Supply and Drainage Board installed an overhead tank for the benefit of the villagers of Kundakulam Panchayat in 1988. While handing over charge of the tank to the Panchayat, the Board imposed a condition that no individual house service connection should be given. The District Collector of Tirunelveli issued an order in 1988 to all the Panchayat Union Commissioners that no individual house service connection should be given from the overhead tanks installed under the above scheme. The Commissioner of the Radhapuram Panchayat Union also passed a similar order to all the Presidents of the Panchayats within his jurisdiction. However, the Kudankulam Panchayat passed a resolution in April, 1989 to provide house service connection and gave connection to some persons. The petitioners in W.P.No.7591 of 1992 filed a writ petition for the issue of a writ of *mandamus* directing the

respondents to disconnect all the service connections thus given. The petitioners in W.P.No.9423 of 1992 filed the petition for forbearing the respondents from disconnecting the connections without furnishing the particulars of G.O.No., Rules, directions referred to in the notice sent by the respondents.

Held: On the facts referred to, the petitioners cannot claim any right in them to continue the water connections given to their houses. The very basis of giving connections to their houses was illegal and it was pursuant to a resolution passed by the Panchayat contrary to the instructions given by the authorities and contrary to the conditions stipulated at the time of handing-over the overhead tank to the Panchayat. When the connections given to the petitioners were based on an illegality at the inception, they cannot claim any right to have them continued and contend that they are entitled to get some more particulars from the authorities concerned. All the relevant particulars were made available to them in the counter-affidavit filed by the first respondent in W.P.No.11292 of 1990. Apart from that no particulars are necessary to be given to the petitioners herein or the petitioners in W.P.No.9423 of 1992. In any event, it has been held by the Supreme Court in several cases that the principle of natural justice need not apply as a matter of rule in every case. They can be excluded in certain cases. In the present case, it has been pointed out by the authority that it is against the interest of the general public of the village to grant house service connection as they would not be able to have sufficient supply of drinking water if individual house service connections are given. That is why even when the tank was handed-over to the Panchayat, a condition was imposed. When it is against the interest of the public at large, the Court should take into account only such interest and should not give credit to the grievance of a few individuals of the village. Particularly, when the said benefits were given to the said individuals by the authorities illegally. Hence, the petitioners in W.P.No.9423 of 1992 have no right to be enforced under Art.226 of the Constitution of India. They cannot contend that the connections given to their houses should be continued on the only ground that they have not been furnished with the orders of the authorities and the documents referred to by the authorities in their notice.

[Paras 9, 10 & 11]

Case referred to:

Union of India v. Tulsiram Patel, A.I.R. 1985 S.C. 1416. [Para 10]

W.P.No.7591 of 1992: Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents 1 to 3 to disconnect all the house service Water Connections given by the then President of the Koodankulam Panchayat in violation of the order of the office of the District Collector in No.mu.ka.13/67540/88, dated 11.8.1988 and of the instructions given by the Tamil Nadu Water Supply and Drainage Board in its charge Paper for Koodankulam Water Supply Scheme handed over to the 2nd respondents on 20.12.1988 and award costs, etc. *P.Peppin Fernando*, for Petitioner.

V.R.Rajasekaran, Government Advocate, for Respondent Nos.1 and 3.

Liaqat Ali, for State.

The Court made the following

ORDER: These two writ petitions are connected. They relate to the same matter. The petitioner in W.P.No.7591 of 1992 is a permanent resident and native of Kudankulam village which falls within the jurisdiction of Radhapuram Panchayat Union. He has filed the writ petition in the interest of all the residents of the village. Under the Rural Water Supply Scheme, the Tamil Nadu Water Supply and Drainage Board installed an overhead tank for the benefit of the villagers in 1988. The village is generally a drought prone area and the villagers have to walk for 4 to 5 Kms. to fetch water for drinking and bathing. When the tank was installed after the great efforts of the villagers, the Tamil Nadu Water Supply and Drainage Board imposed a condition when handing over charge of the tank to the Panchayat that no individual house service connection should be given. The tank is installed with a capacity of 1,00,000 litres. 35 water tapes were also installed in the village to supply water to the residents of the village.

2. The District Collector of Tirunelveli District issued an order in 1988 to all the Panchayat Union Commissioners that no house service connection should be given from the overhead tank installed under the scheme. The 2nd respondent also passed an order on 1.11.1988 to all the Presidents of the Panchayat Board under his jurisdiction directing

them not to provide house service connection. In spite of strict instructions by the Collector and the 2nd respondent, the Panchayat passed a resolution in April, 1989 to provide house service connection on a monthly charge of Rs.15 per house and on a deposit of Rs.300. It is alleged by the petitioner in the writ petition that the President got the resolution passed with the connivance of other members of the Panchayat with a view to get water service connection to their houses and to make money out of it. It is not necessary for me to consider the correctness of the said allegations as the persons to whom the house connections were given are not impleaded as parties in that writ petition.

3. Suffice it to point out that the house service connections have been given against the instructions issued by the Collector and the Commissioner of the Panchayat Union and the resolution of the Panchayat was contrary to the said instructions. It is also contrary to the specific condition imposed by the TWAD Board at the time of giving charge of the overhead tank to the Panchayat.

4. The Divisional Development Officer, Chcranmahadevi, passed an order dated 12.7.1990 that Koodankulam and Radhapuram are drought areas and the action of the Panchayat in passing a resolution to give house service connection was totally illegal and it would affect severely the residents of Koodankulam. The President of the Panchayat instead of disconnecting the water connection issued an order directing the persons who got house service connections not to take water from the taps installed in their houses. Aggrieved thereby those persons filed W.P.No.11292 of 1990 in this Court. In that writ petition, the petitioner in W.P.No.7591 of 1992 got himself impleaded as a party. The writ petition was disposed on 24.4.1992. An order was passed allowing the writ petition on the sole ground that no notice was given to the petitioners therein before the impugned order was passed. The court observed that action could be taken after issuing due notice to the petitioners therein.

5. Pursuant to the said order, the Panchayat Union issued a notice on 22.6.1992 to the persons who got house service connection. In that notice, they had referred to the condition imposed in the scheme under which the overhead tank was installed and handed over to the Panchayat. It is also stated in the notice that 'the condition was violated and the

resolution was passed by the Panchayat to give house connection to 15 persons. It is further stated that the Divisional Development Officer as well as the Commissioner of Panchayat Union had given instructions already that house connections should not be given and, therefore, action is being taken to disconnect the connections already provided. A reference is made to the writ petition filed in this Court and orders passed therein. The notice called upon the petitioners in W.P.No.9423 of 1992 who had the house connection to send their objections if any within 15 days from the date of receipt of notice and otherwise action would be taken to disconnect the pipe.

6. On receipt of the said notice, the petitioners caused through their advocate the issue of a telegram. In that telegram he wanted copies of Water Board's communication, orders of the Director of Rural Development and the District Collector under which tap connection was said to be prohibited and that without the said documents it would be impossible for the petitioners to submit an effective reply. They also prayed for extension of time by 15 days after furnishing of the said documents. A notice was issued on 30.6.1992 by counsel. In the notice also there was a prayer for extension of 15 days after furnishing of documents.

7. Thereafter, they filed W.P.No.9423 of 1992 with a prayer for issue of *mandamus* forbearing the respondents from disconnecting the water service connection given to the petitioners.

8. There is no justification for the request made by the petitioners for furnishing of the documents set out in the telegram issued by the advocate. Even in the counter affidavit filed by the Divisional Development Officer, Cheranmahadevi, in W.P.No.11292 of 1990 in which he was the first respondent, all the relevant particulars had been set out. The said counter affidavit refers to the resolution passed by the Panchayat on 29.3.1989 and points out that in view of the fact that the Managing Director of Tamil Nadu Water Supply and Drainage Board had specifically instructed not to extend water supply for private purposes as the people belonging to economically weaker sections would be deprived of getting enough water for their requirements if individual house service connection were given, the resolution of the Panchayat was not valid. The number of the letter and the date thereof were set out in that affidavit. There is also reference in that affidavit to the instructions

issued by the Commissioner, Panchayat Union, Radhapuram, on the basis of guidance given by TWAD Board and also to the contentions of the petitioners therein against the orders issued in proceedings A5/3433/90, dated 12.7.1990. A reference was made to the notice issued by the President of the Panchayat on 16.5.1990 in the first instance and the second notice on 14.7.1990. It was also pointed out that no reply was sent by the petitioners to the notice dated 16.5.1990. It was stated in the counter affidavit that the decision to disconnect the individual house connection was taken with the sole intention that economically weaker sections should not be deprived of their chance of getting enough drinking water and there was no sufficient supply so as to give house connection to the residents of the villages.

9. I am of the view that on the facts referred to above, the petitioners cannot claim any right in them to continue the water connections given to their houses. The very basis of giving connections to their houses was illegal and it was pursuant to a resolution passed by the Panchayat contrary to the instructions given by the authorities and contrary to the conditions stipulated at the time of handing over the overhead tank to the Panchayat. When the connections given to the petitioners were based on an illegality at the inception they cannot claim any right to have them continued and contend that they are entitled to get some more particulars from the authorities concerned. All the relevant particulars were made available to them in the counter affidavit filed by the first respondent in W.P.No.11292 of 1990. Apart from that no other particulars are necessary to be given to the petitioners therein or the petitioners in W.P.No.9423 of 1992.

10. In any event, it has been held by the Supreme Court in several cases that the principles of natural justice need not apply as a matter of rule in every case. They can be excluded in certain cases. Vide *Union of India v. Tulsiram Patel*, A.I.R. 1985 S.C. 1416 at page 1462, para 101. In the present case, it has been pointed out by the authority that it is against the interest of the general public of the village to grant house service connection as they would not be able to have sufficient supply of drinking water if individual house service connections are given. That is why even when the tank was handed over to the Panchayat a condition was imposed. When it is against the interest of the

public at large, the court should take into account only such interest and should not give credit to the grievance of a few individuals of the villages particularly when the said benefits were given to the said individuals by the authorities illegally.

11. Hence, the petitioners in W.P.No.9423 of 1992 have no right to be enforced under Art.226 of the Constitution of India. They cannot contend that the connections given to their houses should be continued on the only ground that they have not been furnished with the orders of the authorities and the documents referred to by the authorities in their notice. At any rate, I refuse to exercise my discretion under Art.226 of the Constitution in favour of the petitioners in the said writ petition. Consequently, the said Writ Petition No.9423 of 1992 is dismissed.

12. In the other writ petition, the prayer is for issue of *mandamus* directing respondents 1 to 3 to disconnect all the house service water connections given by the then President of Koodankulam in violation of the orders of the District Collector and the Commissioner of Radhapuram Panchayat Union. It follows automatically that this writ petition should be allowed and *mandamus* should be issued as prayed for by the petitioners. Respondents 1 to 3 in W.P.No.7591 of 1992 are directed to disconnect the house service water connections given by the then President of Koodankulam Panchayat Union within one week from this date. There is no necessity for the respondents to give any further notice to the persons who have obtained house connections under the illegal resolution passed by the Panchayat earlier. The writ petition (W.P.No.7591 of 1992) is ordered accordingly. There will be no order as to costs.

B.S. --- W.P.No.7591 of 1992 allowed and
W.P.No.9423 of 1992 dismissed.

IN THE HIGH COURT OF JURISDICTION AT MADRAS.

[*Special Original Jurisdiction*]

Present:- *Raju, J.*

W.P.No.2589 of 1984

9th March, 1992.

Shallesh N.Shah

...Petitioner

v.

The Regional Commissioner, Employees Provident Fund (Tamil Nadu and Pondicherry States)

...Respondent.

(A) *Evidence Act (I of 1872), Secs.107 and 108 - Person shown to be alive within 30 years - Claiming to have him dead - Burden of proof - Person proved to have not been heard of for seven years - Claim that such person is alive - Burden of proof.*

(B) *Constitution of India (1950), Art.226 - Claim by nominee for Provident Fund relying on Secs.107 and 108 of Evidence Act - Rejection by Provident Fund Authorities - Remedy open - Proceedings under Art.226, if will lie.*

The deceased 'K' originally nominated his father to receive the provident fund due to him. Since the father's whereabouts were not known to the deceased for more than ten years, it was presumed that he was dead. The deceased, therefore, sent a fresh nomination on 7.2.1976 to the Respondent, the Regional Provident Fund Commissioner nominating the petitioner to receive the provident fund amount. The deceased informed the Respondent that the nominee was his friend. No communication was received by the deceased, accepting or rejecting the fresh nomination. After the death of the deceased on 20.12.1981, the petitioner moved the respondent. The petitioner was asked to obtain a succession certificate before a court of law. When the petitioner moved the Court for the issue of a succession certificate, it was returned with the endorsement that since the nominee was not an heir of the deceased and since the nomination was in dispute, he was not entitled to file the petition until it was declared that he was the proper nominee. He then filed a petition for the issue of a writ of *mandamus* directing the Respondent to accept the fresh nomination made by the deceased. There was no evidence that the father of the deceased was dead.

Held:- A careful analysis and consideration of Secs.107 and 108 of the Evidence Act would go to show that if a person was shown to be alive within 30 years, the factum of death is to be proved and the burden lies upon the person who claims that such a person was dead. Likewise, when it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that such a person is alive is on the person who affirms it. There is nothing on record before the Court to show that the person concerned, namely, the father of the deceased 'K', who was shown or admitted to be alive within 30 years to be dead. Likewise there are no facts to prove that the whereabouts of the father of the deceased who was not heard of for seven years by the said or anybody who would naturally have heard of him. The petitioner, at any rate, could not claim to be such a person and his plea has no relevance. In the absence of any concrete material to attract the presumption postulated under the above two provisions contained in the Evidence Act, it is not possible for this Court to countenance the plea that the father of the deceased subscriber should be deemed to have died and it is only on that basis the second nomination in 1978 in favour of the petitioner was made. [Para 8]

If the petitioner cannot and is not eligible to secure a succession certificate, it does not preclude the petitioner either to file a suit for recovery of the money or for getting appropriate declaration from the competent Civil Court as is permissible in law declaring his entitlement to the amount and whatever may be the course that has to be adopted lawfully to get the money from the account of the deceased 'K', the course adopted by moving this Court under Art.226 of the Constitution of India cannot be approved, in the light of the existing provisions of the Provident Fund Scheme, 1952. So long as there is no proof before this Court to show that the father of the deceased is no more the claim cannot be countenanced on a due consideration in these proceedings under Art.226 of the Constitution of India since these proceedings will be more inappropriate to give any such declaration either on the issue of the deemed death of the father of the deceased K.Raman or on the consequential entitlement of the petitioner to the amount lying to the account of the deceased subscriber in the Scheme in

question.

[Para 9]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to accept the first nomination made by the deceased K.Raman, nominating the petitioner as a fresh nominee as early as on 7.2.1976, thereby enabling him to claim the amount due.

R.Subramaniam for *M/s.King and Partridge*, for Petitioner.

P.Narasimhan, Senior Central Government Standing Counsel, for Respondent.

The Court made the following

ORDER:- The above writ petition has been filed for a writ of *mandamus* directing the respondents to accept the fresh nomination made by the deceased K.Raman, nominating the petitioner as a fresh nominee as early as on 7.2.1976, thereby enabling him to claim the amount due since the father's whereabouts were not known to the deceased for more than ten years, it was presumed that he was dead and therefore the deceased K.Raman was obliged to send fresh nomination on 7.2.1976 to the Regional Provident Fund Commissioner, Madras, nominating the petitioner to receive the provident fund amount due to him. On receipt of such nomination the Regional Provident Fund Commissioner was said to have returned the papers asking the deceased to state his relationship to the petitioner and the deceased appears to have informed the Commissioner that the relationship between him and the petitioner was 'friend'. It is the contention for the petitioner that though as early as on 7.2.1976 another nomination was sent in the place of K.Krishnan Nair, no communication was received by the deceased during his life time whether the fresh nomination submitted was accepted or not and that therefore the deceased K.Raman, *bona fide* believed that the fresh nomination submitted by him was accepted. It is also contended that the deceased appointed the petitioner as nominee to receive the gratuity amount due under the Payment of Gratuity Act, 1972 and on the strength of such nomination the petitioner already received the amount from the company where he was employed, after the death of Mr.K.Raman, on 20.12.1981. The petitioner appears to have moved the Regional Provident Fund Commissioner, who in his reply dated 6.7.1982

has stated that the change in the nomination should have been made only in Form No. VIII not in Form No. II and that therefore, the petitioner was asked to obtain a Succession Certificate before the Court of Law. The writ petitioner would also claim that when he moved this Court on the Original Side for issue of a Succession Certificate in his favour, the same was returned with an endorsement that since the nomination of the petitioner is in dispute and he is not the heir of the deceased, until it was declared legally that he is the proper nominee, he is not entitled to file the petition under the provisions of the Indian Succession Act. In the above circumstances, the writ petition came to be filed with the relief prayed as referred to supra.

2. Reliance is placed on paragraphs 61(1) (5) and (6) of the Employees Provident Fund Scheme, 1952 to claim the relief prayed for. The respondent has filed a counter affidavit contending that during his life time the deceased K. Raman nominated his father in Form No. II on 13.8.1962, that he submitted another Form No. II dated 21.12.1978 nominating the petitioner as his nominee to receive the Provident Fund amount, that the said renomination was not in accordance with Paragraph 61(8) of the Employees Provident Fund Scheme, and therefore, it cannot be accepted. It is also contended placing reliance upon paragraph 2(g) of the Scheme that a member is required to nominate only members of 'family' as defined, and inasmuch as the original nomination in favour of the father was accepted and the same was still in force, the petitioner's claim that he is the nominee of the deceased member, cannot be treated as valid and that the settlement of provident fund account has to be regulated under paragraph 70(ii) of the scheme. With that object, it is claimed that the petitioner was required to get a Succession Certificate from a Court of law to ensure payment to the proper legal heirs of the deceased and that instead of obtaining such a Succession Certificate or orders confirming his entitlement for the said accumulated provident fund amount, the petitioner has approached this Court with the above writ petition.

3. The respondent also claimed in the counter affidavit that the deceased member died on 20.12.1981 as a bachelor, that the nomination of his father on 13.8.1962 was acceptable and though the member has nominated the petitioner in December, 1978 the change of nomination in favour

of the petitioner, who was only a friend could not be countenanced in accordance with the statutory provisions and that therefore the petitioner does not fall within the provisions envisaged under para. 61(1) of the scheme. It is also claimed that any nomination made by a member of the scheme in favour of the person not belonging to his family is invalid and that therefore the renomination made cannot be accepted and the nomination made originally in favour of his father is subsisting and more so because the petitioner could not produce any documentary evidence to prove the death of the original nominee at the time of execution of another nomination. It is stated that the mere declaration of the member regarding 'no family' and appointing his friend to receive the provident fund proceeds cannot be accepted, unless it is proved that the original nominee had expired. It is also stated, the fact that the petitioner was the son of the manager of the establishment in which the late member was lastly employed create suspicion in the mind of the respondent and there was a room for admitting the *bona fides* of the nomination, since no Last Will of the deceased was produced by the petitioner. The respondent further specifically averred that "the averment that the late member Raman, made attempts to trace his father, is not acceptable and a valid fact to be relied upon. Had it been true, the deceased member would have stated so while executing another nomination." The respondent further contends that in the peculiar circumstances of the case the petitioner, has to satisfy himself beyond doubt, that no other family member of the deceased member is alive and the nomination in question cannot be immediately accepted. The fact relating to the nomination and payment under Gratuity Act is said to be not a relevant consideration for the issue raised under the Provident Fund Scheme and the petitioner should have at any rate try to obtain a Succession Certificate issued by the competent Court of law and in the absence of valid orders of the Court of law, the claim of the petitioner for the release of the provident fund amount of deceased Raman is not sustainable in law and on facts. Reliance is also placed on para. 70(ii) as well as para 61 and the various sub-paragraphs incorporated in the said paragraph. That apart the respondent contended that the claim of the petitioner could not be countenanced in law.

4. The learned counsel for the petitioner while

reiterating the stand taken in the affidavit contended that inasmuch as the whereabouts of the father of the deceased was not known for more than ten years, and he should be presumed to be dead, the nomination in favour of the petitioner must be construed as a fresh nomination though the case is not one falling within the category of modification of an existing nomination and that in any event, the non-filing of modification in Form No. VIII is a mere irregularity and is curable too, and that by keeping silent during the period of the life time of the deceased, the respondent has disabled the petitioner of the scope and opportunity to file an appropriate nomination in the paper form and manner and that inasmuch as the petitioner has moved the Civil Court and has been told that a Succession Certificate cannot be issued at his instance, the petitioner had no other go except to file the above writ petition.

5. Mr. P. Narasimhan, learned counsel appearing for the respondent while reiterating the stand taken in the counter affidavit contend that there are no material on record to demonstrate the claim that the father of the deceased was dead and that in such circumstances and for the said reason only a nomination in favour of the petitioner had been made. The learned counsel also would contend that in the light of the provisions contained in paras. 61 and 70 and the scheme, the objection taken by the respondent was well merited and that in the absence of any Succession Certificate, the petitioner could at least produce proper declaration of the competent Civil Court that he is entitled to recover the money from the respondent, which is lying to the account of the deceased K. Raman and that therefore, the claim now made in these proceedings cannot be countenanced.

6. I have carefully considered the submissions of learned counsel appearing on either side. The relevant portion of para 61 of the Employees' Provident Funds Scheme, 1952, necessary for the case on hand reads as hereunder:

- "61(1) Each member shall make in his declaration in Form 2, a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made.
- (2) A member may in his nomination distribute the amount that may stand to his credit in

the Fund amongst his nominees at his own discretion.

(3) If a member has a family at the time of making nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid.

(4) If at the time of making a nomination the member has no family the nomination may be in favour of any person or persons but if the member subsequently acquires a family, such nomination shall forthwith be deemed to be invalid and the member shall make a fresh nomination in favour of one or more persons belonging to his family.

(5) A nomination made under Sub-paragraph (1) may at any time be modified by a member after giving a written notice of his intention of doing so in Form 8 annexed hereto. If the nominee predeceases the member, the interest of the nominee shall revert to the member who may make a fresh nomination in respect of such interest.

(6) A nomination or its modification shall take effect to the extent that it is valid on the date on which it is received by the Commissioner."

Paragraph 70 of the Scheme reads as under:

"70. On the death of a member before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made--

(i) If a nomination made by the member in accordance with paragraph 61 subsists, the amount standing to his credit in the Fund or that part thereof to which the nomination relates, shall become payable to his nominee or nominees in accordance with such nomination; or

(ii) if no nomination subsists or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall become payable to the members of his family in equal shares;" (*Proviso omitted*)

The learned counsel for the respondent made available the file containing the nomination form referred to supra and also the Contribution Cards. Neither in the Form No. II dated 21.12.1978 nor in any separate communication as such any reason is

disclosed by the deceased subscriber as to the reason for the second nomination, be it be treated as modification or fresh nomination. It is only in the affidavit of the writ petitioner that the reason, namely, the deemed death of the father is pleaded to justify the nomination in favour of the petitioner in 1978 as fresh nomination. Having regard to the plea for the petitioner that on the deemed death of the deceased Raman's father, the nomination in his favour had become ineffective and rendered non-existent thereby facilitating, according to the petitioner the fresh nomination without resorting to the filing of the modification form in Form No. VIII. The first question that would arise for consideration in the background of the above facts and the governing provisions under the scheme would be as to whether the death of the father of the deceased subscriber could be presumed inasmuch as only on such presumption coming into operation the nomination of the petitioner can be countenanced.

7. Sec.107 of the Evidence Act lays down that-

"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it."

Equally Sec.108 of the Evidence Act lays down that-

"When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is (shifted to) the person who affirms it."

8. A careful analysis and consideration of the above provisions would go to show that if a person was shown to be alive within 30 years, the factum of death is to be proved and the burden lies upon the person who claims that such a person was dead. Likewise, when it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that such a person is alive is on the person who affirms it. There is nothing on record before the Court to show that the person concerned namely, the father of the deceased K.Raman, who was shown or admitted to be alive within 30 years, to be dead. Likewise there are no facts to prove that the whereabouts of the father of the deceased Raman was not heard of for seven years by the said Raman or anybody who

would naturally have heard of him. The petitioner, at any rate, could not claim to be such a person and his plea has no relevance. In the absence of any concrete material to attract the presumption postulated under the above two provisions contained in the Evidence Act, it is not possible for this Court to countenance the plea that the father of the deceased subscriber should be deemed to have died and it is only on that basis the second nomination in 1978, in favour of the petitioner was made. The respondent therefore cannot be found fault with for taking the stand that so long the earlier nomination was kept alive particularly in the absence of or without any proper modification of the same by filing Form No. VIII the nomination in favour of the petitioner cannot be legally accepted or countenanced and action taken to pay the amount lying to the credit of the deceased to the petitioner as claimed by him.

9. The next aspect that would require to be considered is as to what is the further course of action. The learned counsel for the petitioner would contend that in the light of the advice given by the respondent to secure a Succession Certificate, the petitioner genuinely moved this Court on the Original Side and that the matter has been returned with an endorsement that no action would lie at the instance of the petitioner to secure a Succession Certificate, he being not a designated legal heir. In my view, the objection, if any, taken to the maintainability of the application for Succession Certificate per se does not lead to the inevitable consequence of a recommendation of the claim by this Court in these proceedings under Art.226 of the Constitution of India. If the petitioner cannot and is not eligible to secure a Succession Certificate, it does not preclude the petitioner either to file a suit for recovery of the money or for getting appropriate declaration from the competent Civil Court as is permissible in law declaring his entitlement to the amount and whatever may be the course that has to be adopted lawfully to get the money from the account of the deceased K.Raman, the course adopted by moving this Court under Art.226 of the Constitution of India cannot be approved, in the light of the existing provisions of the Scheme, to which reference has already been made. So long as there is no proof before this Court to show that the father of the petitioner was no more, the claim cannot be countenanced on a due consideration in these

proceedings under Art.226 of the Constitution of India, since these proceedings will be more inappropriate to give any such declaration either on the issue of the deemed death of the father of the deceased K.Raman or on the consequential entitlement of the petitioner to the amount lying to the account of the deceased subscriber in the Scheme in question.

10. For all the reasons stated above, I see no reason to interfere in the matter by issuing a writ of *mandamus* as prayed for and the writ petition therefore fails and shall stand rejected. The rejection of the writ petition as well as the observations if any made are for the purpose of considering the validity of the nomination under Art.226 of the Constitution of India and shall not preclude in any manner the petitioner from vindicating his right in accordance with law and as and when any such move is made, the claim of the petitioner shall be considered by the appropriate forum or court influenced by any of the observations made in this order. The writ petition is rejected. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: A.R.Lakshmanan, J.

A.A.O.No.493 of 1992 19th November, 1992.

Ettiappa Mudaliar and another ...Appellants
v.

T.Subramanian ...Respondent.

(A) *Guardian and Wards Act (VIII of 1890), Secs.17 and 25 - Hindu Minority and Guardianship Act (XXXII of 1956), Sec.6 - Minor Child - Guardianship - Right of father.*

In the absence of any positive proof that the father has suffered any disqualification from being the guardian and custodian of the minor child, the father alone will be the fit and proper person to have the child's custody. [Para 15]

(B) *Guardian and Wards Act (VIII of 1890), Sec.17 - Hindu Minority and Guardianship Act (XXXII of*

1956), Sec.6 - Minor child - Father if can substitute another person to be guardian, during his life time - Father entrusting custody of minor child to another - If can desire return of child to his custody.

The father is the natural guardian of his child. He cannot therefore, during his life time substitute another person to be the guardian in his place. He may, in the exercise of his discretion as guardian, entrust the custody and education of the child to another, but the authority he thus confers is a revocable authority, and if the welfare of his child requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. Therefore, it can be safely held that the father can desire the return of the child to his custody even though he left the child for a few years in charge of his parents-in-law and it is not sufficient to deprive a father of the custody of his child simply because he left the child for a few years in charge of his parents-in-law and desire to return to his custody of the minor child.

[Para 11]

(C) *Pleadings - New case not raised in pleadings - If can be allowed.*

It is well settled that in the absence of any pleadings, the parties are not permitted to put forth any case other than those which have been raised in the pleadings.

[Para 12]

Cases referred to:

J.Velan v. G.Muthu, (1990) 2 M.L.J. 417. [Para 9]

Mary Vanitha v. Babu Royan, (1991) 2 M.L.J. 231. [Para 9]

Sorra Reddi v. Chenna Reddi, (1950) 1 M.L.J. 83: A.I.R. 1950 Mad. 306. [Para 10]

Appeal against the Order of the District Court, Chengalpattu, dated 9.1.1992 and made in G.W.O.P.No.156 of 1990.

R.Subramanian, for Appellants.

S.Balasubramanian for *A.V.Munuswamy*, *S.M.M.Hussain* and *D.Umakanth*, for Respondents.

The Court made the following

ORDER: The respondents before the lower court are the appellants herein. The present appeal has been directed against the judgment and decree dated 9.1.1992 in G.W.O.P.No.156 of 1990 on the file of the District Judge, Chengalpattu.

2. The respondent herein, who is the father of the minor Ramachandran alias Anandan now aged about 4 1/2 years, has filed the Guardian Wards O.P.No.156 of 1990 under Sec.25(1) of the Guardian and Wards Act, read with Sec.6(a) of the

Hindu Minority and Guardianship Act, 1956, to direct the respondents/appellants herein, who are the maternal grand parents of the minor, to hand over the custody of the minor to the respondent herein.

3. The short facts are, the respondent married the appellants' daughter Dhanalakshmi on 12.2.1987 at Villivakkam and that the marriage was solemnized according to Hindu rites and Custom. The respondent is employed in Tamil Nadu Civil Supply Corporation at Kancheepuram, which is his native place. They were living happily for two years after the marriage at Kancheepuram. The minor child was born on 7.2.1988 at Rakki Hospital, Ambattur. The respondent was then transferred to Ponnammallee and was living with his wife at the residence of the appellants at Ambattur. The respondent was again transferred to Chengalpattu. Hence, he has once again moved to Kancheepuram with his wife and the minor. On 3.4.1990, the respondent's wife got injured in the stove fire accident and was admitted to Kancheepuram Headquarters Hospital. In spite of best treatment given to her, the hospital authorities advised the respondent to take her to Kilpauk Medical College Hospital for further treatment and for plastic surgery. But, on 29.5.1990, she expired in the Kilpauk Medical College Hospital. The dead body was handed over to the respondent after post-mortem. The body was taken to Ambattur at the request of the appellants. The appellants, with the aid of police and under threat and coercion, forced the respondent to sign in a blank stamp paper. The appellants are very poor people and have no means of livelihood. The minor is of tender age and has to be admitted in a school and has to be given proper nourishment. The respondent is very much attached to the minor and he alone is the fit and proper person to maintain and have custody of the minor. The respondent is now working as a Helper in the Tamil Nadu Civil Supply Corporation and earning Rs.1,200 per month. He can properly bring up the minor. The appellants are not entitled to have the custody of the minor. The respondent issued notice to the appellants on 7.6.1990. He issued another notice on 14.7.1990 seeking custody of the minor child. The appellants, though received the notice, have not complied with the demand. Hence, the respondent has filed the above Guardian and wards O.P. for the relief mentioned above.

4. The appellants, as respondents, resisted the petition by filing a counter. Though several contentions have been raised in the counter, it is relevant if I refer to the contentions which are necessary. According to the appellants the respondent never cared to look to the child's wants. The minor child is in the custody of the appellants ever since its birth. It is false to state that they did not provide necessary food and medicine. The respondent cannot maintain the minor as he is living separately after he got divided from his father, step mother and step sister. The respondent himself has to look for someone else for his daily bread. The respondent is incapable of attending on the tender child. The welfare of the minor shall be the paramount consideration and no person shall be entitled to the guardianship by virtue of the provisions of the abovesaid Act or any law relating to guardianship if the Court is of opinion that the guardianship will not be for the welfare of the minor. There are not *bona fides* on the part of the respondent. It will not be in the interest of the minor child to appoint the respondent as the guardian of the minor.

5. The appellants filed an additional counter stating that the respondent had executed an agreement on 30.5.1990 agreeing to leave the minor child with the appellants as per the wishes of his wife. He had also agreed to pay Rs.300 per month for the maintenance of the child. Further, he had returned all the articles that were given to the respondent's wife as Sridhana and had also agreed to give his ancestral property to his minor son. The said agreement was executed by the respondent on his own accord. It was attested by his father Thanagavelu, his brothers Karunanidhi and Dayalan and by his uncle Arunachala Mudaliar and two others of Ambattur. As such, the minor was looked after by the appellants as per the best wishes of their deceased daughter Dhanalakshmi and as agreed by the respondent. If the minor child is entrusted with the respondent, it will be detrimental to the welfare of the minor child.

6. The learned District Judge, Chengalpattu, on a consideration of the entire facts and circumstances of the case, allowed the petition filed by the respondent herein and directed the appellants to hand over the custody of the minor child to the respondent within two months from the date of his order. However, the appellants were permitted, if they so desire, to take the minor child during

quarterly, half yearly and summer vacations and have his custody temporarily. Aggrieved against the judgment and decree of the court below, the respondents therein have filed this appeal.

7. In the appeal, the appellants have raised the following grounds:

- (i) The claim of the father/respondent is not *bona fide* when he himself has admitted about the second marriage in the witness box;
- (ii) The court below has not considered the welfare of the minor child.
- (iii) The court below ought to have held that the welfare of the child will be better if it is with the grand parents/appellants since the child was brought up by them from the date of death of the respondent's wife;
- (iv) The court below ought to have considered the agreement executed by the respondent wherein he undertook to provide maintenance as well as the ancestral properties to the minor child, which should be brought up by the appellants.
- (v) The court below ought to have found that the wife of the respondent died in suspicious circumstances and that the appellants did not pursue the matter since the respondent volunteered for certain conditions as stipulated in the agreement dated 30.5.1990;
- (vi) The court below ought to have found that the respondent has lost his right to claim the custody of the minor child in view of his conduct and treatment of his wife Dhanalakshmi, which resulted in her death.
- (vii) The court below ought to have found that the appellants have sufficient means and capacity to bring up the minor child.
- (viii) The court below ought to have examined the minor child to know about his likes and dislikes as well as the harassment caused to his deceased mother by the respondent.

8. I have heard Mr.R.Subramaniam, learned counsel for the appellants and Mr.S.Balasubramaniam, learned counsel for the respondent.

9. Mr.R.Subramaniam reiterated the grounds raised by him in the appeal at the time of argument. I have been taken through the entire pleadings filed by both parties and the order of the court below. I am unable to accept the contentions raised by the learned counsel for the appellants. I have also carefully gone through the order of the court below and I am of the view that the court below has

allowed the respondent's claim for custody of his minor child on a proper consideration of the entire facts and circumstances of the case and also following the decisions of our High Court reported in *J.Velan v. G.Muthu*, (1990)2 M.L.J. 417 and *Mary Vanitha v. Babu Royan*, (1991)2 M.L.J. 231. It is pertinent to notice here that the counsel for the appellants herein appeared for the respondents in O.P.No.30 of 1988 *J.Velan v. G.Muthu*, (1990)2 M.L.J. 417. Similar contentions raised by the learned counsel for the appellants herein have also been raised in the above case and the same was negatived by me on an elaborate consideration of the same. It is also further pertinent to notice that the appeal (O.S.A.) filed by the respondents therein was also dismissed by a Division Bench of this Court.

10. Let me now consider the contentions raised by Mr.R.Subramaniam, learned counsel for the appellants in this appeal. According to Mr.R.Subramaniam, the respondent is unfit to have the custody of the child since he has married for the second time, which has been admitted by him in the witness box. I am unable to accept this contention in view of the decision of our High Court reported in *Sorra Reddi v. Chenna Reddi*, (1950)1 M.L.J. 83: A.I.R. 1950 Mad. 306, wherein Govinda Menon and Basheer Ahmed Sayeed, JJ., have clearly laid down that the father ought to be the guardian of the person and property of the minor under ordinary circumstances and the fact that a Hindu father has married a second wife is no ground whatever of depriving him of his parental right of custody. In the said case, it was argued that the minor might have developed love and attachment to the other relations with whom was, and this argument was negatived. In the instant case, the very same argument was advanced by the learned counsel for the appellants that the minor has developed love and attachment with the grandparents/appellants with whom he was. Applying the said ratio in the abovesaid decision, I have no hesitation to negative the said contention.

11. Mr.R.Subramaniam next argued that the welfare of the child will be better with the appellants since the minor was brought up by them from the date of death of the respondent's wife. Here again, I am unable to accept the said contention. The father is the natural guardian of his child. He cannot, therefore, during his life time substitute another person to be the guardian in his place. He

may, in the exercise of his discretion as guardian, entrust the custody and education of the child to another, but the authority he thus confers is a revocable authority, and if the welfare of his child requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. Therefore, it can be safely held that the father can desire the return of the child to his custody even though he left the child for a few years in charge of his parents-in-law and it is not sufficient to deprive a father of the custody of his child simply because he left the child for a few years in charge of the appellants and desire to return to his custody of the minor child. Therefore, I reject the contention of the learned counsel for the appellants that the welfare of the child will be better only if it is with the appellants since the child was brought up by them from the date of death of the respondent's wife.

12. Mr.R.Subramaniam then contended that the court below ought to have examined the child to know about its likes and dislikes as well as the harassment caused to its deceased mother by the respondent. This contention is wholly unacceptable and misconceived. Admittedly, the child is of tender age and on the date when the petition was filed, it was only 2 1/2 years old and now it is 4 1/2 years old. No child of tender age will be in a position to express any opinion in regard to its likes and dislikes as well as the harassment said to have been caused to its deceased mother by the father. In this connection, I have also carefully considered the counter-affidavit filed by the appellants, which is very silent on this aspect. Nothing is stated in the counter-affidavit with regard to the harassment said to have been caused by the respondent. It is well settled that in the absence of any pleadings, the parties are not permitted to put forth any case other than those which have been raised in the pleadings. Nothing has been said in the counter-affidavit that the respondent has ill-treated his wife Dhanalakshmi or that the respondent was responsible for the death of his wife. Hence, this contention has no merits.

13. Mr.R.Subramaniam next urged that the appellants have got sufficient means and capacity to bring up the child. I am unable to accept this contention as well. The respondent is employed in the Tamil Nadu Civil Supply Corporation and is earning Rs.1,200 per month. Being the natural

guardian having love and affection with the minor, besides sufficient monetary sources to bring up the minor child, the custody of the minor was ordered in his favour by the court below. The appellants are not financially sound to bring up the minor. There is nothing to show or seen from the counter-affidavit that the appellants are under affluent circumstances. A specific averment has been raised by the respondent in paragraph 5 of his petition that the appellants are very poor and have no means of livelihood and that the respondent alone is fit to have the custody of the minor child and to maintain it. Nowhere in the counter-affidavit it is stated that the appellants are in affluent circumstances and they have sufficient means to bring up the child. The additional counter-affidavit is also very silent on this aspect. On the other hand, respondent has clearly stated in his petition that he is working as a Helper in the Tamil Nadu Civil Supply Corporation and is earning Rs.1,200 per month and he can properly bring up the child and that he being the father, as the natural guardian has no adverse interest and that the interest and welfare of the child will be protected by him as the natural guardian.

14. Next, Mr.R.Subramaniam contended that the court below ought to have considered the agreement executed by the respondent on 30.5.1990 wherein he undertook to provide maintenance as well as the ancestral properties to the minor child, which should be brought up by the appellants, and in the circumstance, the court below ought to have held that the respondent is estopped from claiming custody of the minor child. There is nothing to show that this point has been argued before the learned District Judge. Hence, I am of the view, the appellants are not entitled to raise this point in this Court when the same has not been argued in the court below. Even otherwise, I am of the view, the said point now argued for the first time is not germane to the point involved in this appeal. Further, this is not forum to decide such a dispute.

15. Lastly, it was argued by the learned counsel for the appellants, that the welfare of the minor will be better with the appellants. I am unable to accept the said contention as well. There is absolutely no circumstance which warrants deprivation of parental rights of the father. It is not proved by the appellants that the father does

suffer from any circumstance which would deprive his parental right. The mere fact that the appellants, being grand parents, are much attached to the minor is not at all a ground to negative the claim of the father, the natural guardian. In any event, such custody cannot have any preference to the legitimate right of the natural father. It is also not proved in this case that the respondent has shown any lack of interest in the minor. If that is so, that will be a circumstance, which will have a bearing on the question of interest and welfare of the minor. In the absence of proof in that context, in my opinion, the custody of the minor cannot be denied to the father. The interest of the infant will be saved if the infant is in the custody of natural father, lest the child will forget the face of the father for ever. There are no indications in this case which are likely to unfit the respondent to bring up the small boy. The respondent seems to be anxious to have his own child with him in order to properly look after the child and also to provide further education. The feelings between the parties being what they are, I think it is also natural for the father to feel that if the minor child continues to live with its maternal grand parents, it may be brought up to date the father or to have adverse inference against him at a later stage. This, in my opinion, is not desirable. In the absence of any positive proof that the father has suffered any disqualification from being the guardian and custodian of the minor child, the father alone will be the fit and proper person to have the child's custody. Thus, on a consideration of the entire facts and circumstances of the case and also the law on the subject, I am of the clear view, that the respondent/father alone is the fit and proper person to have the custody of his child. I am also of the view that the welfare of the child will be amply protected only if the child is allowed to be in the custody of its father atleast from now. No other points were argued by both side.

16. For all the fore-going reasons, I confirm the order of the court below and dismiss the appeal. However, there will be no order as to costs. I make it clear that the appellants being the grand parents are entitled to have the custody of the minor child on festive occasions and also during school holidays as directed by the court below. The parties will sink their differences and will have a good relationship at least hereafter in the interest of the minor child. Time for delivery one week

from today.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *M. Srinivasan, J.*

W.P.No.12954 of 1992.

27th August, 1992.

Jeeva Transport Corporation Ltd. ...Petitioner
v.

The Industrial Tribunal, Madras and another
...Respondents.

Industrial Disputes Act (XIV of 1947), Sec.33(2)(b) - Application for approval of dismissal of worker - Findings recorded at domestic enquiry, if can be referred by Industrial Tribunal.

Held: The tribunal has found, after discussing the evidence on record that the evidence is totally insufficient to hold that the charges are proved. Thus, the tribunal has considered the evidence on record and come to the conclusion that the findings recorded by the domestic enquiry officer are perverse. That, the tribunal is entitled to do.

[Para 5]

Case referred to:

Bharat Iron Works v. Bhagubhai, A.I.R. 1976 S.C. 98. [Para 6]

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in Petition No.83 of 1990 in Ind.No.62 of 1982, dated 31.1.1992 and quash the same.

Mrs. Bhagirathi Narayanan, for Petitioner.

The Court made the following

ORDER: The petitioner filed an application under Sec.33(2)(b) of the Industrial Disputes Act for approval of the order of dismissal passed by the petitioner against the second respondent herein, who is a driver for act of misconduct. According to the petitioner, the second respondent drove the

bus in a rash and negligent manner and caused an accident whereby two persons were killed and one person was seriously injured. According to the second respondent, the accident took place not an account of any negligence on his part but when he was driving the bus along the left side of the road a buffalo crossed the road all on a sudden and he applied the brakes in order to avert dashing against it. At that time, a motor-cyclist and a scooterist, who were coming in the opposite direction were riding their vehicles rashly and negligently and when the buffalo hit against the motor cyclist, he fell down and he was caught under the bus. The buffalo's horn was broken and fell on the road. It is also the case of the driver that the negligence was only on the part of the motor cyclist and scooterist and he had been driving the vehicle carefully in accordance with the road rules.

2. In the domestic enquiry held by the petitioner, the only witness examined by the management was an Engineer by name Ganesan to whom the conductor of the bus was said to have given a report as soon as the accident took place on 15.10.1989. It is stated by the said Engineer that when he got the report of accident, he went to the spot and saw the tyre marks the road and according to him, the driver would have turned the bus to the right and he would not have applied the brakes as stated by him. According to the engineer's evidence, the bus was stopped on the right side of the road and the dead bodies were lying there near the bus. No other person who could have given evidence about the accident was examined.

3. The conductor of the bus was not examined as a witness. He was a person present at the spot of the accident and he could have given direct evidence as to how an accident happened. Apart from the conductor, there was another person who had witnessed the accident as is evident from the first information report given to the police. One Vijayagopal son of Viswanatha Konar claimed to have come driving a TVS 50 and he was going from west to east at some distance behind the scooter and the motor cycle and witnessed the accident. He gave information to the police even before the petitioner's people went there. He could have been examined as a witness. Instead of doing so, the management relied only on the evidence of the Engineer, who was not an eye witness. The Engineer was only drawing inferences from the tyre marks on the road and other physical features.

4. It is contended vehemently that the fact that the bus stopped on the right side of the road and the Engineer was not cross-examined by the driver as regards the van coming from the opposite direction will show that a *prima facie* case has been made out against the driver. According to learned counsel it is sufficient for an applicant under Sec.33(2)(b) of the Act to make out a *prima facie* case for passing of an order of dismissal. According to her, in this case the evidence on record is more than ample to justify the same.

5. The tribunal has found, after discussing the evidence on record, that the evidence is totally insufficient to hold that the charges are proved. Thus, the tribunal has considered the evidence on record and come to the conclusion that the findings recorded by the domestic enquiry officer are perverse. That, the tribunal is entitled to do.

6. Reliance is placed on the judgment in *Bharat Iron Works v. Bhagubhai*, A.I.R. 1976 S.C. 98. The Supreme Court held that there is no defect in procedure in a domestic enquiry against an employee, the tribunal, while granting or withholding permission under Sec.33 does not sit as a court of appeal, weighing or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is, in order to find out either whether there is a *prima facie* case or if the findings are perverse. Thus, the Supreme Court has held that the tribunal is entitled to consider whether the finding of the domestic enquiry officer is perverse or not. The judgment really does not in any way support the petitioner herein. In this case, the tribunal has further taken into account all the relevant facts and come to the conclusion that the finding of the domestic enquiry officer is perverse.

7. The order of the tribunal does not suffer from any error apparent on the face of the record and does not warrant interference under Art.226 of the Constitution of India.

8. The writ petition is dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Bellie, J.

A.S.No.452 of 1982

4th September, 1992.

Indirani Ammal

... Appellant

v.

E.Chandra and another ... Respondents.

(A) *Transfer of Property Act (IV of 1882), Sec.35 - Scope of - "Same transaction" - Transactions if should be under one document only.*

Sec.35 of the Transfer of Property Act contemplates 'same transaction' and not 'same instrument'. To be the same transactions, the transaction need not necessarily be under one document only. [Paras 14 & 17]

(B) *Evidence Act (I of 1872), Secs.107 and 108 - Effect of - Burden of proof that a person is alive - When shifted to person affirming it.*

A combined effect of Secs.107 and 108 of the Evidence Act would show that it is only upon proof that a person concerned has not been heard of for seven years by those who would have naturally heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive [Para 19]

(C) *Words and phrases - (அருமைப் பரிசுவரை) - Meaning - Whether refers to wife or concubine.*

Cases referred to:

Ramayya v. Mahalakshmi, A.I.R. 1922 Mad. 357. [Para 16]

Makineni Virayya v. Mad.Amarchi Bapayya, (1945)2 M.L.J. 208; A.I.R. 1945 Mad. 492. [Para 17]

Mohan v. Santha Bai Ammal, (1989)2 L.W. 197. [Para 22]

N.Varadarajan, for Appellant.

R.Srinivasan and A.L.Somayaji, for Respondents.

The Court delivered the following

JUDGMENT: The plaintiff Indirani Ammal, who has filed a suit for partition, since she is not satisfied with the decree passed partially has filed this appeal.

2. The plaintiff filed the suit alleging as follows: The plaintiff is the daughter of one Thayarammal by her husband Ezhumalai. About 25 years ago Thayarammal left her husband and came to live with one P.V.Gopalan Nair as his mistress. The plaintiff was brought up by them and she was living with them till her marriage. First defendant was born to Thayarammal and Gopalan Nair. Plaintiff

Schedule item 1 house property was owned by the plaintiff's mother Thayarammal and Gopalan Nair which has been purchased by them under Ex.A-1 Sale Deed, dated 19.4.1974. The plaintiff item 2 land measuring 1.09 acres was owned and possessed by Thayarammal and first defendant which has been purchased by them under Ex.A-2 Registered Sale Deed dated 27.1.1972. Thayarammal was thus entitled to a moiety in each of the said properties. Thayarammal pre-deceased Gopalan Nair on 10.10.1975. She left behind the plaintiff and the first defendant as her heirs. Gopalan Nair was not married to Thayarammal and she was only her paramour. He also died on 1.8.1978. Both the plaintiff and the first defendant as the heirs of Thayarammal inherited her right to moiety in both the properties. The plaintiff became entitled to 1/4th share in the said properties and the first defendant became entitled to 1/4th share in the first item and 3/4th share in second item. Thayarammal had left a fixed deposit amount of Rs.10,000, viz., The third item in the plaintiff schedule with the second defendant Bank. The plaintiff became entitled to a moiety in this deposit amount also. While so the plaintiff learnt that Gopalan Nair had executed a settlement deed in favour of the first defendant on 24.10.1975 purporting to settle the entire first item house. Since Gopalan Nair was entitled to only a moiety in the said property he was not competent to execute a settlement deed in respect of the other moiety which was owned and possessed by Thayarammal. The settlement deed is void in so far as the plaintiff's 1/4th share is concerned. Since it is no longer possible to be a co-owner with the first defendant the plaintiff had to file a suit for partition of her shares in the three items of properties. She has also prayed for mesne profits in respect of the first item of properties for the past three years.

3. The first defendant resisting the suit contended in her written statement that her father Gopalan Nair got Rs.10,00,000 in a lottery and with that amount he purchased the suit item 1 in the name of himself and Thayarammal. The purchase in the name of Thayarammal also will not confer any beneficial interest on her and Gopalan Nair had absolute right to settle this property. Gopalan Nair settled this property upon this defendant who is his daughter out of love and affection. Just three days after the settlement on this defendant, due to the persuasion of herself and her husband

Gopalan Nair settled another house property at No.4/1, Eswaran Koil Street, Gowripet, Avadi, Madras, worth about Rs.75,000 on 27.10.1975 in favour of the plaintiff. In view of the fact that the plaintiff was brought up by Gopalan Nair as a sort of family arrangement he settled on her substantial property. For the third item fixed deposit amount also Gopalan Nair did not intend to confer any right on Thayarammal and this defendant was made nominee for that amount and only she is entitled to this amount and the plaintiff cannot have any claim in it. This defendant is not liable to pay any mesne profits to the plaintiff.

4. The second defendant Bank filed a written statement only stating that with regard to third item deposit of Rs.10,000 it would abide by the orders of the court.

5. The trial court on consideration of the evidence adduced in the case held that in all the three items Thayarammal had beneficial interest and it rejected the case of the first defendant that Gopalan Nair alone had right in them. It further held that subsequent to the settlement deed dated 24.10.1975 in favour of the first defendant in respect of the first item of suit property, Gopalan Nair has executed another settlement deed Ex.B-1, dated 28.10.1975 in respect of another house in favour of the plaintiff and the plaintiff has elected to be satisfied with that settlement deed in her favour and not to claim any share in the suit schedule first item and therefore the settlement deed Ex.A-5 is valid and binding on the plaintiff. It also held that it must be presumed that Gopalan Nair was married Thayarammal. On these findings the trial Court held that the plaintiff is not entitled to any share in the first item property but she is entitled to 1/6th share in the second item and 1/3rd share in the third item.

6. The two questions that arise for consideration in this appeal are:

- i. Whether the finding of the trial Court that the settlement deed Ex.A-5 is valid is not correct?
- ii. Whether the first finding of the trial Court that Gopalan Nair was the husband of Thayarammal also is not correct?

7. The facts not disputed are, the plaintiff was born to Thayarammal through her father Ezhumalai and when she was an infant (3 years) Thayarammal left Ezhumalai with the plaintiff came to Gopalan Nair and lived with him as a wife. There

is no evidence as to whether Ezhumalai was heard thereafter excepting that of the plaintiff as P.W.1 that she had seen Ezhumalai in her 10th year. It is not in dispute that Gopalan Nair in a lottery got a sum of Rs.10,00,000 and with that sum he purchased properties both in his name and in the name of Thayarammal and in the joint names of both of them.

8. The first item of suit schedule is a house property purchased in the name of Thayarammal and Gopalan Nair under Ex.A-1 dated 19.4.1972. Another property has been purchased in the name of Gopalan Nair alone under two sale deeds dated 7.12.1969 and 31.5.1971. Gopalan Nair has executed a settlement deed on 24.10.1975 in respect of item I i.e. the property purchased under Ex.A-1 in favour of the first defendant under Ex.A-5 and he executed another settlement deed Ex.B-1 on 28.10.1975, in respect of the other house property, i.e. the property purchased under two sale deeds dated 7.12.1969 and 31.5.1979 in favour of the plaintiff.

9. It is in evidence that Thayarammal died on 10.10.1975. Therefore, it is seen that the abovesaid settlement deeds have been executed soon after her death. Quite possibly Gopalan Nair wanted to make sure that both the first defendant-his own daughter and also the plaintiff who had been brought up by him as his own daughter had separate houses independently free from any dispute or trouble and therefore he executed Ex.B-1 settlement deed in favour of the plaintiff in respect of the house purchased in his name, in favour of the first defendant and Ex.A-5 settlement deed in favour of the first defendant in respect of the house purchased in his name and in the name of Thayarammal.

10. According to the first defendant, under a family arrangement Gopalan Nair executed those two settlement deeds. While Ex.A-5 has been executed on 24.10.1975 in favour of the first defendant Ex.B-1 has been executed just three days after, i.e. on 28.10.1975. It is the evidence of the plaintiff that she has not raised any objection with regard to the settlement Ex.A-5 until the time of the death of Gopalan Nair. It is her further evidence that after the settlement deeds for six months Gopalan Nair was with the first defendant in the Annamalaipuram house which has been settled on the first defendant thereafter for six months he was living with the plaintiff in Avadi house (which

has been settled on the plaintiff); and then he went to Kerala and there he died. It may be recalled that both the houses have been purchased by Gopalan Nair only with his own funds. These facts probabilise that it was under some family arrangements as contended by the first defendant these two settlement deeds were executed.

11. Besides the defendant as D.W.1. D.Ws.2 Batcha Mohideen and D.W.1 Gabriel also have given evidence that under an arrangement arrived at in the family in which the plaintiff as well as her husband also participated Gopalan Nair executed, the two settlement deeds. D.W.2 is the attestor and D.W.3 is the writer of both the settlement deeds. The plaintiff (P.W.1) has admitted in her evidence that it is only under Ex.B-1 she is in enjoyment of the Avadi house.

12. The trial Court seems to think that there is no sufficient evidence to show that there was family arrangement but however it took the view that the evidence and the circumstances show that the plaintiff elected to be satisfied with the Avadi house settled in her favour and not to claim any right in the other Annamalaipuram house. It appears the trial Court did not believe the evidence regarding the alleged family arrangement mainly for the reasons that D.Ws.1 to 3 have stated that the plaintiff executed a release deed, but no such release deed has been filed. But I do not think that for that reason alone the evidence of D.Ws. can be rejected. There may be some discrepancies in their evidence. But I do not see any material discrepancy that affects the voracity of their evidence. In my view, the circumstances in the case are tell-tale that it was only under some agreed family arrangement the settlement deeds were executed and the plaintiff took possession of the Avadi house.

13. It is argued by Mr.N.Varadarajan, learned counsel for the appellant-plaintiff that no mention whatsoever has been made either in Ex.B-1 on in A-5 about any family arrangement or that the plaintiff elected to have the Avadi house. That may be so. But in the circumstances Gopalan Nair might have thought that such averments, especially when it is he who purchased both the houses and he is giving them are not necessary in the documents.

14. It is then contended that only in the case of same transaction the question of election under Sec.35 of the Transfer of Property Act arises, but in this case there are two transactions one under

Ex.A-5 and another under Ex.B-1. But to be the same transaction the transaction need not necessarily be under one document only. As pointed out above whereas Ex.A-5 has been executed on 24.10.1975. Ex.B-1 has been executed just three days after, i.e., on 28.10.1975. Gopalan Nair has died on 1.8.1975, i.e., more than 2 1/2 years after the settlement deeds and as pointed out above, the plaintiff when he was alive, did not raise any objection whatsoever regarding Ex.A-5.

15. Mr.Varadarajan, would further submit that whereas the value of the Avadi property as seen from the value stated in Ex.B-1 is only Rs.40,000 the value of the Annamalaipuram property as seen from the value stated in Ex.A-5 is Rs.1,25,000 and this shows that the plaintiff would not have elected as contended. But here it is to be again recalled that both the properties were purchased by Gopalan Nair, but for the settlement deed Ex.B-1 will not have any right in the Avadi property and in the Annamalaipuram property she would have had a share only in respect of the share of her mother Thayarammal in which share the first defendant will also be entitled to a share. From all these it appears to me very clear that both Exs.A-5 and B-1 has been executed as parts of the same transaction and the plaintiff had elected to be satisfied with the Avadi house property.

16. Mr.Varadarajan on a decision in *Ramayya and another v. Mahalakshmi*, A.I.R. 1922 Mad. 357, wherein it has been held that:

"Although the doctrine of election provides that a man is not at liberty to take under a Deed or Will and at the same time to dispute the operation of that Deed or Will in other respects, yet a person who accepts the benefit under a Will is not precluded from disputing some transaction in which the testator was engaged long before his death and which is not the subject of the Will at all".

It is apparent even from the passage quoted above that the facts in that case are entirely different from the facts in our case. Therein the dispute was in respect of a transaction long before the testator's death and therefore it was held that no election under the Will can be pleaded. Hence this judgment is of no help to the plaintiff.

17. Mr.Varadarajan cited another decision also in *Makineni Virayya v. Mad.Amianchi Bapayya*, (1945)2 M.L.J. 208: A.I.R. 1945 Mad. 492, wherein too the facts are entirely different from the facts in the

present case. This is clear from the following passage in the judgment:

"On the facts of this case, there can be no question of election in the strict sense of the doctrine, for at the time when the plaintiff is supposed to have made his election he could not have given up the property which he now claims as he became entitled to it only long after".

Mr. Varadarajan however further submits that this judgment would also show that the person who is said to have elected must have got the benefit under the same instrument and in this connection he points out a sentence in the judgment which reads:

"And moreover, for the purpose of this doctrine the person sought to be precluded from setting up his right must have taken some benefit directly under the instrument".

But this has been said in the circumstances of that case where there was only one instrument. The judgment does not say that there can be one instrument only. Sec.35 of the Transfer of Property Act contemplates "same transaction" and not "same instrument". In Mulla's Transfer of Property Act, Seventh Edition, at page 159 under the heading 'same transaction' it is stated that 'election may arise when the two donations are conferred by two different instruments, if the two instruments are used to carry out one transaction'. In consideration of the said facts and circumstances in the case I am satisfied that the lower court has correctly held that the plaintiff has elected to be satisfied with the execution of the settlement deed Ex.B-1 in her favour in respect of the Avadi house and not to claim any right in the Annamalaiapuram property settled under Ex.A-5 in favour of the first defendant.

18. Coming to the question as to whether Thayarammal was the wife of Gopalan Nair as held by the Court below, Mr. Varadarajan would contend that it is nobody's case that Ezhumalai-father of the plaintiff died and unless the husband is dead a wife cannot marry a second time and therefore it cannot be believed that Thayarammal had married Gopalan Nair. There is no doubt that there is considerable force in this argument of the learned counsel.

19. It is contended on behalf of the first defendant that under Sec.108 of the Evidence Act if a person is not heard of for seven years he must be

presumed to have died and since Ezhumalai had not been heard of for the last 20 years he must be presumed to have died. As per Sec.107 of the Evidence Act "when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it". Then Sec.108 states that "provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it". A combined reading of these two sections would show that it is only upon proof that a person concerned has not been heard of for seven years by those who would have naturally heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it that he is alive.

20. Mr. Varadarajan would rightly point out that there is no evidence whatever to show that for seven years Ezhumalai was not heard of by those who would naturally have heard of him if he had been alive. The plaintiff (P.W.1) alone has just stated that she has seen her father Ezhumalai when she was 10 years only

(என் அப்பா ஏழுமலையை நான் 10 வயதில் பார்த்திருக்கிறேன்)

From this alone it cannot be stated that it has been proved that Ezhumalai has not been heard of for seven years by those who would have naturally heard of him if he had been alive. It follows therefore that there is no burden on the first defendant to show that he is alive. In these circumstances, it cannot be held that it can be presumed that Ezhumalai was not heard of Gopalan Nair married Thayarammal. In those circumstances, it is difficult to believe that Gopalan Nair married Thayarammal.

21. No one has spoken to any such marriage. The only argument is that it is even admitted by the plaintiff herself that Gopalan Nair and Thayarammal had been living as husband and wife throughout and from this it could be presumed that there was marriage. That would arise only in case if Ezhumalai had died. May be in the reply notice sent by the first defendant's counsel to the plaintiff's counsel it is stated that Thayarammal became the wife of Gopalan Nair in or about 1952. But this version by the first defendant herself will

not help her to establish that there was any marriage between Gopalan Nair and Thayarammal. In Ex.A-1 sale deed dated 19.4.1972 executed by one Saroja Somayaji in favour of Gopalan Nair and Thayarammal it is mentioned that Thayarammal is the wife of Gopalan Nair. May be thinking that Thayarammal is the wife of Gopalan Nair, the vendor mentioned so in the document.

22. But in the sale deeds Ex.A-2 dated 27.1.1972 and Ex.A-3 sale deed dated 10.2.1976 by Gopalan Nair Thayarammal has been referred to as Gopalan Nair's 'Abhimana Bariyal' (அபிமான பரியல்). As regards this word 'Abhimana Bariyal' whereas it is contended on behalf of the plaintiff that it refers to concubine it is contended by the first defendants that it refers to wife. In this connection, Mr. Varadarajan, learned counsel appearing for the appellant-plaintiff cited a Division Bench decision of this Court in *Mohan and another v. Santha Bai Ammal and others*, (1989)2 L.W. 197, wherein it is categorically ruled that the word 'Abhimana Manaivi' does not refer to a wife and it means only the 'wife of affection'.

A reference in Winslow's 'A comprehensive Tamil and English Dictionary' at page 27 would show that the meaning of 'Abhimana Bariyal' which means 'Abhimana Manaivi' would only mean someone other than the real wife and that could be concubine. If a wife is to be referred to only as wife (Manaivi) and there is absolutely no necessity to refer to her as 'abhimana manaivi' or 'abhimana bariyal'. This itself would show that an 'abhimana bariyal' is not a wife. It is therefore clear that it cannot be held that Thayarammal was the wife of Gopalan Nair as the trial Court did.

23. Now in as much as Thayarammal was not the wife of Gopalan Nair as held above, the plaintiff will be entitled to 1/4th share in the second item and half share in the third item.

24. In the result, the appeal is partly allowed, the judgment and decree of the court below are confirmed as regards the first item property is concerned and it is modified as regards items 2 and 3 i.e. the plaintiff will be entitled to 1/4th share in the second item and 1/2 share in the third item and not 1/6th share in the item 2 and 1/3rd share in item 3 as held by the trial court. The appeal is thus disposed of. There will be no order as to costs.

B.S. --- Appeal partly allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: M.Srinivasan, J.

W.P.No.10579 of 1992.

17th August, 1992.

Tvl.Pandiyam Roadways Corporation Ltd., Madurai ...Petitioner
v.

Tvl.Flower Transports (P) Ltd., Rajapalayam and others ...Respondents.

(A) Motor Vehicles Act (LIX of 1988), Sec.71(1) - State Transport Appellate Tribunal granting 'permit to ply' buses between two points not falling within approved scheme - Petitioner, State Transport undertaking objecting to the grant of such permit - Filing writ petition under Art.226 of the Constitution of India - Maintainability - Constitution of India (1950), Art.226.

(B) Motor Vehicles Act (LIX of 1988), Sec.80(3) - Whether contains a special rule for stage carriage permits - Application for inclusion of a new route or alteration of a route whether will not lie in the case of a stage carriage permit.

(C) Tamil Nadu Motor Vehicles Rules (1940), Rule 3(e) - Aggregate distance of town service or city service route - Permit containing two routes - Distance whether to be computed with reference to each route.

Held:- The order made by the tribunal granting variation of permit does not in any manner affect any right of the petitioner (a State Transport Undertaking) herein. The route does not fall within the approved scheme. The petitioner has no grievance as such against the order. In this case, the tribunal has found that the grant of the application made by the first respondent will be most beneficial to the travelling public and no inconvenience will be caused to them in any manner. Hence, it must be held that the petitioner is not a person aggrieved and it is not entitled to maintain a writ against the order of the tribunal.

[Paras 5 and 12]

The language of sub-sec.(3) of Sec.80 is significant. It can be analysed as follows:- An application to vary the conditions can be made (1) by inclusion of a new route or routes or a new area of (2) by altering the route or routes or areas covered by it or (3) by increasing the number of trips above the

specified maximum or (4) by variation, extension or curtailment of the route or routes or the area specified. As regards the four alternatives set out above all of them will apply to a stage carriage permit. Alternatives 1 and 2 will have application to permits other than stage carriage permit. No doubt, the fourth alternative may apply to some extent to contract carriage permit; but generally such permits are issued for a Stage or throughout the country. The Parliament has deliberately used the expression 'or' or a conjunctive and not as a disjunctive. Hence, there is no scope for contending that the sub-section contains a special rule for stage carriage permits and a general rule for all the permits with the result the special will prevail over the general. Even assuming that the provision for a stage carriage permit is a special rule, unless there is a repugnancy between the general rule and the special rule, there is no question of the special overruling the general. If both can stand together, then the rule that 'special rule excludes general' cannot be invoked. In view of the views expressed by Ramamurthy, J. in *Natesa Mudaliar v. Thanapal Bus Service*, A.I.R. 1964 Mad. 136, by Veerasami, J. in *Swamy Motor Transport (P) Ltd. v. Raman and Raman (P) Ltd.*, (1965)1 M.L.J. 594, and the decision in *Narayana Reddy v. Secretary Regional Transport Authority, Cudappah and another*, (1960)2 An.W.R. 91, it must be held that the first part of the section will also apply to all permits including stage carriage permit and the only exclusion is a temporary permit. There is no warrant for applying the maxim *generalis specialibus non derogant*.

[Paras 16 and 24]

Rule 3(e) of the Tamil Nadu Motor Vehicles Rules refers only to the aggregate distance of a town service or city service route. If a permit covers two routes, each of them shall not exceed 30 kms. There can be no dispute that a permit can cover more than one route. Sec.70(1)(a) and Sec.72(2)(i) of the Act use the expression 'route or routes'. Hence, aggregate distance referred to the Rule 3(e) must be computed with reference to each route. Moreover, in this case another permit has been issued to the 1st respondent to run a town service between Srivilliputhur and Sivakasi. Rule 3(e) does not refer to the aggregate of the distance covered by two permits and hence there is no violation of the rule in this case.

[Para 28]

Cases referred to:

Mithilesh Garg v. Union of India, A.I.R. 1992 S.C.

443. [Paras 3, 7]

The Nagar Rice and Flour Mills v. Teekappa Gowda & Bros. and others, A.I.R. 1971 S.C. 246: (1970)2 S.C.J. 473. [Para 6]

Nasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, A.I.R. 1976 S.C. 578. [Para 6]

M.L. Krishnamurthi v. The District Revenue Officer, Vellore, (1989)2 L.W. 442. [Para 7]

Surendra Rao v. Regional Transport Authority, Gorakpur, A.I.R. 1992 All. 211. [Para 8]

Quilon District Private Bus Operators' Association v. State Transport Appellate Tribunal, Ernakulam, A.I.R. 1992 Ker. 267. [Para 8]

S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149. [Paras 9, 10]

Shri Sachidanand Pandey v. The State of West Bengal, A.I.R. 1987 S.C. 1109. [Para 10]

Bangalore Medical Trust v. B.S. Muddappa, A.I.R. 1991 S.C. 1902. [Para 11]

Akhil Bhartiya Soshit Karmachari Sangh v. Union of India, A.I.R. 1981 S.C. 298. [Para 11]

Fertilizer Corporation Kamgar Union v. Union of India, A.I.R. 1981 S.C. 344. [Para 11]

Pretty v. Solly, (1859-53 E.R. 1032). [Para 14]

J.K. Cotton Spinning and Weaving Mills Company Ltd. v. State of U.P., A.I.R. 1961 S.C. 1170. [Para 15]

De Winton v. Brecon, (1858)28 L.J.Ch. 598. [Para 15]

Churchill v. Crease, (1889)135 U.S. 255. [Para 15]

Carroll v. Greenwich Insurance Company, (1905) 199 U.S. 401. [Para 15]

Natesa Mudaliar v. Thanapal Bus Service, A.I.R. 1964 Mad. 136. [Para 19]

Swamy Motor Transport (P) Ltd. v. Raman and Raman (P) Ltd., (1965)1 M.L.J. 594. [Para 22]

Narayana Reddy v. Secretary Regional Transport Authority, Cuddappah, (1960)2 An.W.R. 91. [Para 23]

M/s. Shiv Chand Amolak Chand v. The Regional Transport Authority, A.I.R. 1984 S.C. 9: (1983)4 S.C.C. 433: 1984 Lab.L.J. 1: (1984)1 Comp.L.J. 214. [Para 26]

M. Duraiswami v. Sri Murugan Bus Service, A.I.R. 1986 S.C. 1980: (1986)2 S.C.J. 56. [Para 26]

M. Palani, for Petitioner.

V.T. Gopalan, for Respondent No.1.

V.R. Rajasekaran, for Respondent No.2.

The Court made the following

ORDER: The petitioner is a State Transport Undertaking operating number of stage carriage

services in the entire Madurai District and also on the adjoining inter-district and inter-State routes. The first respondent is a stage carriage operator, operating on the Srivilliputhur Town Service route between Srivilliputhur and Puthur (via.) Rajapalayam, Seithur, Muhavoor and Dhalavoipuram. It made an application for variation of permit conditions involving

- 1) conversion of the route from town service into mofussil service;
- 2) extension of route from Srivilliputhur to Sivakasi by means of 12 singles; and
- 3) reduction of:
 - (a) 10 singles from Rajapalayam to Dhalavoipuram; and
 - (b) 6 singles from Dhalavoipuram to Puthur.

The Regional Transport Authority/second respondent rejected the application holding that the advantage of the proposal is outweighed by greater disadvantages and that the application is not in public interest. An appeal was preferred by the first respondent to the tribunal/third respondent. 2. When the appeal was taken up for consideration, counsel for the first respondent made the following endorsement:

"This appellant is not pressing for conversion of town service into mofussil service and prays that the new sector sought for, i.e., Srivilliputhur to Sivakasi may be granted as a town service and by way of an independent route in the existing permit instead of by way of extension as this course will obviate the objection of the Corporation that if converted into a mofussil route, the approved scheme Madurai to Shencottah published on 28.5.1975 will be a bar."

Obviously, the endorsement was made in order to avert the objection raised by the petitioner herein to the grant of conversion, as the route, if converted, would fall within an approved scheme. Even after the aforesaid endorsement was made modifying the prayer, the petitioner put forward several objections to the grant of the application of the petitioner. An objection was raised by the first respondent that the petitioner had no *locus standi* to raise any objection to the application of the first respondent and the only purpose for which notice was issued to the petitioner was to get the details of approved schemes. The tribunal overruled the said contention of the first respondent and considered the objections raised by the

petitioner herein. However, the tribunal rejected the objections of the petitioner on merits and allowed the appeal filed by the first respondent, on the following terms:

"The appellant is permitted to ply nine singles between Puthur and Srivilliputhur instead of eight singles, and eight independent singles is granted between Srivilliputhur and Sivakasi. The permit holder is allowed to do one additional singles from Puthur to Rajapalayam in order to maintain the present night halt. Curtailment of two singles between Puthur and Rajapalayam, curtailment of three singles from Dhalavoipuram to Srivilliputhur and curtailment of one single from Dhalavoipuram to Rajapalayam are allowed. The lower authority is directed to issue another permit to the bus of the appellant to do eight independent singles between Srivilliputhur to Sivakasi as a multi-pronged route, and the same shall be issued within a month from the date of the receipt of the records without fail. After the issuance of the abovesaid permit by the Regional Transport Authority, Kamarajar District at Virudhunagar, the Secretary to the Regional Transport Authority, shall fix suitable timings within two months. The conversion of the route from town service to mofussil, prayed for in the application is rejected. The pattern of trips shall be as follows: The bus of the appellant shall depart from Rajapalayam in the morning as at present and do its first single between Rajapalayam and Srivilliputhur singles 2 to 5 shall be done between Srivilliputhur and Puthur. Thereafter, the appellant shall do eight continuous independent singles, i.e., singles 6 to 13 between Srivilliputhur and Sivakasi. Thereafter singles 14 to 18 shall be done between Srivilliputhur and Puthur continuously and the 19th single shall be done from Puthur to Rajapalayam and the bus shall halt for the night at Rajapalayam."

3. Aggrieved by the said order of the tribunal, the petitioner has filed this writ petition challenging the same. A preliminary objection is raised by learned counsel for the first respondent that the petitioner is not an aggrieved person and he is not entitled to maintain the writ petition. It is also argued by learned counsel that the petitioner had no right to raise objections even before the Regional Transport Authority or before the State

Transport Appellate Tribunal. According to him, the policy under the new Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') has changed from that which prevailed under the old Act. It is pointed out by him the grant of permits has been considerably liberalised and there is no scope for objections by other parties. It is also submitted that the only particulars which should be furnished by the petitioner Corporation when applications for grant of permits or variation of conditions of permit are considered, are the details of the approved schemes. Beyond that, the petitioner Corporation has no right, according to him, to raise any objections on the merits of the application. Reliance is placed on the following passages in the judgment of the Supreme Court in *Mithilesh Garg v. Union of India and others, etc., A.I.R. 1992 S.C. 443*:

"5. A comparative reading of the provisions of the Act and the old Act makes it clear that the procedure for grant of permits under the Act has been liberalised to such an extent that an intended operator can get a permit for asking irrespective of the number of operators already in the field. Under Sec.57 read with Sec.47(1) of the old Act an application for a stage carriage permit was to be published and kept for inspection in the office of the Regional Transport Authority so that the existing operators could file representations/objections against the said application. The application, along with objections, was required to be decided in a quasi-judicial manner. Sec.47(3) of the old Act further permitted the imposition of limit on the grant of permits in any regional, area or on a particular route. It is thus obvious that the main features of Chapter IV "control of transport vehicles" under old Act were as under:

1. The applications for grant of permits were published and were made available in the office of the Regional Transport Authority so that the existing operators could file representations;
2. The applications for grant of permits along with the representations were to be decided in quasi-judicial manner; and
3. The Regional Transport Authority was to decide the applications for grant of permits keeping in view the criteria laid down in Sec.47(1) and also keeping in view the limit fixed under

Sec.47(3) of the Act. An application for grant of permit beyond the limited number fixed under Sec.47(3) was to be rejected summarily. 6. The Parliament in its wisdom has completely effaced the above features. The scheme envisaged under Secs.47 and 57 of the old Act. The right of existing - operators to file objections and the provision to impose limit on the number of permits have been taken away. There is no similar provision to that of Sec.47 and Sec.57 under the Act. The statement of objects and reasons of the Act shows that the purpose of bringing in the Act was to liberalise the grant of permits. Sec.71(1) of the Act provides that while considering an application for a stage carriage permit the Regional Transport Authority shall have regard to the objects of the Act. Sec.80(2), which is the harbinger of Liberalisation, provides that a Regional Transport Authority shall not ordinarily refuse to grant on application for permit of any kind made at any time under the Act. There is no provision under the Act like that of Sec.47(3) of the old Act and as such no limit for the grant of permits can be fixed under the Act. There is, however, a provision under Sec.71(3)(a) of the Act under which a limit can be fixed for the grant of permits in respect of the routes which are within a town having population of more than five lakhs.

... ..

More operators mean healthy-competition and efficient transport system. Overcrowded buses, passengers standing in the aisle, clinging to the bus-doors and even sitting on the roof-tops are some of the common sights in this country. Moreover one finds a bus which has noisy engine, old upholstery, uncomfortable seats and continuous emission of black-smoke from the exhaust pipe. It is, therefore, necessary that there should be plenty of operators on every route to provide ample choice to the commuter-public to board the vehicle of their choice and patronise the operator who is providing the best service. Even otherwise, the liberal policy is likely to help in the elimination of corruption and favouritism in process of granting permits. Restricted licensing under the old Act led to the concentration of business in the hands of few persons thereby giving rise to a kind of monopoly, adversely affecting the public

interest. The apprehension of the petitioners that too many operators on a route are likely to affect adversely the interest of weaker section of the profession is without any basis. The transport business is bound to be ironed-out ultimately by the rationale of demand and supply. Cost of a vehicle being as it is the business requires huge investment. The intending operators are likely to be conscious of the economics underlying the profession. Only such number of vehicles would finally remain in operation on a particular route as are economically viable. In any case the transport system in a state is meant for the benefit and convenience of the public. The policy to grant permits liberally under the Act is directed towards the said goal.

... ..

It is thus a guaranteed right of every citizen whether rich or poor to take up and carry on, if he so wishes, the motor transport business. It is only the State which can impose reasonable restrictions within the ambit of Art.19(6) of the Constitution of India. Secs.47(3) and 57 of the old Act were some of the restrictions which were imposed by the State on the enjoyment of the right under Art.19(1)(g) so far as the motor transport business was concerned. The said restrictions have been taken away and the provisions of Secs.47(3) and 57 of the old Act have been repealed from the Statute Book: The Act provides liberal policy for the grant of permits to those who intend to enter the motor transport business. The provisions of the Act are in conformity with Art.19(1)(g) of the Constitution of India. The petitioners are asking this Court to do what the Parliament has undone. When the State has chosen not to impose any restriction under Art.19(6) of the Constitution of India in respect of motor transport business and has left the citizens to enjoy their right under Art.19(1)(g) there can be no cause for complaint by the petitioners."

4. According to learned counsel for the first respondent, notice was issued to the petitioner by the Regional Transport Authority and the objections raised by the petitioner were considered. According to him, Rules 136 and 141 of the Tamil Nadu Motor Vehicles Rules prescribe public hearing and hearing of representative or accredited agent. It is submitted by him that Rule 157(2)(a) of the

said Rules provides for filing an appeal against an order granting or refusing to grant an extension or variation or curtailment of an existing route or area covered by a permit. It is contended that the petitioner had, therefore, a right to be heard by the Regional Transport Authority as well as the Appellate Tribunal. I am of the view that it is wholly unnecessary for me to decide the question whether the State Transport Undertaking had a right to be heard by the Regional Transport Authority or the tribunal. In the present case, the petitioner has been heard by both the Authorities. The objections raised by the petitioner have been overruled by the tribunal. Hence, the first respondent is not affected in any way by the tribunal allowing the petitioner to prefer its objections to the application made by the first respondent. It would be necessary to consider such a question in cases where the tribunal refuses to hear the State Transport Undertaking or other objectors and in cases where objections preferred by the objectors including the State Transport Undertaking are upheld. Hence, I do not propose to consider the said question here.

5. However, it is necessary to decide whether the petitioner is entitled to maintain the writ petition. The contention of the first respondent that the petitioner is not a person aggrieved and he cannot invoke the jurisdiction of this Court under Art.226 of the Constitution of India is well-founded. The order made by the tribunal does not in any manner affect any right of the petitioner herein. The route does not fall within the approved scheme. The petitioner has no grievance as such against the order. But, learned counsel for the petitioner contends that the tribunal has acted in contravention of the provisions of the Statute and the rules made thereunder. According to him, even a member of the public can bring to the notice of this Court under Art.226 of the Constitution a violation of statutory provision and get a direction that the statutory authority should comply with the statute and the rules made thereunder. It is rightly submitted by learned counsel for the first respondent that if the petitioner has filed the writ petition as a member of the public and if this matter is to be treated as a public interest litigation, then the test of public injury should be satisfied. It is submitted that in the present case, there is no such public injury and the petitioner cannot sustain the writ petition on the only ground that some provisions

of the statute and the rules are violated.

6. In *The Nagar Rice and Flour Mills v. Teekappa Gowda & Bros. and others*, A.I.R. 1971 S.C. 246: (1970)2 S.C.J. 473, it was held that a rice mill owner had no *locus standi* to challenge under Art.226 of the Constitution of India, the setting up of a new rice mill by another, even if it was in contravention of Sec.8(3)(c) of the Rice Milling Industry (Regulation) Act, 1958, because no right vested in such a person was infringed. The position was reiterated in *Nasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and others*, A.I.R. 1976 S.C. 578. It was held that a rival in trade, in that case a cinema theatre owner, had no *locus standi* to invoke the special jurisdiction under Art.226 of the Constitution of India.

7. Following the said rulings, a Full Bench of this Court held in *M.L.Krishnamurthi v. The District Revenue Officer, Vellore*, (1989)2L.W. 442, that an existing rice mill owner was not a person aggrieved, when permit or licence under the Rice Milling Industry (Regulation) Act was granted to another person, for entitling him to file a writ petition challenging the grant. In *Mithilesh Garg v. Union of India and others, etc.*, A.I.R. 1992 S.C. 443, already referred to in this judgment, the Apex Court has quoted *in extenso* the observations made by Sarkaria, J. in *Nasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and others*, A.I.R. 1976 S.C. 578, and reiterated the proposition.

8. Learned counsel for the petitioner places reliance on the decisions in *Surendra Rao v. Regional Transport Authority, Gorakhpur*, A.I.R. 1992 All. 211 and *Quilon District Private Bus Operators' Association v. State Transport Appellate Tribunal, Ernakulam*, A.I.R. 1992 Ker. 267. In the former case it is held that an existing operator has an alternative remedy of revision before the tribunal against the order of the Regional Transport Authority granting stage carriage permit to an applicant. That has no relevance in this case. In the latter case, it is held that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The *sine qua non* is public injury. Mere violation of a provision of law is not sufficient to enable the third party who is not aggrieved, to challenge the order in

question. Hence, that judgment also does not help the petitioner.

9. If the petition is to be treated as a public interest litigation, it is necessary for the petitioner to establish that the impugned order causes injury to public interest. The following passage in the judgment of the Supreme Court in *S.P.Gupta and others v. President of India and others*, A.I.R. 1982 S.C. 149, is relevant:

"18. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, *resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury.*" (*Italics mine*).

10. Again in *Shri Sachidanand Pandey v. The State of West Bengal*, A.I.R. 1987 S.C. 1109, it is ruled thus:

"60. It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self imposed restraint on public interest litigants."

11. Learned counsel for the petitioner relies on the following passage in the judgment in *Bangalore Medical Trust v. B.S.Muddappa*, A.I.R. 1991 S.C. 1902:

"36. *Locus standi* to approach by way of writ petition and refusal to grant relief in equity jurisdiction are two different aspects, may be with same result. One relates to maintainability of the petition and other to exercise of discretion. Law on the former has marched much ahead. Many milestones have been covered. The restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of broad and wide construction in wake of public interest litigation. Even in private challenge to executive or administration

action having extensive fall out the dividing line between personal injury or loss and injury of a public nature is fast vanishing. Law has veered round from genuine grievance against order affecting prejudicially to sufficient interest in the matter. The rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenging with public interest flavour. It is too late in the day, therefore, to claim that petition filed by inhabitants of a locality whose park was converted into a nursing home had no cause to invoke equity jurisdiction of the High Court. In fact public spirited citizens having faith in rule of law are rendering great social and legal service by espousing cause of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of *locus standi* or absence of personal loss or injury. Present day development of this branch of jurisprudence is towards freer movement both in nature of litigation and approach of the courts. Residents of locality seeking protection and maintenance of environment of their locality cannot be said to be busy bodies or interlopers. *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149, *Akhil Bhartiya Soshit Karmachari Sangh v. Union of India*, A.I.R. 1981 S.C. 298 and *Fertilizer Corporation Kamgar Union v. Union of India*, A.I.R. 1981 S.C. 344. Even otherwise physical or economic injury may give rise to civil or criminal action but violation of rule of law either by ignoring or affronting individual or action of the executive in disregard of the provisions of law raises substantial issue of accountability of those entrusted with responsibility of the administration. It furnishes enough cause of action either for individual or community in general to approach by way of writ petition and the authorities cannot be permitted to seek shelter under cover of technicalities of *locus standi* nor they can be heard to plead for restraint in exercise of discretion as grave issues of public concern out weight such considerations."

That was a case in which conversion of a public park into a private nursing home was held to be illegal. It was a clear case of public injury. Hence, the observations of the Supreme Court made in the context of the facts of that case cannot help the

petitioner herein.

12. In this case, the tribunal has found that the grant of the application made by the first respondent will be most beneficial to the travelling public and no inconvenience will be caused to them in any manner. The following passages in the order of the tribunal are relevant:

"17. At present, the appellant is plying eight singles between Puthur and Srivilliputhur, one single between Srivilliputhur and Rajapalayam, and single between Rajapalayam and Dhalavoipuram and three singles between Srivilliputhur and Dhalavoipuram. Out of the above, the appellant has prayed for reduction of 10 singles from Rajapalayam to Dhalavoipuram, and six singles from Dhalavoipuram to Puthur. In the sector between Seithur and Rajapalayam, six town buses are plying doing 98 singles and the occupancy ratio is 54%. In the sector between Dhalavoipuram and Seithur, 4 town buses are plying doing 70 singles and the occupancy ratio is 42%. In the sector between Dhalavoipuram and Puthur, 4 towns buses are plying doing 62 singles and their occupancy ratio is 51% only. On an appreciation of the pros and cons and in order to rationalise and make it more viable and also to provide maximum benefit to the travelling public, in my view, it would be expedient to make the sector Puthur to Srivilliputhur a straight route instead of small, independent sectors. Hence I am persuaded to hold that the existing two singles between Puthur and Rajapalayam and three singles between Dhalavoipuram and Rajapalayam and one single between Rajapalayam and Dhalavoipuram can be curtailed considering the poor occupancy ratio in those sectors. I am clearly of the opinion that no inconvenience will be caused to the travelling public and the other bus operators by doing so and the curtailment can be effectively compensated by straightening the sector between Puthur and Srivilliputhur by granting nine single between the sector, viz., Puthur to Rajapalayam may be granted in order to maintain the existing night halt.

18. In the sector between Srivilliputhur and Sivakasi only 11 buses are plying doing 134 singles and considering the occupancy ratio, viz., 94% which is extremely high, I am clearly of the opinion that there is sufficient

justification to run more buses in that sector as that alone will help the travelling public to reach Sivakasi without any loss of time. Admittedly, Sivakasi is a big industrial town and there are number of match factories, and other factories and therefore running more buses will help the travelling public to reach Sivakasi conveniently and the workers to reach their factories punctually. On a careful analysis of the entire matter and on making a calculation of the timing that will be consumed and the maximum distance that can be covered in a day, viz., 500 km., I am persuaded to hold that the permit holder can be allowed to run eight independent singles between Srivilliputhur and Sivakasi and the same will be most beneficial to the travelling public."

Hence, I hold that the petitioner is not a person aggrieved and it is not entitled to maintain a writ against the order of the tribunal.

13. Even otherwise, the contentions urged by the petitioner are without any merit. It is argued that the application filed by the first respondent before the Regional Transport Authority is only for conversion of a route from town service into mofussil service and there is no application for grant of a new permit. It is contended that the modification in the prayer consequent on the endorsement made before the appellate tribunal does not fall within the scope of the petition filed before the Regional Transport Authority. It is submitted that the averments found in the application before the first authority do not support the prayer in the modified form. There is no substance in this contention. It is seen that in paragraph 2 of the application and column 13 of Form PVA attached to the application, it is stated that the vehicle is at present plying on the route Srivilliputhur to Puthur as town service and it is sought to be extended from Srivilliputhur to Sivakasi a distance of 20 Kms., by reducing 10 singles from Rajapalayam to Dhalavoipuram and 6 singles from Dhalavoipuram to Puthur to serve the public. The tribunal has rightly found that the averments in the application are sufficient to support the modified prayer.

14. The next contention is that under Sec.80(3) of the Act, there cannot be an application for inclusion of a new route or alteration of a route in the case of a stage carriage permit. According to learned counsel, with reference to a stage carriage permit, there can be only an application to vary the

conditions by increasing the number of trips above the specified maximum or by the variation, extension or curtailment of the route or routes or the areas specified in the permit. It is necessary to extract the section in order to appreciate the contention. Sec.80 in so far as it is relevant, is as follows:

"80.(1) An application for a permit of any kind may be made at any time.

(a) A Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under this Act:

Provided that the Regional Transport Authority may summarily refuse the application if the grant of any permit in accordance with the application would have the effect of increasing the number of stage carriages as fixed and specified in a notification in the Official Gazette under clause (a) of sub-sec.(3) of Sec.71 or of contract carriages as fixed and specified in a notification in the Official Gazette under Clause (a) of sub-sec.(3) of Sec.74;

Provided further that where a Regional Transport Authority refuses an application for the grant of a permit of any kind under this Act, it shall give to the applicant in writing its reasons for the refusal of the same and an opportunity of being heard in the matter.

(3) An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or by altering the route or routes or area covered by it, or in the case of a stage carriage permit by increasing the number of trips above the specified maximum or by the variation, extension or curtailment of the route or routes or the area specified in the permit shall be treated as an application for the grant of a new permit:

Provided that it shall not be necessary so to treat an application made by the holder of stage carriage permit who provides the only service on any route to increase the frequency of the service so provided without any increase in the number of vehicles:

... .."

15. It is argued that the first part of sub-sec.(3) of Sec.80 of the Act which applies to any permit, other than a temporary permit is a general provision and the second part of the Sub-section, which

applies to stage carriage permit, is a special provision and the rule that 'special will prevail over general' will apply. Reliance is placed on the judgment of the Supreme Court in *J.K. Cotton Spinning and Weaving Mills Company Ltd. v. State of U.P. and others*, A.I.R. 1961 S.C. 1170. The following passage is cited:

"(9) There will be complete harmony however if we hold instead that Clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of Clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty v. Solly*, (1859) 53 E.R. 1032, quoted in Craies on Statute Law at p.206, 6th Edition) Romilly, M.R., mentioned the rule thus: "The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton v. Brecon*, (1858) 28 L.J.Ch. 598, *Churchill v. Crease*, (1889) 135 U.S. 255 and *Carroll v. Greenwich Insurance Company*, (1905) 199 U.S. 401."

16. It is, therefore, contended that the first part of the section under which variation of conditions of any permit be inclusion of new route or routes etc., will not apply in the case of a stage carriage permit with reference to which a special provision is made under the second part of the section. I do not agree with this contention. The language of the sub-section is very significant. It can be analysed as follows:

An application to vary the conditions can be made,

(1) by inclusion of a new route or routes or a new area;

or

(2) by altering the route or routes or areas covered by it;

or

(3) by increasing the number of trips above the specified maximum;

or

(4) by variation, extension or curtailment of the route or routes or the area specified.

As regards the four alternatives set out above, all of them will apply to a stage carriage permit. Alternatives 1 and 2 will have application to permits other than stage carriage permit. No doubt, the fourth alternative may apply to some extent to contract carriage permit; but generally such permits are issued for a Stage or throughout the country. The Parliament has deliberately used the expression 'or' or a conjunctive and not as a disjunctive. Hence, there is no scope for contending that the sub-section contains a special rule for stage carriage permits and a general rule for all the permits, with the result the special will prevail over the general. Even assuming that the provision for a stage carriage permit is a special rule, unless there is a repugnancy between the general rule and the special rule, there is no question of the special overruling the general. If both can stand together, then the rule that 'special rule excludes general' cannot be invoked.

17. However, the matter is not *res integra*. The question has been considered by this Court and another High Courts earlier with reference to corresponding provisions under the old Motor Vehicles Act of 1939. Sec.57(8) of the old Act was on similar terms. Under the Central Act, sub-sec.(8) of Sec.57 read as follows:

"(8). An application to vary the conditions of any permit other than a temporary permit, by

the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of trips above the specified maximum or by altering the route covered by it or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit;

Provided that it shall not be necessary so to treat an application made by the holder of a stage carriage permit who provides the only service on any route or in any area to increase the frequency of the service so provided, without any increase in the number of vehicles."

18. By the Motor Vehicles (Madras Amendment) Act (III of 1964), sub-sec.(8) of Sec.57 of the old Act was amended by the words "or by the variation, extension or curtailment of the route or routes or the area specified in the permit", after the words "by the inclusion of a new route or routes or a new area". It is worth noting that the provision for application for variation, extension or curtailment was with reference to any permit other than a temporary permit under the old Act as amended by the Madras Act. In the latter part of the section in which reference was made to stage carriage permit, the provision was for an application for variation by increasing the number of trips above the specified maximum or by altering the route covered by it. It is to be noted that by the same Amendment Act III of 1964, Sec.48 of the Central Act of 1939 was also amended. Sub-sec.(2) of Sec.48 was omitted and in sub-sec.(3), Clause (i) was renumbered as clause (i-a) and the following clause was inserted as clause (i):

"that the stage carriage or stage carriages shall be used only on a specified route or routes or in a specified area,"

Sub-clause (a) of clause (xxi) of Sec.48 was substituted with the following clause:

"(a) vary, extend or curtail the route or routes or the area specified in the permit;"

(The remaining part of Sub-clause (a) of Clause (xxi) is not extracted as it is unnecessary for this case.) Thus, when the legislature amended Sec.48, Sec.57 was also amended consequently. The expression used in Sub-clause (a) of Clause (xxi) is 'vary, extend or curtail', while the expression used in sub-sec.(8) of Sec.57 is 'variation, extension or curtailment'. Thus, it is seen that the legislature

thought fit to incorporate the provisions of Sub-clause (a) of Clause (xxi) of sub-sec.(3) of Sec.48 in Sec.57 as it had made the route as a condition of the permit under sub-sec.(3) of Sec.48. The reason for such amendment was obviously the opinion expressed by the majority of a Full Bench of this Court in *Natesa Mudaliar v. Thanapal Bus Service*, A.I.R. 1964 Mad. 136. Ramachandra Iyer, C.J., and Jagadisan, J. who formed the majority, took the view that the route was not a condition of a permit, as it did not fall under Sec.48(3) of the Act as it stood.

19. After referring to Sec.57(8) of the old Act, it was observed as follows:

"This is only a procedural provision and is practically a substitute of the old Rule 208(a), which we have already extracted above. This sub-section consists of three parts and provides what application should be treated as an application for the grant of a new permit. The first category comprises applications to vary the conditions of any permit other than a temporary permit by the inclusion of a new route or routes in a new area. The second group comprises applications in regard to stage carriage permit for increasing the number of services above the specified maximum. The third class comprises application in the case of a contract carriage permit or a public carriage permit for increasing the number of vehicles covered by the permit. The first category uses the expression 'any permit'. Necessarily even a stage carriage permit would fall within its ambit. *But if the route is not a condition of the permit relating to a stage carriage then obviously that group should have regard only to permits in regard to other kinds of transport vehicles like contract carriage or public carrier.* It would not be proper to assume that because a provision is made for treating an application to vary the condition of any permit by including a new route what is not prescribed as a condition of permit should be attributed to have that character. As we have said, this is not a substantive provision enacting the conditions of a stage carriage permit, but is only a rule of procedure which obliges the transport authority to treat certain applications as if they are applications for a grant of a new permit. We are therefore unable to agree with any of the contentions urged on behalf of the first respondent."

(*Italics mine*).

It was to overrule the view taken by the majority, the amendment was brought in by the State legislature. Later, Sec.48 of the Central Act was similarly amended by Central Act 56 of 1969 with effect from 2.3.1970 by omitting sub-sec.(2) and introducing clause (i) in sub-sec.(3) and renumbering the old clause (i) as clause (i-a) as was done by the State legislature.

20. It is worth referring to the view expressed by Ramamurti, J. in his dissenting judgment in that case, on the interpretation of Sec.57(8) of the Act, which is as follows:

"(43) If I may say so, this clause is unambiguous, explicit, and very clear and does not admit scope for any argument or difficulty in the rules of interpretation. The word "any" is of general import and excludes limitation or qualification and is "all inclusive". "the words used negative qualification and affirm generality." Vide *Per Fry, L.J. Duck v. Bates*, (1884)13 Q.B.D. 843 at p. 851. In construing statutes the word "any" is equivalent to and has force of "every" and "all". I see absolutely nothing in the context of the sub-section to control or restrict the generality that is connoted by the deliberate use of the expression "any". On the other hand, such context as is manifested in Sec.57(8) leads to the same inference. The controlling context "excepting a temporary permit" shows that the legislature is full aware of the implications of the import of the word "any" and exempts only a temporary permit and no other. It is impossible to brush aside or slur over the three component parts of Sec.57(8): the first part deals with all the vehicles, the second part deals with a stage carriage permit with regard to the increase of the number or vehicles and the third part deals with the increase in the number of vehicles of a contract carriage or a public carrier. The proviso to the section further emphasises the same view and its importance should not be overlooked.

(44) I am wholly unable to countenance any argument involving an assumption that there is any looseness or inaccuracy in the language employed in Sec.57(8). I have no doubt in my mind that the legislature has used the words "any permit" in the opening words of sub-sec.(8) deliberately, with a view to take in all vehicles without any distinction and that

whenever the legislature wants to make a distinction and restrict the scope, it has taken particular care to do so by employing necessary, precise, apt, language. If I may say so, I cannot even visualise what clearer language the legislature could have employed to manifest its legislative intent. There is no justification whatsoever for reading the words "any permit" as "any permit other than a stage carriage permit", as contended by learned counsel for the petitioner, especially when the legislature designedly excepts a temporary permit only."

21. With respect, I agree with the reasoning of the learned Judge and apply it here in interpreting Sec.80 sub-sec.(3) of the Act.

22. Though there is no discussion on the question, the same view is expressed by Veeraswami, J. in *Swami Motor Transport (P) Ltd. v. Raman and Raman (P) Ltd.*, (1965)1 M.L.J. 594, in the following words:

"Sec.57(8) enjoins that an application to vary a condition of a stage carriage permit by inclusion of a new route should be treated as an application for the grant of a new permit. The effect of this is that an application should be disposed of by complying with the procedure for the grant of such carriage permits."

23. The question was raised specifically before a Division Bench of the Andhra Pradesh High Court in *Narayana Reddy v. Secretary Regional Transport Authority, Cuddappah and another*, (1960)2 An.W.R. 91, and it was held that the first part of Sec.57(8) of the Act would apply to stage carriage permits also. The relevant passage reads thus:

"Sri Babul Reddy invites us to hold that the first part of Sec.57(8) applies only to contract carriage permits or public carriers' permits and is inapplicable to stage carriage permits and that it is only the clause which deals with "increasing the number of services above the specified maximum" that governs the stage carriage permits. We think this argument is unsubstantial. The first part of Sec.57(8) is general in its terms and governs not only contract carriages or public carriers but stage carriages also. It should be remembered that Chapter IV is headed "Control of Transport Vehicles" which includes stage carriages. If really the intendment of the section was that the first part of it should be confined only to

contract carriages and public carriers, it would have been made specific by restricting its scope only to the two types of carriages. In our opinion, this sub-section enables us to solve the problem before us without much difficulty."

24. It is, therefore, clear that the first part of the section will also apply to all permits including stage carriage permit and the only exclusion is a temporary permit. There is no warrant for applying the maxim *generalis specialibus non derogant*.

25. Learned counsel for the petitioner contends that under Sec.80(3) of the Act an application to vary the conditions of any permit shall be treated as an application for the grant of a new permit and if the first respondent's application is treated as one for grant of a new permit, it will not be entitled to the permit, as the first respondent is not an individual. Reliance is placed on the proviso to Sec.71(1) of the Act. the said sub-section reads thus:

"A Regional Transport Authority shall, while considering an application for a stage carriage permit, have regard to the objects of this Act: Provided that such permit for a route of fifty kilometers or less shall be granted only to an individual or a State Transport undertaking."

According to learned counsel the first respondent being a private limited company, is neither an individual nor a State transport undertaking and is, therefore, not entitled to grant of a new permit. Learned counsel for the first respondent submits that the contention was not raised before the Tribunal and the petitioner should not be permitted to raise it here. It is further argued that even otherwise, there is no merit in the contention. It is pointed out that the fiction introduced in the last part of sub-sec.(3) of Sec.80 of the Act is for a limited purpose and the effect thereof is to make the procedure prescribed in Secs.80(1) and (2) to be applicable to the application. In other words it is contended that by treating the application as one for grant of a new permit, the provisions of sub-secs.(1) and (2) of Sec.80 of the Act are alone applicable to the same and orders should be passed on the basis of the said provisions.

26. My attention is drawn to the judgments of the Supreme Court in *M/s. Shiv Chand Amolak Chand v. The Regional Transport Authority and another*, A.I.R. 1984 S.C. 9: (1983) 4 S.C.C. 433; 1984 Lab.L.J. 1: (1984) 1 Comp.L.J. 214, and *M. Duraiswami v. Sri Murugan Bus Service*, A.I.R. 1986 S.C. 1980;

(1986) 2 S.C.J. 56. In both the cases, the provisions of Sec.57(8) of the old Act were considered. Referring to the fiction introduced by sub-sec.(3), the Court observed in the former case as follows:

"There can, therefore, be no doubt that if an application for varying the condition of a permit by extension of the route specified in the permit were equated wholly with an application for grant of a new permit and the permit for the extended route were to be regarded as a new permit, the procedure prescribed in Sec.47 sub-sec.(3) would have to be followed and the number of stage carriages for which permits may be granted on the extended route would have to be determined before the application could be entertained by the Regional Transport Authority. But we do not think that the prescription in sub-sec.(8) of Sec.57 that an application for varying the condition of a permit by extension of the route shall be treated as an application for grant of a new permit has effect of equating such an application with an application for grant of a new permit for all purposes so as to attract the applicability of sub-sec.(3) of Sec.47. Sec.57 deals with the procedure in applying for and granting permits; and sub-secs.(3) to (7) lay down the procedure which must be followed in considering and deciding, *inter alia*, an application for grant of a stage carriage permit. Sub-sec.(8) follows upon sub-secs.(3) to (7) and is part of the same section which has a definite object and scheme of providing the procedure for considering and granting an application and, therefore, when it provides that an application to vary the conditions of a permit by the inclusion of new route or routes or new area or by increasing the number of trips above the specified maximum or by altering the route covered by it shall be treated as an application for grant of a new stage carriage permit it is obviously intended to incorporate and make applicable the procedure set out in the preceding sub-secs.(3) to (7) to such an application. The context in which sub-sec.(8) occurs and its juxtaposition with sub-secs.(3) to (7) in Sec.57 clearly indicate that what is sought to be made applicable to an application referred to in sub-sec.(8) by treating it as an application for grant of a new permit, is the procedure set out in sub-secs.(3) to (7) of Sec.57 and nothing more. The

requirement spelt out in sub-sec.(3) of Sec.47 that the number of stage carriages for which permits may be granted on any particular route must be first determined before an application for grant of a stage carriage permit can be entertained by the Regional Transport Authority under Sec.48, is obviously not a part of the procedure for considering an application for grant of a permit; it is a condition precedent before an application for grant of a permit can be considered and granted. This condition precedent cannot be said to have been incorporated by reference under sub-sec.(8) of Sec.57. An application to vary the conditions of a permit as set out in sub-sec.(8) of Sec.57 is undoubtedly to be treated as an application for grant of a new permit, but that is only for the purpose of applying the procedure set out in sub-secs.(3) to (7) of that section. It is not an application for a new permit and if it is granted, the permit for the extended route does not become a new permit in the hands of the applicant."

27. In the latter case, the above passage was quoted and the position in law was reiterated. Hence, the contention that the provisions of Sec.71(1) of the Act are attracted to the application of the first respondent is untenable.

28. The next contention is that the provisions of Rule 3(e) of the Tamil Nadu Motor Vehicles Rules are violated by the grant of permit to the first respondent. The said rule defines "City and Town Service" as "a service plying in a city or a Municipal Town or any built up place notified in the Tamil Nadu Government Gazette as "City" or "Town" for this purpose by the Transport Authority concerned with the prior concurrence of the State Transport Authority. No route shall lie entirely outside, but at least one terminus of it shall be within the limits of municipal town or a city or any built up place notified for the purpose. The aggregate distance of a "town" or "city service" route lying partly within and partly outside the limits of a municipal town or city or any built up place, notified for the purpose shall not exceed 30 kilometres."

29. The contention is that the distance between Srivilliputhur and Puthur is 28.6 Kms. and the distance between Srivilliputhur and Sivakasi is 20 Kms. and the aggregate being 48.6 Kms. exceeds the limit of 30 Kms. fixed in Rule 3(e). Hence,

permission to operate between Srivilliputhur and Sivakasi offends the rule. There is no merit in this contention too. The rule refers only to the aggregate distance of 'a' town service or city service route. If a permit covers two routes, each of them shall not exceed 30 Kms. There can be no dispute that a permit can cover more than one route. Sec.70(1)(a) and Sec.72(2)(i) of the Act use the expression "route or routes". Hence, aggregate distance referred to the Rule 3(e) must be computed with reference to each route. Moreover, in this case another permit has been issued to the first respondent to run a town service between Srivilliputhur and Sivakasi. Rule 3(e) does not refer to the aggregate of the distance covered by two permits and hence there is no violation of the rule in this case.

30. The facts referred to by the tribunal show that the order has been made in the best interests of the travelling public. Hence, there is no justification for interfering with the same. The writ petition fails and suffers a dismissal with costs. Counsel's fee Rs.1,000.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi and Raju, JJ.*

R.C.No.1 of 1990

14th October, 1992

M/s.Ponds (India) Ltd.

...Appellant

v.

Collector of Central Excise, Madras

...Respondent.

(A) *Precedents - Decisions of Customs, Excise and Gold (Control) Appellate Tribunal - Binding nature of.*

(B) *Central Excise and Salt Act (I of 1944), Sec.2(f) - Central Excise Tariff Act (1985), Chapter Notes of Schedule - Central Excise Rules, Rules 57-A, 57-D, 57-F - Plastic Granules known as LDPE, HDPE and PVC compound used in the manufacture of plastic jars etc., used as containers for Excisable goods - Whether packaging materials and inputs -*

Said granules if entitled to benefit of MODVAT.

The applicant, a manufacturer of cosmetics sought permission of the Assistant Collector of Central Excise for taking the MODVAT benefit on certain raw materials or plastic granules known as LDPE, HDPE and PVC compound used in the manufacture of plastic jars etc. used as containers for the Excisable goods, shampoo, talcum powder and cream manufactured by it. The Assistant Collector held that the applicant was not eligible to avoid the MODVAT credit on those raw materials under Rule 57-A of the Central Excise Rules and that consequently it could not seek permission to operate under Rule 57 (F-2) thereof. The Assistant Collector also found that Rule 57-D(2) also had no application. The Order was upheld by the Collector of Central Excise. The Customs, Excise and Gold (Control) Appellate Tribunal also upheld the decisions. An application for reference under Sec.35-G(1) of the Central Excise and Salt Act was also dismissed. Thereupon, the applicant filed an application before the High Court for a reference. On the orders of court four questions were referred. The petitioner and the respondent relied upon decisions of the tribunals. *Held:* The reasoning found in the decisions of the tribunals could have at best only persuasive effect before the High Court. [Para 8]

The learned counsel for the applicant submits that once the abovesaid plastic granules could be and are used as packaging materials for making the abovesaid containers, they would also come under the term 'packaging materials'. There is force in this submission. The net result is that the abovesaid plastic granules are inputs within the meaning of the said term in Rule 57-A. Thus, the abovesaid plastic granules which were utilised for manufacturing the abovesaid containers for packing the abovesaid excisable goods like shampoo, etc., and for making them marketable, would be component parts for the abovesaid goods which are the end products. [Paras 12 and 15]

In the main part of Rule 57-A also the expression used in "goods used in or in relation to the manufacture of the said final products" (hereinafter referred to as 'inputs'). Under Sec.2(f) of the Act, the term 'manufacture' would also include any process which is specified in relation to any goods in the section or chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture. It has also been mentioned

earlier that Chapter Note No.4 of Chapter 33 of the abovesaid Schedule also states that adoption of any treatment to render the products marketable to the consumer shall be construed as manufacture. Therefore, in the main part of Rule 57-A also, the term 'goods used in or in relation to the manufacture of the said final products' would cover the above referred to plastic granules also.

[Paras 16 and 18]

It cannot also be said that because the abovesaid containers are exempted from duty, the duty paid on the abovesaid granules which go to make up those containers cannot get reimbursement under the MODVAT scheme. Once those granules are held to be 'inputs' the abovesaid Rule 57-D(2) also will come to the aid of the applicant to claim MODVAT benefit in respect of them. Rule 57-D(2) says that the credit of specified duty allowed in respect of any inputs shall not be denied on the ground that any intermediate products have come into existence during the course of 'manufacture' of the final product and that such intermediate products are for the time being exempt from the whole of the duty of excise; leviable thereon. Here again, for the term 'manufacture' the abovesaid Sec.2(f) definition read with the abovesaid Chapter Note No.4 to Chapter 33 would apply and so, the abovesaid containers could be taken as the abovesaid 'intermediate products' which have come into existence 'during the course of manufacture of the final product'. In such a case the requirement mentioned in the proviso to Rule 57-D(2) will stand satisfied since the abovesaid containers, the intermediate products, are admittedly 'used within the factory of production in the manufacture of a final product' and specified as inputs or final product under the Notification issued under Rule 57-A. This apart, it cannot also be said that there is no cascading effect if the value of the containers which are exempt from duty are actually charged to duty subsequently when the said containers are used to pack the final products and are actually get integrated in the said final products. The purpose for which the exemption was granted to those containers would also be nullified if their value is to be taxed subsequently when they are used to pack the abovesaid Cream etc.

[Paras 20 and 21]

Cases referred to:

Rasoi Ltd. v. Collector of Central Excise, (1990)49 E.L.T. 522. [Paras 9, 11, 22]

F.D.C. Ltd. v. Collector of Central Excise, (1991) 55 E.L.T. 601. [Paras 10, 11, 12]
Ponds India Ltd. v. Collector of Central Excise, (1988) 38 E.L.T. 351. [Para 12]
Parle Products (P) Ltd. v. Collector of Central Excise, (1992) 57 E.L.T. 152. [Para 12]
Collector of Central Excise v. Easteno Paper Industries Ltd., (1989) 43 E.L.T. 201. [Para 13]
Empire Industries Ltd. v. Union of India, (1985) 20 E.L.T. 179; (1985) 3 S.C.C. 314. [Para 13]
J.K. Cotton Spinning and Weaving Mills Company Ltd. v. Sales Tax Officer, (1965) 16 S.T.C. 563. [Para 13]
State of Tamil Nadu v. V.V. Vaniaperumal and Company, (1990) 76 S.T.C. 203. [Para 14]
Punjab Distilling Industries v. Income-Tax Commissioner, A.I.R. 1959 S.C. 346. [Para 15]
M/s. Doypack Systems (P) Ltd. v. Union of India, A.I.R. 1988 S.C. 782. [Para 16]
Collector of Central Excise v. Balasapur Industries Ltd., (1989) 43 E.L.T. 804. [Para 17]
State of Bombay v. Hospital Mazdoor Sabha, A.I.R. 1960 S.C. 610. [Para 19]
Kusum Products Ltd. v. Collector of Central Excise, (1990) 48 E.L.T. 50. [Para 22]
Shivaji Works Ltd. v. Collector of Central Excise, (1990) 50 E.L.T. 50. [Para 23]
Mysore Kirloskar Ltd. v. Collector of Central Excise, (1990) 50 E.L.T. 175. [Para 23]
Collector of Central Excise Bombay v. M/s. Parle Exports (P) Ltd., A.I.R. 1989 S.C. 644; (1988) 38 E.L.T. 741. [Para 25]
Collector of Central Excise, Guntur v. Andhra Sugar Ltd., (1988) 38 E.L.T. 564. [Para 25]
Coroline M. Armitage v. Fredrick Wilkinson, (1878) 3 A.C. 355. [Para 25]
Orient Paper Mills v. Union of India, A.I.R. 1969 S.C. 48. [Para 25]
Rajagopala Naidu v. State Transport Appellate Tribunal, A.I.R. 1964 S.C. 1573. [Para 25]
Mettur Chemicals and Industrial Corporation Ltd. v. Collector of Central Excise, (1991) 52 E.L.T. 592. [Para 26]
 Case referred to the High Court by the Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench at Madras, dated 15.10.1987 in Order No. 731 of 1987 in Excise Appeal No. E.271/87/MAS, and as per the directions of this Court in Order dated 22.11.1989 in R.C.P. No. 20 of 1989, and refer the following questions in exercise of the power conferred under Sec. 35-G of the Central

Excise and Salt Act, 1944.

1. Is it correct in law for the tribunal to hold that if the duty paid on LDPE, HDPE, PVC compound etc., is not allowed MODVAT credit as inputs for cosmetic and toilet preparations, in facts and circumstances of the case, there will be no cascading effect merely because the plastic containers made out of them are exempted from duty?

2. Is it correct in law for the tribunal to hold that intermediate products are necessarily those which have to undergo further processing in the factory of production for further use in the manufacture of the final product when the word 'intermediate' only means, coming between two things as regards time, place or order?

3. Is the tribunal correct in law in holding that the manufacture of plastic containers is not an intermediate stage for completion of the manufacture and clearance of cosmetic and toilet preparations particularly with reference to Sec. 2(f) of the Central Excise and Salt Act, 1944, read with Chapter Note No. 4 of Chapter 33 of the Schedule to the Central Excise Tariff Act, 1985?

4. Is the tribunal correct in law in not taking into consideration the expression used in Rule 57-A, viz. duty paid on the 'goods used in or in relation to the manufacture of the said final products' as an integral part thereof and thus holding that the raw materials for the containers are not eligible for MODVAT benefit?

Against Order in Appeal No. 12 of 1987 (M) dated 29.1.1987 on the file of the Collector of Central Excise (Appeals), 121, Nungambakkam High Road, Madras-34, against No. V/14F/30/5/86 VC, dated 18.7.1986, on the file of the Assistant Collector of Central Excise V Division, Madras.

K. Parasaran, Senior Counsel, for *Vijaynarayanan* and *R. Parthiban*, for Applicant.

K. Jayachandran, Additional Central Government Standing Counsel, for Respondent.

The Order of the Court was made by *Abdul Hadi, J.*: Pursuant to the Order of this Court under Sec. 35-G(3) of the Central Excise and Salt Act, 1944 (hereinafter referred to as 'the Act'), dated 22.11.1989 in R.C.P. No. 20 of 1989, directing the Customs-Excise and Gold (Control) Appellate Tribunal, Southern Regional Bench at Madras, to refer four questions of law specified

below, to this Court for its opinion, the said tribunal has referred the same and thus this R.C.No.1 of 1990 is before us. The said four questions arise out of the said tribunal's order dated 15.10.1987 in Excise Appeal No.271 of 1987 (MAS) filed by the appellant therein, Pond's (India) Ltd., (the applicant before us).

2. The said questions relate to the scheme known as MODVAT. MODVAT is short form of Modified Value Added Tax. This scheme enables the manufacturers, whose manufactured products (termed as "final products") suffer excise duty under the Act, to obtain instant and complete reimbursement of specified duty paid on the goods used in or in relation to the manufacture of the said products. (These goods are referred to as "inputs"). In other words, the charge of excise duty on the above said final products is only on the *value added* to the said inputs, which had already suffered duty. This scheme was introduced on 1.3.1986 by inserting Rule 57-A to Rule 57-N under the new section or heading "A.A. credit of duty paid on excisable goods used as inputs" to The Central Excise Rules, 1944. It is a *modification* or improvement of the pre-existing pro forma credit scheme. Hence it is known as Modified Value Added Tax or MODVAT shortly. The object of the scheme is to eliminate the cascading effect on the excise duty levied on the final products, or, in other words, to avoid payment of duty on earlier duties paid.

3. The applicant herein is a manufacturer of cosmetics. It sought permission of the Assistant Collector of Central Excise, Madras-5 Division for taking the abovesaid MODVAT benefit on certain raw materials or plastic granules, known as LDPE, HDPE and PVC compound, *used in the manufacture of plastic jars etc., used as containers for the excisable goods, shampoo, talcum powder and cream manufactured by it.* Admittedly those plastic jars, etc., used as containers are exempted from excise duty. But the abovesaid raw materials, which went to make up those containers suffered excise duty. Further, admittedly, the applicant did not manufacture the said containers in its own factory, using the abovesaid raw materials, but instead purchased those raw materials and sent them to processors for the manufacture of the said containers and after the said manufacture, brought the containers to its factory and used them in packing its abovesaid excisable final products viz.,

shampoo, cream, talcum powder, etc.

4. The Assistant Collector by his order dated 18.7.1986, has held that the applicant is not eligible to avoid the said MODVAT credit on those raw materials under the abovesaid Rule 57-A and that consequently it cannot also seek permission to operate under Rule 57-F(2) thereof. The Assistant Collector has also found that Rule 57-D(2) thereof also has no application. The said order of the Assistant Collector was also concurrently upheld by the Collector of Central Excise (Appeals), Madras, by his order dated 29.1.1987 in the first appeal filed by the applicant and by the abovesaid tribunal in the abovesaid second appeal filed by it, viz., Excise Appeal No.271 of 1987 (MAS). Subsequently, the applicant filed the reference application under Sec.35-G(1) of the Act to the tribunal. But that was also dismissed by an order 10.1.1989, holding that there was no question of law arising out of the abovesaid tribunal's order dated 15.10.1987. Then application filed in R.C.P.No.20 of 1989 in this Court under Sec.35-G(3) of the Act resulted in the above order dated 22.11.1989. Pursuant to the said order, four questions have been referred to us. Those questions are:

"1. Is it correct in law for the tribunal to hold that if the duty paid on LDPE, HDPE and PVC compound, etc., is not allowed MODVAT credit as inputs for cosmetic and toilet preparations, in the facts and circumstances of the case, there will be no cascading effect merely because the plastic containers made out of them are exempted from duty?

2. Is it correct in law for the tribunal to hold that intermediate products are necessarily those which have to undergo further processing in the factory of production for further use in the manufacture of the final product when the word 'intermediate' only means 'coming between two things as regards time, place or order'?

3. Is the tribunal correct in law in holding that the manufacture of plastic containers is not an intermediate stage for completion of the manufacture and clearance of cosmetic and toilet preparations particularly with reference to Sec.2(f) of the Central Excise and Salt Act, 1944, read with Note No.4 of Chapter 33 of the Schedule to the Central Excise Tariff Act, 1985?

4. Is the tribunal correct in law in not taking

into consideration the expression used in Rule 57-A viz., duty paid on the 'goods used in or in relation to the manufacture of the said final products' as an integral part thereof and thus holding that the raw materials for the containers are not eligible for MODVAT benefit?

5. The relevant portions of the abovesaid Rule 57-A are as follows:-

"Applicability: (1) The provisions of this Section shall apply to such finished excisable goods (hereinafter referred to as the "final products"), as the Central Government may, by notification in the Official Gazette, specify in this behalf for the purpose of allowing credit of any duty of excise or the additional duty under Sec.3 of the Customs Tariff Act, 1975 (51 of 1975) as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in relation to the manufacture of the said final products (hereinafter referred to as the "inputs") and for utilising the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification.....

Explanation: For the purpose of this rule, "inputs" includes-

(a) inputs which are manufactured and used within the factory of production in or in relation to, the manufacture of final products, and
(b) paints and packaging materials, but does not include-

(i)

(ii) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(iii) packaging materials the cost of which is not included or had not been included during the proceeding financial year in the assessable value of the final products under Sec.4 of the Act;

(iv)

(v) plywood for tea chests;"

The above referred notification under Rule 57-A has also been issued by the Central Government and admittedly the above referred to final

products manufactured by the applicant and the above referred to raw materials used in the manufacture of the abovesaid containers respectively, come under Chapters 33 and 39 of the Schedule to the Central Excise Tariff Act, 1985 (Central Act 5 of 1986) as per the said notification. It is needless to say that as per the charging section viz., Sec.3 of the Act, excise duty is leviable on excisable goods at the rate set forth in the schedule to the above referred to Central Excise Tariff Act, 1985. Here it is also necessary to note the definition of the term "manufacture" referred to by the learned Counsel for the applicant. The relevant portions of the said definition under Sec.2(f) of the Act are as follows:

"manufacture" includes any process,

(i)

(ii) which is specified in relation to any goods in the section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture."

One of the above referred to Chapter Notes, viz., Chapter Note No.4 to Chapter 33 runs as follows:

"4. In relation to products of heading Nos.33.03, 33.04 and 33.05, conversion of power into tablets, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retain packs or the adoption of any other treatment render the products marketable to the consumer, shall be construed as manufacture."

There is no dispute that the above referred to excisable goods of the assessee come under the above referred to headings.

The above referred to Rule 57-D(2) runs as follows:

"(2) Credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are for the time being exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty:

Provided that such intermediate products are-
(a) used within the factory of production in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit) on which the duty of excise is leviable whether in whole or in part; and (b) specified as inputs or as final products under a

notification issued under Rule 57-A".

Rule 57-F prescribes the manner of utilisation of the inputs and the credit allowed in respect of duty paid thereon and *inter alia* provides for the removal of the abovesaid inputs from the factory with the permission of the Collector of Central Excise, as if they have been manufactured in the said factory.

6. The learned Senior Counsel Mr.K.Parasaran mainly makes the following submissions:

The tribunal erred in holding that the abovesaid "plastic granules" are not "inputs" within the meaning of that term in the above referred to Rule 57-A. Further, the expression "in relation to" used in the main part of Rule 57-A is of widest amplitude. The tribunal should have also given a liberal interpretation to the abovesaid term "inputs". Further, if two interpretations are possible, the interpretation in favour of the assessee should have been adopted. The learned Senior Counsel also relies on several decisions (some of which are also judgments of different Benches of the Customs, Excise and Gold (Control) Appellate Tribunal), which will be referred to in the course of the discussion.

7. On the other hand, Mr.Jayachandran, learned Additional Central Government Standing Counsel reiterates the reasonings found in the orders of the first two authorities below and the tribunal and submits that the above said plastic granules are neither "inputs" under the abovesaid Rule 57-A, nor "intermediate products" under Rule 57-D(2) and that the claim of the applicant cannot be accepted since the abovesaid containers are exempted from duty. He also submits that the relevant circular issued by the Board in interpreting the relevant rules should be given due weight. He also cites several decisions (some of which are also decisions given by the different Benches of the abovesaid tribunal), which will also be considered during the course of the discussion.

8. We have carefully considered the rival submissions and the authorities cited. Though both the sides rely on tribunal decisions also, it is rightly agreed by both of them that the reasoning found in those decisions could have at best only persuasive effect before us.

9. The main question to be considered is whether the abovesaid plastic granules could be taken as "inputs" within the meaning of the term in Rule 57-A, more particularly in the above referred to

explanation therein. The said explanation, *inter alia*, says "inputs" includes packaging materials. But, the said term does not include, *inter alia*, those packaging materials, in respect of which any exemption to the extent of the duty of excise payable on the value of packaging materials is being availed for packaging any final products. So far as the term "packaging materials", in *Rasoi Ltd. v. Collector of Central Excise, (1990) 49 E.L.T. 522*, (Tribunal), the East Regional Bench, Calcutta) observed as follows while dealing with the question whether the MODVAT benefit could be given in respect of tin plates used for making metal containers, which were used for packing the manufactured excisable goods, viz., vegetable products:

"In our opinion, the question for determination turns on the expression packaging materials which are included in the scope of the term "inputs" in the Explanation to Rule 57-A. The term "packaging" is described in "Readers Digest Universal Dictionary" as material used for packaging'. Packaging material which is the crucial expression is thus different from package, just as, say, dress material is different from dress. Just as dress is made from dress material, package is made from packaging material. The specific exclusion in the Explanation to Rule 57-A of packaging materials in respect of which any exemption to the extent of 'duty payable' on the value of such packaging materials is availed of and of packaging materials the costs of which is not included in the assessable value of the final product under Sec.4 of the Central Excises and Salt Act, however tend to point to the possibility of the expression packaging material being used refer to packages themselves. But we cannot go beyond the normal meaning of the term. Thus, packaging material is different from package or container. Further, the specific exclusion of the item "plywood for tea chests" is also a pointer in this regard. Wood is not package by itself but a packaging material to make tea-chests. Because of its specific exclusion it stands excluded from the scope of MODVAT benefit available to packaging material. There is no such exclusion affecting tin plates. Their uses are similar. Both are used to make packages or containers for packaging excisable goods. Since tin plates tin sheets are used for making metal

containers in which vegetable product is packed they are packaging materials, which are eligible inputs which are sued in relation to the manufacture of vegetable products."

Thus observing, the said tribunal has held that MODVAT benefit is available in the abovesaid case.

10. This view has also been followed by the Western Regional Bench of the tribunal at Bombay in *F.D.C. Ltd. v. Collector of Central Excise*, (1991)55 E.L.T. 601, (Tribunal) while dealing with the question whether the MODVAT benefit could be given to printed aluminium foils used to make sachets (containers) for packing the excisable goods, viz., medicaments. In the said decision it observed thus:

"The term 'packaging materials' has a wider connotation and meaning. This is also evident from the fact that even plywood for tea chests are recognised as packaging materials but are sought to be specifically excluded, while including the other packaging materials. Hence what is required to be looked into is, whether the material received could be known to have its normal use as packaging materials and is also established to be used as packaging materials, which are permitted under Rule 57-A. If the intention was only to permit ready to use containers such as boxes or bottles, then the term used would have been 'package or container'. In the absence of any such restrictive meaning provided, the term 'packaging material' has to be interpreted as such and cannot be interpreted in the restricted manner.

11. We are in agreement with the abovesaid view expressed in *Rasoi Ltd. v. Collector of Central Excise*, (1990)49 E.L.T. 522, (Eastern Regional Bench of the Tribunal) and *F.D.C. Ltd. v. Collector of Central Excise*, (1991)55 E.L.T. 601, (Western Regional Bench of the Tribunal) (*supra*). We may also observe that given the abovesaid meaning for the term "packaging materials", the above referred to plastic granules will not also come under Sub-clause (ii) of clause (b) in the above referred to explanation under Rule 57-A, since admittedly those plastic granules are not packaging materials in respect of which any exemption is being availed of for packaging any final product.

12. No doubt in the above referred to *F.D.C. Ltd. v. Collector of Central Excise*, (1991)55 E.L.T. 601, (Tribunal), the decision of the South Regional

Bench, which is under review in the present case (and which also has been reported in *Ponds India Ltd. v. Collector of Central Excise*, (1988)38 E.L.T. 351, has been distinguished thus:

"In any case, we are of the view that the test that should be applied is, whether the material is identifiable as a packaging material and its normal usage is for packing purposes and it has been brought only for the packaging purposes. If this test is satisfied, neither the Rule 57-A could be said to deny the benefit nor the Rule 57-F (2) could be refused in such cases."

A similar distinction was also sought to be made by the same Western Regional Bench of the tribunal in *Parle Products (P) Ltd. v. Collector of Central Excise*, (1992)57 E.L.T. 152 (Tribunal). The learned Senior Counsel for the applicant submits that this distinction sought to be made out by the said Bench of the tribunal in *F.D.C. Ltd. v. Collector of Central Excise*, (1991)55 E.L.T. 601, is not correct since, once the abovesaid plastic granules could be and are used as packaging materials for making the abovesaid containers, they would also come under the term 'packaging materials'. We see force in this submission. The net result is that the abovesaid plastic granules are inputs within the meaning of the said term in Rule 57-A.

13. That apart, we find that the view expressed by the Supreme Court in *Collector of Central Excise v. Easteno Paper Industries Ltd.*, (1989)43 E.L.T. 201 (S.C.), also would lead to confusion the MODVAT benefit should be given in the present case. That case before the Supreme Court related to the pre-existing proforma credit scheme under Rule 56-A and the question there was whether the said proforma credit could be given to certain paper which was used by the assessee for wrapping the excisable goods, which was also certain other kind of paper. In that context, the Supreme Court has held that the said credit could be given to such wrapping paper and observed as follows:

"As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning of the expression is that to become 'goods' it must be something which can ordinarily come to the market to be bought and sold and is known to the market as such. The tribunal found, and there was material of the tribunal to do so, that the market in which articles in question were sold were paper packed

and wrapped in paper. Therefore, anything that enters into and forms part of that process must be deemed to be raw material or component part of the end product and must be deemed to have been used in completion or manufacture of the end product. This Court in the case of *Empire Industries Ltd. and others v. Union of India, and others*, (1985) 20 E.L.T. 179; (1985) 3 S.C.C. 314, has explained the concept of 'process' in Excise Law. In view of the principle laid down therein and other relevant decisions, processes incidental or ancillary to wrapping are to be included in the process of manufacture, manufacture in the sense of bringing the goods into existence as these are known in the market is not complete until these are wrapped in wrapping paper. In *J.K. Cotton Spinning and Weaving Mills Company Ltd. v. Sales Tax Officer*, (1965) 16 S.T.C. 563 (S.C.), this Court, while construing the expression 'in the manufacture or processing of goods for sale' in the context of Sales Tax Law, though the concept is different under the Excise Law, has held that manufacture of goods should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process, this Court further emphasised, is so integrally connected with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, articles required in that process, would fall within the expression 'in the manufacture of goods'.....

To be able to be marked or to be marketable, it appears to us, in the light of facts in the appeals, that it was an essential requirement to be goods, to be wrapped in paper. Anything required to make the goods marketable, must form part of the manufacture and any raw material or any materials used for the same would be component part for the end product. In our opinion, the tribunal was right in the view it took. There is no ground to interfere in these appeals."

14. The learned Senior Counsel for the applicant emphasises that in the present case also, the excisable goods, cream, talcum powder etc., cannot be marketed without the abovesaid containers. In this context, he also relies on the decision in *State of Tamil Nadu v. V.V. Vaniaperumal and*

Company, (1990) 76 S.T.C. 203 (F.B.), which has held that when oil is sold in tin containers, what was sold was a "tin of oil". Though this case related to sales tax, we think, we can draw inspiration from the following observation made therein and apply the reasoning adopted there to the present case also:

"As we said above only tin of oil is sold. There is no intention for sale or purchase of tin. The intention is to purchase of oil which of course is in tin. Therefore, whatever is the price paid, it must be taken to be the price of the oil. May be if more oil is sold and delivered in a container brought by the purchaser the price may be lesser than the oil sold in tin container, but nevertheless, when oil is sold in tin, the price that is paid is the price of the oil. Therefore, total turnover of the price has to be taxed and there is no question of taxing separately for the price of oil and price of tin at different rates."

15. In this connection, the learned counsel also relies on *Punjab Distilling Industries v. Income-Tax Commissioner*, A.I.R. 1959 S.C. 346. It is no doubt an income-tax case and the facts are that the assessee therein sold liquor in bottles and the sale price included certain sum as price for bottles also and a further sum was also collected by the buyer as security deposit. The Supreme Court held in that context that the receipt by the assessee-seller of the security deposit was also revenue receipt since sale was liquor with the bottle and that hence the security deposit was only part of the price paid. In this connection, the Supreme Court observed thus:

"It is clear to us that the trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the appellant would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold."

Therefore, the learned Senior Counsel submits that the abovesaid plastic granules, which were utilised for manufacturing the abovesaid containers for packing the abovesaid excisable goods like shampoo etc., and for making them marketable, would be component parts for the abovesaid goods which are the end products. We see force in this

submission also in view of the abovesaid observations in the Supreme Court decision and the Full Bench decision of this Court.

16. In the main part of Rule 57-A also the expression used in "goods" used in or in relation to the manufacture of the said final products" (hereinafter referred to as 'inputs') (*emphasis supplied*). The said Senior Counsel is also right in his submission that wide connotation should be given to the above words "in relation to" (*Vide M/s. Doypack Systems (P) Ltd. v. Union of India, A.I.R. 1988 S.C. 782.*

17. We may also point out that in *Collector of Central Excise v. Balasapur Industries Ltd. (1989) 43 E.L.T. 804 (S.C.)*, the Supreme Court also follows the above *Collector of Central Excise v. Eastern Paper Industries Ltd., (1989) 43 E.L.T. 201 (S.C.)*, (of course *(1989) 43 E.L.T. 804 (S.C.)*, arose in a different set of facts and context.

18. We have already pointed out that under Sec.2(f) of the Act, the term 'manufacture' would also include any process which is specified in relation to any goods in the section or chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture. We have also mentioned earlier that Chapter Note No.4 of Chapter 33 of the abovesaid Schedule also states that adoption of any treatment to render the products marketable to the consumer shall be construed as manufacture. Therefore, in the main part of Rule 57-A also, the term 'goods used in or in relation to the manufacture of the said final products' (hereinafter referred to as the "inputs") would cover the above referred to plastic granules also.

19. Further, it must be noted that the abovesaid explanation to Rule 57-A contains only an inclusive definition of the term "inputs". In this connection, the learned Senior Counsel also relies on the following observation in *State of Bombay v. Hospital Mazdoor Sabha, A.I.R. 1960 S.C. 610*:

"It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

20. It cannot also be said that, because the abovesaid containers are exempted from duty, the duty paid on the abovesaid granules, which go to make up those containers cannot get reimbursement under the MODVAT scheme. Once those granules are

held to be 'inputs' the abovesaid Rule 57-D(2) also will come to the aid of the applicant to claim MODVAT benefit in respect of them. Rule 57-D(2) says that credit of specified duty allowed in respect of any inputs shall not be denied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are for the time being exempt from the whole of the duty of excise leviable thereon. Here again, for the term 'manufacture' the abovesaid Sec.2(f) definition read with the abovesaid Chapter Note No.4 to Chapter 33 would apply and so, the abovesaid containers could be taken as the abovesaid 'intermediate products' which have come into existence 'during the course of manufacture of the final product'. In such a case the requirement mentioned in the proviso to Rule 57-D(2) will stand satisfied since the abovesaid containers, the intermediate products, are admittedly 'used within the factory of production in the manufacture of a final product' and specified as inputs or final product under the Notification issued under Rule 57-A.

21. This apart, it cannot also be said that there is no cascading effect if the value of the containers which are exempt from duty are actually charged to duty subsequently when the said containers are used to pack the final products (cream, etc.) and are actually get integrated in the said final products. The purpose for which the exemption was granted to those containers would also be nullified if their value is to be taxed subsequently when they are used to pack the abovesaid cream etc.

22. In *Kusum Products Ltd. v. Collector of Central Excise, (1990) 48 E.L.T. 50*, the tribunal East Regional Bench, Calcutta, no doubt observed differently (from what it observed later in *Rasoi Ltd. v. Collector of Central Excise, (1990) 49 E.L.T. 522* (Tribunal), as stated above). Its observation is as follows:

"In the explanation to Rule 57-A relating to MODVAT credit which is what is claimed by the appellants, the term-input has been given an inclusive coverage whereby packaging materials are included. The inputs in question are polythene granules. These are not packing materials, as such. Using them, bags which are packaging materials are manufactured. The bags represent the final stage of manufacture as far as they are concerned. They do not constitute intermediate products for the

detergent powder. It has been contended by the appellants that the term-intermediate product has not been defined in the Central Excise Rules. The term can only mean the products obtained from the raw materials in the course of manufacture of the final product. Here the final product is detergent product and it is not manufactured from either polythene granules or plastic bags which are made therefrom to enable the latter to be considered as the intermediate products for detergent powder."

Here in the abovesaid *Kusum Products Ltd. v. Collector of Central Excise*, (1990)48 E.L.T. 50 (Tribunal), the tribunal has not borne in mind the actual meaning of the words "packaging materials" and went wrong in saying that polythene granules were instead held by the tribunal in the above case as packaging materials. We are of the view, as indicated above that those bags are only packages or containers and cannot be strictly called "packaging materials. Further, the tribunal erred in saying that those bags do not constitute intermediate products for the detergent powder. As already indicated in view of Sec.2(f) of the Act and the abovesaid Chapter Note No.4, to Chapter 33, those bags would be "intermediate products" (for the abovesaid detergent powder) spoken to in Rule 57-D(2).

23. Likewise, the tribunal in *Shivaji Works Ltd. v. Collector of Central Excise*, (1990)50 E.L.T. 50 (Tribunal) and *Mysore Kirloskar Ltd. v. Collector of Central Excise*, (1990)50 E.L.T. 175 (Tribunal), which were relied on by the Additional Central Government Standing Counsel, cannot be said to be correct in holding that sand moulds prepared using certain chemicals were not intermediate products, coming into existence during the course of manufacture of the final product, iron and steel on the ground that the said sand moulds were independently manufactured. Here again, Sec.2(f) definition read with the abovesaid Chapter Note No.4 was not considered.

24. The learned Additional Central Government Standing Counsel also made an attempt to rely on Rule 57-C. But Rule 57-C only says that no credit of the specified duty paid on the inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the duty excisable thereon. But, in the present case, the abovesaid containers are not final products

and so, Rule 57-C cannot have any application.

25. Further, it is settled law that even if two views are possible, the view favourable to the assessee is to be followed (Vide *Collector of Central Excise Bombay v. M/s. Parle Exports (P) Ltd.*, A.I.R. 1989 S.C. 644; (1988)38 E.L.T. 741 (S.C.)). No doubt, the learned Additional Central Government Standing Counsel relies on the same decision to contend that the interpretation given by the Board should be given weight. In this connection, he also relies on *Collector of Central Excise, Guntur v. Andhra Sugar Ltd.*, (1988)38 E.L.T. 564 (S.C.), to contend that contemporaneous exposition by the Board should be accepted. What was observed in *Collector of Central Excise Bombay v. M/s. Parle Exports (P) Ltd.*, A.I.R. 1989 S.C. 644; (1988)38 E.L.T. 741 (S.C.), is as follows:

"The principle is well-settled that when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment. But in this connection, it is well to remember the observations of the Judicial Committee in *Coroline M. Armytage v. Fredrick Wilkinson*, (1878)3 A.C. 355 at 370, that it is only, however in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction arises."

But, in the present case, we do not think that there is any real difficulty in interpreting Rule 57-A. No doubt, the Supreme Court in the above decision also observed thus:

"It is a well-settled principle of interpretation that courts in construing a statute or notification will give much weight to the interpretation put up on it at the time of enactment or issue, and since by those who have to construe, execute and apply the said enactments."

However, it is obvious that any interpretation put by Board's circulars cannot be conclusive. In fact in *Orient Paper Mills v. Union of India*, A.I.R. 1969 S.C. 48, cited by the learned Senior Counsel for the applicant, the Supreme Court has held that the directions issued by the Central Board of Revenue cannot be binding on Courts or Quasi Judicial Tribunals. In fact in that decision, the Supreme Court quotes the following earlier observation in *Rajagopala Naidu v. State Transport Appellate Tribunal*, A.I.R. 1964 S.C. 1573: -

"If the exercise of discretion conferred on a

quasi judicial tribunal is controlled by any such direction, that forges fetters on the exercise of quasi judicial authority and the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process."

In the present case, one of the Board's clarification was as follows:

"Rule 57-A allows MODVAT credit for 'packaging materials' and not on raw materials for making such packaging materials. Packaging materials are ready to use articles such as containers, boxes, cartons, bottles etc. Therefore MODVAT credit will be admissible for the duty paid on such ready to use packaging materials but not on the raw materials such as plastic granules, steel sheets/strips etc.) used for making packaging materials. Raw materials like plastic granules or steel sheets/strips are general purpose articles which can be put to various uses, one of which is making of packaging materials. These raw materials by themselves are not recognisable as packaging materials."

As already stated, we are unable to agree with this interpretation. We have already pointed out what actually is meant by packaging materials. They only refer to the raw materials which go to make up the abovesaid containers. So, we hold that the abovesaid clarification given by the Board is not correct.

26. The learned Additional Central Government Standing Counsel also relies on *Mettur Chemicals and Industrial Corporation Ltd. v. Collector of Central Excise*, (1991) 52 E.L.T. 592 (Tribunal). But the facts therein are different and the decision may have no application to the present facts.

27. In the light of the above discussion, our answers to the above referred to four questions are in the negative and in favour of the applicant. Accordingly, we answer this reference. In the circumstances, we make an order as to costs.

B.S. ----- Reference answered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- K. Venkataswami, J

C.R.P.No.2849 of 1990 13th October, 1992.

Nesamony Transport Corporation Ltd., Nagercoil
...Petitioner
v.

John Bright (Minor), represented by Guardian and Father A. Ramasamy and another
... Respondents.

Civil Procedure Code (V of 1908), O.47 - Motor Vehicles Act (IV of 1939), Sec.110-C(2) - Tamil Nadu Motor Vehicles Rules, Rule 18 - Motor Accidents Claims Tribunal, if can review its judgment.

The Supreme Court has, categorically, held in *Bhagwathi Devi v. M/s.I.S.Goel*, 1983 A.C.J. 123, that the Motor Accidents Claims Tribunal is a Civil Court. Further, the Supreme Court as well as this Court has applied the provisions of the Civil Procedure Code not expressly mentioned either in the Act or in the Rules framed thereunder. Following that trend and as observed by a Division Bench of this Court in the decision reported in *S.V.R.Natarajan Chettiar v. State of Madras*, I.L.R. 1960 Mad. 449, it should be held that the tribunal so long as it exercises judicial functions should be held to possess power to review its judgment where due cause is shown. [Para 18]

Cases referred to:

P.N.Thakershi v. Pradyumen Singhi, A.I.R. 1970 S.C. 1273. [Paras 5, 11, 17]
Col.Avtar Singh Skkhow v. Union of India, A.I.R. 1980 S.C. 2041: (1981) 1 S.C.R. 168. [Paras 5, 19]
V.Dhandayuthapani v. S.P.Krishnamurthi, A.I.R. 1988 Mad. 78. [Paras 5, 11]
M/s.National Hotel v. Rukaiyabai, A.I.R. 1985 Bom. 403. [Para 5]
State of Haryana v. Smt. Darshana Devi, A.I.R. 1979 S.C. 855: 1979 A.C.J. 205. [Paras 6, 14]
Bhagwathi Devi v. M/s.I.S.Goel, 1983 A.C.J. 123. [Para 6]
Kanniammal v. P Narayanan, 1988 T.L.N.J. 310. [Para 15]
S.V.R.Natarajan Chettiar v. State of Madras, I.L.R. 1960 Mad. 449. [Paras 16, 18]
New India Assurance Company Ltd. v. Minque Lourence Corriea, 1986 A.C.J. 646. [Para 17]

Chennichi alias Parikkal v. Srinivasan Chettiar, (1970)1 M.L.J. 234. [Para 19]

S.N.Kuba v. P.P.L.Vaithyanathan, 1988 T.L.N.J. 1. [Para 19]

Petition under Art.227 of the Constitution of India praying the High Court to revise the order of District Court, Kanyakumari at Nagercoil, dated 9.7.1990 and made in I.A.No.127 of 1990 in MCOP S.R.No. 1899 of 1989,

Mrs.Bhagirathi Narayanan, for Petitioner.

V.K.Rajagopal for Respondent No.1.

The Court made the following

ORDER: This revision petition is filed under Art.227 of the Constitution of India challenging an order of the tribunal below allowing I.A.127 of 1990 a petition for reviewing an order already passed on 31.1.1990 in I.A.No.435 of 1989 in S.R.No.1899 of 1989.

2. Brief facts are the following:

In a motor accident that took place on 23.12.1986 minor John Bright, the first respondent herein was permanently disabled. Unfortunately the father and guardian of the minor did not take timely steps to file a petition for compensation under Sec.110-A of the Motor Vehicles Act, 1939, but filed the same after a delay of 737 days with a petition to condone that delay. That petition namely I.A.No.435 of 1989 was dismissed. Aggrieved by that the minor represented by the father and guardian has filed I.A.No.127 of 1990 purporting to invoke the provisions of O.47, Rule 1 of the Code of Civil Procedure.

3. The court below overruling the objections of the petitioner herein entertained the review application and allowed the same. Hence the present revision petition.

4. At the outset it is to be pointed out that there is nothing to suggest from the original application or from the original records that I.A.No.127 of 1990 was filed before the Motor Accidents Claims Tribunal and dealt with as such. However, the counter filed by the petitioner herein as second respondent in the said I.A. proceeds as if the application was filed before the Motor Accidents Claims Tribunal (District Court Kanyakumari at Nagercoil). It proceed on the basis that the application was disposed of by the claims tribunal though the cause title shows as if it was disposed of by the District Court.

5. Mrs.Bhagirathi Narayanan, learned counsel appearing for the petitioner raised two important

contentions before me. The first contention was that the tribunal has no inherent power to review an earlier order passed by it. The second contention was even assuming that the tribunal has power to review its order the order under revision cannot be sustained as no reason is given in the order. Learned counsel placed reliance on two judgments of the Supreme Court one judgment of this court and another judgment of Bombay High Court. They are *P.N.Thakersli v. Pradyumen Singhji*, A.I.R. 1970 S.C. 1273, *Col.Avtar Singh v. Union of India*, A.I.R. 1980 S.C. 2041; (1981)1 S.C.R. 162. *V.Dhandayuthapani v. S.P.Krishnamurthi*, A.I.R. 1988 Mad. 78 and *M/s.National Hotel v. Rukaiyabai*, A.I.R. 1985 Bom. 403.

6. Mr.V.K.Rajagopal learned counsel appearing for the first respondent submitted that the tribunal has power to review its order and though the review order does not contain any reason having regard to the fact that the minor's career has been seriously affected and that the minor is not in a position to look after himself as a result of the accident this Court may not be pleased to interfere with the order under revision. In support of his contention that the tribunal has power to review its earlier order he cited the decision in *State of Haryana v. Smt.Darshana Devi*, A.I.R. 1979 S.C. 855; 1979 A.C.J. 205 and also the decision in *Bhagwathi Devi and others v. M/s.I.S.Goel and others*, 1983 A.C.J. 123.

7. I have considered the rival submissions.

8. Before going into the actual question namely whether the tribunal has power to review it is relevant to note down the provisions relating to 'procedure and powers of claims tribunals' Sec.110-C of the Motor Vehicles Act 1939 reads as follows:

"110-C: *Procedure and powers of claims tribunals*: (1) In holding any inquiry under Sec.110-B the claims tribunal may subject to any rules that may be made in this behalf follow such summary procedure as it thinks fit.

(2) The claims tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for other purposes as may be prescribed; and the claims tribunal shall be deemed to be a civil court for all the purposes of Sec.195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(2-A) Where in the course of any inquiry the claims tribunal is satisfied that--

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim, it may for reasons to be recorded by it in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

(3) Subject to any rules that may be made in this behalf, the claims tribunal may, for the purpose of adjudicating upon any claim for compensation choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry."

The relevant rule framed in this regard by the Tamil Nadu Government is rule No.18 which reads as follows:

"18. Code of Civil Procedure to apply in certain cases...

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be apply to proceedings before the claims tribunal namely O.5, Rules 9 to 13 and 15 to 30 O.9, O.13, Rules 3 to 10; O.16, Rules 1 to 21; O.17 and O.23, Rules 1 to 3."

9. The contention of Mrs. Bhagirathi Narayanan was that neither Sec.110-C (2) nor Rule 18 refers to O.47, C.P.C. to enable the tribunal to invoke the power of review. Therefore according to the learned counsel the tribunal has no jurisdiction to review its earlier order as it has otherwise no inherent jurisdiction.

10. On the first blush the above argument is not only attractive but appeals for acceptance. However, it requires a detailed discussion.

11. In *P.N. Thakersh v. Pradyumen Singhji*, A.I.R. 1970 S.C. 1273, the Supreme Court has held as follows:

"The first question that we have to consider is whether Mr. Mankodi had competence to quash the order made by the Saurashtra Government on October 22, 1956. It must be remembered that Mr. Mankodi was functioning as the

delegate of the State Government. The order passed by Mr. Mankodi in law amounted to a review of the order made by Saurashtra Government. It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provisions in the act was brought to our notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order it is obvious that its delegate could not have reviewed its order....."

The above ruling of the Supreme Court was applied by a Division Bench of this court in the case reported in *V. Dhandayuthapani v. S.P. Krishnamurthi*, A.I.R. 1988 Mad. 78. Again the ruling of the Supreme Court was applied in the case relied on by the learned counsel for the petitioner namely *M/s. National Hotel v. Rukaiyabai*, A.I.R. 1985 Bom. 403.

12. As against this it has to be found out whether the above ruling of the Supreme Court applied by this Court and the Bombay High Court as noticed above can be applied to the facts of this case.

13. In *State of Haryana v. Smt. Darshana Devi*, A.I.R. 1979 S.C. 855; 1979 A.C.J. 205, the Supreme Court while finding fault with the State of Haryana for filing a Special Leave Petition against the judgment of the Punjab and Haryana High Court granting leave to file a petition for compensation as indigent person under O.33, C.P.C. observed as follows:

".....The court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit making through sale of civil justice disguised as court-fee is fully reviewed by this Court. Before parting with this point we just express our poignant feeling that no State, it seems, has as yet framed rules to give effect to the benignant provision of legal aid to the power in O.33, Rule 9-A, Civil Procedure Code, although several years have passed since the enactment parliament is stultified and the people are frustrated. Even after a law has been enacted for the benefit of the poor the State does not bring into force by wilful default in fulfilling the condition *sine qua non*. It is a public duty of each great branch of Government to obey the rule of law and uphold the

tryst with the Constitution by making rules to effectuate legislation meant to help the poor." Even though O.33, C.P.C. is not expressly mentioned either in the Motor Vehicles Act or in the rules framed thereunder by the respective states in the aforesaid Supreme Court Judgment the learned judges have upheld the leave granted under O.33, C.P.C. to file the application as indigent person.

14. Again the Supreme court in *Bhagwathi Devi v. M/s.I.S.Goel*, 1983 A.C.J. 123, held as follows:

"In view of the observations of this Court in *State of Haryana v. Smt.Darshna Devi*, 1979 A.C.J. 205; A.I.R. 1979 S.C. 855, we are of the view that the Motor Accident Claims Tribunal constituted under the Motor Vehicles Act is a civil court for the purpose of Sec.25 of the Code of the Civil Procedure. We are satisfied that the cases before us are fit cases for being transferred from the file of the Motor Accidents Claims Tribunal, Moradabad to the file of the Motor Accidents Claims Tribunal, Delhi. The transfer petitions are accordingly allowed and compensation application Nos.3 to 15 of 1982 pending before the Motor Accidents Claims Tribunal, Moradabad are transferred to the file of the Motor Accidents Claims Tribunal, Delhi."

Here again though Sec.25 of the Code of Civil Procedure was not referred to either in the Motor Vehicles Act or in the Rules framed thereunder the application of that section was justified by the Supreme Court.

15. Applying the principle laid down by the Supreme Court in *Bhagwathi Devi v. M/s.I.S.Goel*, 1983 A.C.J. 123, Srinivasan, J., in *Kanniammal and others v. P.Narayanan and others*, 1988 T.L.N.J. 310, has held as follows:

"Thus the Motor Accidents Claims Tribunal having been held to be a civil court for the purpose of Sec.25, Code of Civil Procedure is certainly a court subordinate to the High Court for the purpose of Sec.24, Code of Civil Procedure.

xxx xxx xxx

According to learned counsel it is only those courts which are specifically referred to in Sec.3 Code of Civil Procedure are subordinate to High Court and not any other statutory tribunal which may be equated to civil court for certain purposes. Sec.110(c)(2) of the Motor Vehicles Act is to the effect that the tribunal

shall have all the powers which civil courts have for taking evidence for enforcing the attendance of witness for discovery for production of documents and the like. It is also stated that the claim tribunal shall be deemed to be a civil court for the purpose of Sec.195 and Chapter 35, C.I.P.C., 1898 (Act 5 of 1898). In view of the decision of the Supreme Court and the provisions of Sec.110(c)(2) of the Motor Vehicles Act it is clear that the Motor Accidents Claims Tribunal is a civil court for certain purposes. As it is held to be a civil Court for the purpose of Sec.25, Code of Civil Procedure it is necessarily a court subordinate to the High Court for the purpose of Sec.24, Code of Civil Procedure because it is a court of a grade inferior to that of a District Court....."

16. A Division Bench of this Court in *S.V.R.Natarajan Chettiar v. State of Madras*, I.L.R. 1960 Mad. 449, on the question whether the tribunal constituted under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, has got power to review its judgment held as follows:

"It is argued that this decision of the tribunal was without jurisdiction that the consent of the appellants could not confer jurisdiction upon the tribunal and that we must set aside the subsequent order illegally passed in the present appeal. The argument appears to us to be quite unsustainable upon two broad grounds. Firstly, whatever view we may take of the technical position whether a quasi judicial tribunal would or would not possess rights of review under the Code of Civil Procedure the proposition certainly seems maintainable that in order to render justice all such tribunals so long as they exercise judicial functions should be held to possess inherent powers to review their judgments where due cause is shown. Our attention has been drawn to a decision briefly reported in *Balakrishnayya v. State of Andhra*, where *Balakrishna Aiyar, J.* held under somewhat similar circumstances that the Inam Settlement Officer had no jurisdiction to reopen an enquiry made under Sec.9 of Act XXVI of 1948 at the question of the ryots. We do not think that it is necessary to dilate upon this aspect for the learned Judge was dealing with the case of a Settlement Officer making some kind of an administrative enquiry though under the act. In the present case we are concerned

with a quasi-judicial tribunal giving a finding in the presence of the parties whether a particular village did or did not fall within the ambit of the relevant provision. As we have already stressed there can be no doubt that an inherent power to review should be presumed in all such cases, as it cannot be just and expedient that such tribunals rendering judicial decisions should be unable to rectify an error apparent on the face of the record or to exercise powers of review for similar adequate causes."

17. In *New India Assurance Company Ltd. v. Minque Lourence Corriea*, 1986 A.C.J. 646, a learned single Judge of the Bombay High Court on the question of power to review by Motor Accidents Claims Tribunal held as follows:

"On a careful consideration of the above authorities I am of the opinion that the decision of the Supreme Court in *Northern India Caterers' case*, A.I.R. 1980 S.C. 674, is not of any help for the purpose of determining as to whether or not the power of review has to be expressly conferred. In fact the said authority deals with the problem as to when powers of review are to be exercised. However, the authority in *P.N.Thakershi v. Pradyumen Singhji*, A.I.R. 1970 S.C. 1273, is more to the point. Their Lordships had made it clear that the power of review can be said to have been conferred in an authority or court if there is an express provision therefor or such power has to be read by necessary implication. Now applying these observations to the case before me I am bound to hold that powers of review have been vested in the Motor Accidents Claims Tribunal. In fact Sec.3-A empowers the State Government to make rules for the purpose of carrying into effect the provisions of Secs.110 to 110-E of the Act and in particular to make rules enabling the claims tribunal to exercise the powers vested in a civil court. In exercise of such powers the Government of Goa, Daman and Diu has enacted the Goa, Daman and Diu Motor Accidents Claims Tribunal Rules 1966. Rule 6 specifically provides that the claims tribunal may exercise all the powers of a civil court save in so far as the same are not inconsistent with the provisions of the Motor Vehicles Act, 1939 and Rules framed thereunder. Rule 6 vests in the claims tribunal all the

powers of a civil court which are not inconsistent with the provisions of the Motor Vehicles Act and the rules framed thereunder. The power of review is by no stretch of imagination inconsistent with the provisions of the act and the rules framed thereunder. Thus it has to be held that the act read with the rules by necessary implication vests the power of review in the claims tribunal."

Though that judgment was in the light of the rules made in that State under Sec.111-A of the Motor Vehicles Act the point to be noticed is that there was no express provision either in the Act or rules framed thereunder.

18. We have now seen that the Supreme Court has categorically held that the Motor Accidents Claims Tribunal is a civil court. Further the Supreme Court as well as this court had applied the provisions of the Civil Procedure Code not expressly mentioned either in the Act or in the Rules framed thereunder. Following that trend, and as observed by a Division Bench of this Court in the decision reported in *S.V.R.Natarajan Chettiar v. State of Madras*, I.L.R. 1960 Mad. 449, it should be held that the tribunal so long as it exercises judicial functions should be held to possess power to review its judgment where due cause is shown. In view of the later Supreme Court judgments holding that the tribunal is a civil court, I do not think that the ratio laid down by the Supreme Court in *P.N.Thakershi v. Pradyumen Singhji*, A.I.R. 1970 S.C. 1273, can be pressed into service. In the light of the foregoing I am inclined to hold that the Motor Accidents Claims Tribunal has jurisdiction to review its earlier order where due cause is shown.

19. Now coming to the second question whether the order is sustainable in the absence of any reason given therefor, in support of her contention that the order under revision cannot be sustained, the learned counsel for the petitioner cited a judgment of the Supreme Court in *Col.Aviar Singh Skkhow v. Union of India*, A.I.R. 1980 S.C. 2041: (1981)1 S.C.R. 168, wherein the Supreme Court has observed as follows:

"A review is not a routine procedure. An earlier order cannot be reviewed unless the court is satisfied that material error manifest on the face of the order undermines its soundness or results in miscarriage of justice. A review of a judgment is a serious step and resort to it is

proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility....."

No doubt the above judgment supports the contention of the learned counsel for the petitioner. However, in the facts of the present case I find that equity is not in favour of the petitioner. Considering that I expected the petitioner to compromise the matter and for that purpose the matter was adjourned. However the learned counsel for the petitioner expressed her inability to persuade the petitioner to compromise the matter. In this connection, the exercise of the jurisdiction under Art.227 of the Constitution of India being discretionary I would like to quote and apply an observation of Ismail, J. as he then was while considering the scope of Sec.115 of the Code of Civil Procedure in *Chennichi alias Parikkal v. Srinivasan Chettiar*, (1970)1 M.L.J. 234, which reads as follows:

"The revisional jurisdiction of the court is intended to secure and subserve ends of justice and not to deny or defeat it if interference in a particular case will result in hardship or injustice to a party the High Court will be justified in refusing to interfere in the exercise of its revisional jurisdiction, even if the order is found to be one without jurisdiction."

The above passage has been approved and applied by a Division Bench of this Court in *S.N.Kuba v. P.P.L.Vaithyanathan*, 1988 T.L.N.J. 1, I am inclined to apply the above ratio to the facts of this case and declined to exercise my discretionary jurisdiction in favour of the petitioner. Accordingly the civil revision petition fails and the same is dismissed. No costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra and Arumugham, JJ.*

L.P.A.Nos.46 to 49 of 1992 *24th November, 1992.*

Amsath Ansari Jawahar and another....Appellants
v.

S.Sikkandar Batcha and others ...*Respondents.*

(A) *Civil Procedure Code (V of 1908), O.41, Rule 22 - Preliminary decree for partition - Defendant filing appeal against decree - Plaintiff preferring cross-objection after a delay of over 6 years - Memorandum of cross-objections whether can be dismissed on ground of delay - Period of limitation for cross-objections.*

(B) *Letters Patent (Madras), Clause 15 - Single Judge of High Court dismissing cross-objections on the ground of limitation - Appeal against - If maintainable.*

Rule 22, O.41, C.P.C. has clearly envisaged a cross-objection not only when a respondent in the appeal can take by way of appeal a matter to the court where a part of the decree has gone against him, but also in a case where the decree is entirely in his favour but a certain finding is, according to him, erroneous or has gone against him. A cross-objection is treated at par with the appeal and heard along with the appeal if the appeal is not dismissed for any reason of default or withdrawn by the appellant. When, however, the appeal is withdrawn or dismissed for default, the objection so filed is treated as an appeal by the respondent and heard, independently. The provision in Rule 22 of O.41, however, has given a right to the respondent to approach the court for adjudication of any issue that has been decided against him or any part of the decree that has gone against him within a period of one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such time as the appellate court may see fit to allow. It has not affected the court's power to enter into any issue that has been decided against the respondent and in favour of the appellant or to interfere with that part of the decree which has been in favour of the appellant and has gone against the respondent. The period of limitation for cross-objection is different as found in Rule 22, O.41, C.P.C. from

the period of limitation for appeal against a decree. It starts running from the day of the service of notice on the day fixed for hearing the appeal. The period of 30 days under Rule 22 is not a fixed period in the sense that unless sufficient cause is shown in terms of Sec.5 of the Limitation Act, the court cannot accept a cross-objection beyond 30 days of the service of notice of the day fixed for hearing the appeal. The words 'or within such further time as the appellate court may see fit to allow' in sub-rule (1) of Rule 22 of O.41 of the Code are indicative of the discretion of the court in appropriate cases to give further time to a respondent than the period of one month from the date of service of notice of appeal for filing the cross-objection. As to when and how the appellate court can think fit to allow further time, however, is a question that can be answered only by saying that it shall be a decision taken on the facts of each case.

[Para 3]

There can be no dispute that the appeal is maintainable against the judgment of the learned single Judge dismissing the cross-objection on the ground of limitation.

[Para 6]

Cases referred to:

Ramaswami Chettiar v. Kanniappa Mudaliar, 60 M.L.J. 237. [Para 5]

Selvam Mudaliar v. Raju Mudaliar, (1962) 2 M.L.J. 657. [Para 5]

A.B. Manavala Chettiar v. T.V. Selavarajan, 1991 T.L.N.J. 166. [Para 5]

Sha Babulal Khinji v. Jayaben, A.I.R. 1981 S.C. 1786; (1981) 4 S.C.C. 8. [Para 5]

Jugal Kishore Palival v. Sat Jit Singh, (1984) 1 S.C.C. 358. [Para 5]

Appeals under Clause 15 of the Letters Patent against the order of Srinivasan, J., dated 20.1.1992 and made in the exercise of the Appellate Jurisdiction of the High Court in C.M.P. Nos. 16659, 12830, 12829 and 12828 of 1991 respectively in Appeal No. 148 of 1984 (O.S. No. 316 of 1980 dated 24.9.1983 on the file of the Court of the Subordinate Judge, Madurai).

M. Velusami, for Appellants.

K. Vaitheswaran, for Respondent No. 1.

S. V. Jayaraman, for Respondent Nos. 4 to 6.

The Judgment of the Court was delivered by *Mishra, J.*:- The petition to condone delay of several years in filing a memo of cross-objection has been dismissed by a learned single Judge of this Court. He has accordingly dismissed the memo of

cross-objection. He has also dismissed a petition for adding proposed parties as respondents 6 to 10 in the appeal A.S. No. 148 of 1984 which is filed against the decree of the Court of the III Additional Subordinate Judge, Madurai (in O.S. No. 316 of 1980). He has also rejected the application for interim injunction against the 1st respondent (1st defendant) in the suit and the proposed respondents. These appeals have been filed against the order common to all these petitions. The plaintiff/appellant filed the original suit for partition of certain properties between the plaintiff and the defendants in the suit. While the suit was pending it appears that Land Acquisition proceedings started with respect to item No. 7 of 'C' Schedule properties in the suit. It was contended before the trial court on behalf of the defendants that there can be no division of a property which has been subjected to the land acquisition proceedings. The trial court decreed the suit for partition in respect of other properties, but excluded item No. 7 of 'C' schedule properties on the ground that it had been subjected to land acquisition proceedings. The first defendant, aggrieved by the decree for partition in respect of the joint estate has preferred appeal A.S. No. 148 of 1984. It appears however that the Land Acquisition Proceedings in respect of item No. 7 of the 'C' schedule property were later withdrawn. The appellants herein also learnt however that the first defendant intended to dispose of the said item No. 7 of 'C' schedule properties taking advantage of the fact that it was excluded from partition decree by the trial Court. The plaintiff/respondent moved this court with an application for injunction against the 1st defendant and the proposed transferees and also preferred cross-objection to the appeal of the 1st defendant/appellant in A.S. No. 148 of 1984, with a petition for condonation of delay. The delay has been inordinate extending to a period of 6 years and 79 days. Learned single Judge has rejected the petition for condonation of delay holding that the delay is entirely due to the negligence on the part of the appellant/plaintiff herein. In his words:

"When the decree of the court below has negatived the claim of the petitioners for partition of item No. 7 of 'C' schedule as acquisition proceedings were pending, it is the duty of the petitioners to verify whether the judgment was based on proper reasoning. The petitioners would have certainly found out if the reasons

given by the court below were erroneous and would have taken steps to prefer a regular appeal or cross-objections in time. The delay is entirely due to the negligence on the part of the petitioners. I do not find any justification to condone the delay."

He has as a consequence rejected the cross-objection as well as the petitions for injunction.

2. A suit for partition until preliminary decree stage is a suit for determination of the extent of shares of the parties and extends to all such properties which may be found in the common hotch-pot of the joint family of the parties. It is for that reason that it is said that in a suit for partition the plaintiff is in the position of a defendant and the defendant is in the position of a plaintiff. Only because there has been a land acquisition proceeding, it is difficult to conceive any impediment in making a declaration as to the extent of shares between the parties in the property that was subjected to acquisition under the Land Acquisition Act. When a property is subjected to land acquisition and there is a dispute as to who is the owner of the property or there is a dispute as to the extent of the rights and interests of various persons in such a property, for grant of compensation, Secs. 18 and 30 of the Land Acquisition Act take care of such disputes. Item 7 of 'C' schedule could have been continued as a joint estate for the purposes of preliminary decree in the suit, as there was no abatement of the suit in respect of the said item of the property, merely because there was a land acquisition proceeding. But if it was contended, no prejudice was caused to either party by such exclusion for claims, for, compensation or apportionment thereof could be made by each co-owner of the property under Sec. 18 of the Land Acquisition Act or in the event of a dispute as to the interest or extent thereof under Sec. 30 of the said Act. If no cross-objection was filed thus for the reason that item No. 7 of 'C' Schedule property had been excluded from the joint estate of the parties although the court decreed the suit of the plaintiff for partition of the joint estate, by the plaintiff, no serious blame for that can be put upon the plaintiff/appellant.

3. O. 41 of the Code of Civil Procedure which takes care of the proceedings in appeal has made a specific provision under Rule 22 thereof that:

"Any respondent, though he may not have appealed from any part of the decree, may not

only support any decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour, and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow."

The rule has got an explanation which reads as follows:

"A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent."

The rule also indicates the form of objection and provisions applicable to the same and says:

"Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit."

This rule has clearly envisaged a cross-objection not only when a respondent in the appeal can take by way of appeal a matter to the court whether a part of the decree has gone against him, but also in a case where the decree is entirely in his favour, but a certain finding is, according to him, erroneous or has gone against him. A cross-objection is treated at par with the appeal and heard along with the appeal if the appeal is not dismissed for any reason of default or withdrawn by the appellant. When however the appeal is withdrawn or dismissed for default, the objection so filed is treated as an appeal by the respondent and heard independently. The provision in Rule 22 of O. 41 however has given a right to the respondent to approach the court for adjudication of any issue that has been decided against him or any part of the decree that has gone against him within a period of one month from the date of service on him or his

pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate court may see fit to allow. It has not affected the court's power to enter into any issue that has been decided against the respondent and in favour of the appellant or to interfere with that part of the decree which has been in favour of the appellant and has gone against the respondent. The appellate court's power is spelt out in Rule 33 in this behalf in these words:

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the appellate court shall not make any order under Sec.35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

When we, however, advert to the facts of this case we find no reason to limit the filing of the cross-objection within the period of limitation for appeal against the decree. The period of limitation for cross-objection is different as found in Rule 22, O.41, C.P.C. from the period of limitation for appeal against a decree. It starts running from the day of the service of notice of the day fixed for hearing the appeal. The period of 30 days under Rule 22 is not a fixed period in the sense that unless sufficient cause is shown in terms of Sec.5 of the Limitation Act, the Court cannot accept a cross-objection filed beyond 30 days of the service of notice of the day fixed for hearing the appeal. The words 'or within such further time as the Appellate Court may see fit to allow' in Sub-rule (1) of Rule 22, O.41 of the Code are indicative of the discretion of the Court in appropriate cases to give further time to a respondent than the period of one month from the date of service of notice of

appeal for filing the cross-objection. As to when and how the appellate court can see it fit to allow further time, however, is a question that can be answered only by saying that it shall be decision taken by the appellate court bearing and depending on facts of each case. We are in the instant case constrained to observe that there is absolutely nothing in the impugned order to show as to when the plaintiff was served with the notice of appeal and when the period of one month from the date of service of notice expired. We have not been able to understand how the cross-objection limitation could be based on the understanding of the plaintiff/respondent of the decree of the appellate court negating his claim for partition of item No.7 of 'C' schedule. Cross-objection's delay cannot be mixed up with any party respondent not filing a regular appeal. It has to be decided independently and viewed independently.

4. It is a case in which we have to take notice of the conduct of the first defendant/respondent herein who took the stand before the trial court that since land acquisition proceedings had started in respect of item 7 of 'C' schedule properties, the same should be excluded from partition and on this representation of the first defendant/respondent herein, the trial court excluded item 7 of 'C' schedule property from partition decree. He has known that the plaintiff/appellant had included the suit property in the hotchpot and sought partition. He could not, as the law permitted the appellant to do so, deny to the appellant the right to approach proper authorities under the Land Acquisition Act for his share of compensation or for determination of his interest in the land acquired in accordance with law. He could not similarly deny to the appellant the right to get a declaration and accordingly a partition of item 7 of 'C' schedule properties in the suit. He, it appears, however, took advantage of the withdrawal of acquisition proceedings and release of item 7 of 'C' schedule properties from the land acquisition and proposed to sell and it appears has sold it to the proposed respondents for consideration. He has, to say the least, not acted *bona fide* and has given to the appellant a *fait accompli* of transfer of item 7 of 'C' schedule to the proposed respondents. We ask ourselves: "Can this be not a ground to see it fit to allow further time to the appellant to file cross-objection in the appeal A.S.No.148 of 1984?"

5. The learned single Judge has passed a composite order. He has dismissed the application of the appellant to add proposed respondents. This Court has in *Ramaswami Chettiar v. Kanniappa Mudaliar*, 60 M.L.J. 237, *Selvam Mudaliar v. Raju Mudaliar*, (1962) 2 M.L.J. 657 and *A.B. Manavala Chettiar v. T.V. Selvarajan and others*, 1991 T.L.N.J. 166, has taken the view that no appeal under clause 15 of the Letters Patent lies against an order dismissing the application for addition of parties under O.1, Rule 10 of the Code of Civil Procedure or an order to add a party. We have in *B.G. Lingam v. Mrs. Statesenko Larissa*, O.S.A. Nos. 8 and 25 of 1987, judgment dated 19.11.1992, gone into this aspect of the law, and observed on the basis of some of the principles of law stated by the Supreme Court in its judgments, like *Sha Babulal Khimji v. Jayaben*, A.I.R. 1981 S.C. 1786; (1981) 4 S.C.C. 8 and *Jugal Kishore Paliwal v. Satjit Singh*, (1984) 1 S.C.C. 358, that it may not in all situations be correct to hold that no appeal shall lie against an order either refusing to add or to add a party/defendant in a suit. This we have observed in view of the law that concept of a judgment as defined by the Code of Civil Procedure is rather narrow. There can be three kinds of judgments, a final judgment, a preliminary judgment and intermediary or interlocutory judgment, while there can be no manner of doubt that appeal shall lie against the first two kinds of judgments, in case of an intermediary or interlocutory judgment it will always be necessary to see whether it vitally affects a valuable right of the defendant, whether it is a judgment of moment and whether otherwise it is an appealable judgment. We have also observed that when an order granting leave to amend the plaint by introducing a new cause of action in certain circumstances is an appealable order/judgment, there is no reason to say that an order to add a party is not an appealable order, because we have seen in that case in some detail that here is always a consequential amendment of the plaint to an order to add a party-defendant. In that case we have also found that no exception can be taken to the Court *suo motu* ordering addition of a party.

6. In the instant case, however we are not required to decide whether an appeal against the order dismissing the application to add the parties is maintainable. There can be no dispute that the appeal is maintainable against the judgment of the

learned single Judge dismissing the cross-objection on the ground of limitation. Sitting in appeal, we have the same discretion to decide whether a certain person is a necessary party or not.

7. On the facts of this case, we would have decided to remit the case to the learned single Judge for a decision as to whether this is a fit case for the exercise of discretion for extending time for filing the cross-objections; but we do not intend to do so for the reason that even if there is no cross-objection the appellate court has got the power to go into that part of the judgment of the trial court wherein it has decided to exclude item 7 of 'C'-schedule property from partition, that being an issue decided by the trial court in the suit, whether in the final judgment or at any inter-locutory stage is a ground that may be available to a party in the appeal and exercising appellate power, we have every reason to believe it shall act in the interest of justice and shall take notice of all relevant aspect of the case, so that nothing unjust occurs and no person is denied his due in accordance with law. The appellant herein shall for the reason the dismissal of the cross-objection not suffer any injury except that in case the first defendant would withdraw his appeal, the court shall have no appeal before it to decide, but had the cross-objection been there, he would have asked for its disposal in accordance with law, even after the dismissal of the appeal for default or withdrawal. We propose accordingly to leave the matter at the ultimate discretion of the appellate court at the hearing of the appeal to decide how it shall determine the controversy between the parties and how shall it finally administer justice, exercising its power under Rule 33, O.41, Code of Civil Procedure. We however think it necessary to order that the development in the suit are such that the transferees from the 1st defendant are necessary for effective and final adjudication of the controversy between the parties. They have to be added in the appeal, and accordingly they have been heard by us through their counsel.

8. In the result, all the appeals are disposed of with the direction as above. The appeal A.S.No. 148 of 1984 shall be taken up in the presence of proposed respondents, namely, - D. Thanabackiam, K.M. Madasami, R. Rajeswari, S. Subramanian and B. Murugeswari, the transferees from the 1st

defendant. No costs.

B.S. ----- Appeals ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Swamidurai, J.

C.R.P.No.1096 of 1992 3rd September, 1992

A. Radhakrishnan ...Petitioner
v.

Auvadai Ammal and another ...Respondents.

Civil Procedure Code (V of 1908), O. 6, Rule 17 - Suit for permanent injunction restraining defendants from interfering with his possession - Defendants claiming that they were in possession of suit properties - Plaintiff therefore filing petition to amend the plaint praying for declaration that he is absolute owner of the suit property or in the alternative for a direction to defendants to deliver vacant possession of suit properties - Amendment held must be allowed.

The petitioner originally filed a suit for a permanent injunction restraining the defendants from interfering with his peaceful possession of the suit properties and for costs. The defendants stated in the written statement that they were in possession of the suit properties. Therefore, the plaintiff filed an application for amendment seeking two new prayers, (i) for a declaration that the plaintiff was the absolute owner of the suit property, and (ii) for a direction to the defendants to deliver vacant possession of the plaint properties failing which to direct the Officer of the trial Court to put the plaintiff in vacant possession of the suit properties. The trial Court dismissed the application holding that the amendment would change the nature of the suit. In revision,

Held: The plaintiff has stated all the facts with regard to his title and also his possession and by way of the amendment, he seeks to introduce a new prayer based on the pleadings already brought by him in the plaint. Applying the ratio in the decision in *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation*, A.I.R. 1967 S.C. 96, the plaintiff is entitled to have the plaint amended and the

contention of the learned counsel for the respondents that the plaintiff is introducing a new cause of action or a new case cannot be countenanced. Even after the closing of the evidence, the plaint was allowed to be amended in the judgment reported in *Gopi Pillai v. Dr. Swamy*, 93 L.W. 317. Therefore, the defendants will not be prejudiced in allowing this amendment and in the circumstances, the order of the lower court refusing to amend the plaint is not in accordance with law.

[Paras 14 and 15]

Cases referred to:

Narayanan Chettiar v. Rathinasabapathy Ayyar, 29 M.L.J. 464. [Para 2]

Firm Srinivas Ram Kumar v. Mahabir Prasad, A.I.R. 1951 S.C. 177. [Para 4]

A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation, A.I.R. 1967 S.C. 96; (1967) 1 S.C.J. 223. [Paras 5, 13]

Cropper v. Smith, (1884) 26 Ch.D. 700. [Para 5]

Kisandas Rupchand v. Rachappa Vithoba, (1909) I.L.R. 33 Bom. 644. [Para 5]

Pirgonda Hongonda Patil v. Kalgonda Shidgonda, A.I.R. 1957 S.C. 363; 1957 S.C.J. 392; 1957 S.C.R. 657; 1957 M.L.J. (Cr.) 314. [Para 5]

Cooke v. Gill, (1873) L.R. 8 C.P. 107. [Para 5]

Robinson v. Union Property Corporation Ltd., (1962) 2 All E.R. 24. [Para 5]

Dorman v. J.W. Ellis and Company Ltd., (1962) 1 All E.R. 303. [Para 5]

M/s. Ganesh Trading Company v. Moji Ram, A.I.R. 1978 S.C. 98. [Para 6]

Gopi Pillai v. Dr. Swamy, 93 L.W. 317. [Para 7]

Gopi Pillai v. Dr. Swamy, (1990) 1 L.W. 363. [Para 7]

Seeni Nadar v. Thangamuthu, (1990) T.N.L.J. 335. [Para 8]

P.K. Thimayya v. Krishnamma Naidu, 89 L.W. 604. [Para 12]

Ganpat Singh v. Sher Bhahadur Singh A.I.R. 1978 All. 66. [Para 12]

Petition under Sec. 115 of Act V of 1908, praying the High Court to revise the order of the City Civil Court (XVIII Assistant Judge), Madras, dated 25.2.1992 and made in I.A.No.19921 of 1991 in O.S.No.9306 of 1989.

T.V. Ramanujam, for Petitioner.

D. Nellaiappan, for Respondents.

The Court made the following

ORDER: The civil revision petition is taken up today for final disposal by consent of parties. This revision is filed against the order made in an

application for amendment of plaint in LA.No.19921 of 1991 in O.S.No.9306 of 1989 on the file of the learned XVII Assistant City Civil Judge, Madras, dismissing the application filed under O.6, Rule 17 and Sec.151, C.P.C. The original plaint is for a permanent injunction restraining the defendants, their agents, servants and men or every one claiming under them or acting on their behalf from in any way interfering with the plaintiff's peaceful possession and enjoyment of the suit properties, more fully described in the Schedules A, B and C in the plaint and for costs. In this application for amendment the plaintiff seeks to introduce certain facts which are detailed by him in his application and the plaintiff also seeks to introduce two new prayers (i) for a declaration that the plaintiff is the absolute owner of the suit property more fully described in the schedule A, B and C, and (ii) for a direction to the defendants to deliver vacant possession of the plaint, A, B and C Schedule properties to the plaintiff within the time to be fixed by the trial court failing which to direct the officer of the trial court to put the plaintiff in vacant possession of the abovesaid schedule properties. The second prayer for delivery of vacant possession is an alternative one. The alternative prayer has been taken up by the plaintiff possibly on the ground that the defendants have stated in the written statement that they are in possession of the suit properties. The trial court dismissed the application for amendment on the ground that the proposed amendment will change the nature of the suit.

2. In this revision Mr.T.V.Ramanujam, learned counsel for the petitioner contended that the proposed two prayers are only in the nature of additional reliefs on the pleadings already made in the plaint. In the original plaint, there is a pleading that the plaintiff is the owner of the suit properties. In para 6 of the plaint, the plaintiff has stated that he is in lawful possession and enjoyment of the suit properties as full owner thereof and he is exercising all the acts of ownership. Further, the plaintiff has stated that he has got patta in his name and that in pursuance of the sanctioned plan granted by the Corporation of Madras, he has put up construction in the suit properties in his capacity as full owner thereof. In the cause of action paragraph, the plaintiff has stated that he had purchased the suit properties on 17.7.1985 and that he has been put in possession thereof in

pursuance of the sale deed and from which date the plaintiff has been exercising all acts of ownership over the suit properties. In paragraph 8 of the plaint, the plaintiff has stated that for the past one week, the defendants are making attempts to trespass upon the suit properties with the help of rowdy elements and that the plaintiff has protested against the same. Therefore, Mr. T.V.Ramanujam, learned counsel for the petitioner argued that there is no charge of cause of action nor any new suit has been introduced by way of this amendment. According to him, the order of the lower court refusing amendment is illegal. In support of his contention, he relied upon the judgment reported in *Narayanan Chettiar v. Rathinasabapathy Ayyar and others*, 29 M.L.J. 464 (D.B.). The Division Bench has observed as follows:

"Where the plaint as originally presented asked merely for a declaration that a decree obtained by the plaintiff against the defendants' father was binding on them but subsequently a prayer was allowed to be added by way of amendment of the plaint seeking for a direction to the defendants to pay the amount of the decree."

While narrating the facts of the case, the Division Bench stated as follows:

"On 21.8.1901, the plaintiff obtained a decree on a promissory note against defendants' father in O.S.No.295 of 1901. During the pendency of the execution proceedings defendant's father died. Plaintiff sought to execute the decree against the defendants but was unable to realise the amount from them. On 7.8.1907 plaintiff instituted the suit which is the subject of the present second appeal. The suit as originally framed was for a declaration that the decree in O.S.No.295 of 1901 was binding on the defendants and that they were liable to pay the decree debt to the extent of the ancestral property in their possession. The defendants contended *inter alia* that the plaintiff should have asked for further relief in the suit viz., the recovery of the decree amount from the defendants. On 24.2.1908 the plaintiff applied for leave to amend the plaint and the District Munsif passed an order allowing the amendment. The plaint was accordingly amended and a prayer for the recovery of the decree amount from the defendants was inserted on 15.7.1908. The District Judge on appeal, held that, though

the suit was instituted within 6 years from the decree in O.S.No.295 of 1901, the amendment asked for a new and distinct relief, viz., the recovery of the decree amount from the family property of the defendants and that to allow the amendment after the period of limitation would be to deprive the defendants of a defence open to them at law, consequently he refused to allow the amendment and dismissed the plaintiff's suit. Against this, the plaintiff preferred a second appeal to the High Court." ".....The lower courts have held that the suit was barred because at the date of the amendment the decree was more than 6 years old and a suit such as the present suit came after the amendment, would have been barred, had it been instituted at the date of the amendment. In our opinion the lower courts have misunderstood the law applicable to the facts before them. The plaintiff did not seek to plead any new facts when he applied for leave to amend the plaint. All he desired to do was to be allowed to ask for a fresh relief on the facts already pleaded."

3. In the present case, the plaintiff has already pleaded that he is the owner of the suit property and that he is in possession of the same and he has originally filed the suit for a bare injunction restraining the defendants from interfering with the possession of the plaintiff. By way of this amendment, he seeks to introduce the prayer for a declaration of title and also for recovery of possession of the suit properties, in case the court finds that the defendants are in possession of the suit property as pleaded by him in the written statement.

4. In *Firm Srinivas Ram Kumar v. Mahabir Prasad and others*, A.I.R. 1951 S.C. 177, the Supreme Court has observed as follows:

"A plaintiff may rely upon different rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or has an opportunity to meet. But, when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was

expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit.

Thus, where in a suit for specific performance of a contract, in part performance of which the plaintiff alleges to have paid the defendant some money, the defendant denies the contract and pleads that the money was taken by him as a loan, the court can pass a decree for recovery of the loan in favour of the plaintiff on his failure to prove the contract even though the plaintiff had failed to plead and claim relief on this alternative case."

5. In support of the contention of the plaintiff, Mr.T.V.Ramanujam, learned counsel, relied upon the judgment reported in *A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation*, A.I.R. 1967 S.C. 96: (1967)1 S.C.J. 223, wherein the Supreme Court has observed as follows:

"In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. Where, however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts to amendment is to be allowed even after expiry of the statutory period of limitation."

The Supreme Court has also observed as under:

"The principal reasons that have led to the rule last mentioned are, first, that the object of Court and Rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (*Cropper v. Smith*, (1884) 26 Ch.D. 700 (710-711)), and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be

amended (*Kisandas Rupchand v. Rachappa Vithoba*, (1909) I.L.R. 33 Bom. 644 at 651, approved in *Pirgonda Hongonda Patil v. Kalgonda Shidgonda*, A.I.R. 1957 S.C. 363; 1957 S.C.J. 392; 1957 S.C.R. 657; 1957 M.L.J. (Cr.) 314.

The expression "cause of action". In the present context does not mean "every fact which is material to be proved to entitle the plaintiff to succeed" as was said in *Cooke v. Gill*, (1873) L.R. 8 C.P. 107 (116), in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Union Property Corporation Ltd.*, (1962) 2 All E.R. 24 and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas" *Dornan v. J.W. Ellis and Company Ltd.*, (1962) 1 All E.R. 303. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time 2.

6. In *M/s. Ganesh Trading Company v. Moji Ram*, A.I.R. 1978 S.C. 98, the Supreme Court has observed as follows:

"Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

O.6, Rule 2, C.P.C. says:

Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures."

O.6, Rule 4 indicates cases in which particulars

of its pleading must be set out by a party. And O.6, Rule 6 requires only such conditions precedent to the distinctly specified in a pleading as a party wants to put in issue. O.6, Rule 5 provides for such "further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading....." as the court may order, and "upon such terms, as to costs and otherwise, as may be just." O.6, Rule 7 contains a prohibition against departure of proof from the pleadings. After some provisions relating to special cases and circumstances and for signing, verification and striking out of pleadings, comes O.6, Rule 17 which reads as follows:

The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendment, are intended for promoting the ends of justice and not for defeating them. Even if a party if its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed, generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.

It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the court will refuse to permit it if it amounts to depriving the party, against which a suit is pending, of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself,

constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit, if any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could some time be viewed as equivalent to as introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not *ab initio* completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court-fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings."

7. In *Gopi Pillai v. Dr. Swamy*, 93 L.W. 317, Sathiaddev, J. (as he then was) has held that in a suit for permanent injunction, amendment of plaint praying alternative prayer of recovery of possession, being filed after examination and after closing the evidence cannot be allowed. This judgment has been overruled by the Supreme Court in *Gopi Pillai v. Dr. Swamy* (1990) 1 L.W. 363, wherein it has been observed as under:

"The amendment has been sought for at rather early stage, i.e., before the trial was over and it neither alters the nature of the suit nor it works any serious injustice to the defendant who would certainly be entitled to file an additional written statement in order to rebut the allegations made in the amended plaint."

8. Mr. D. Nellaippan, learned counsel for the respondent relied upon the judgment reported in "*Seeni Nadar and three others v. Thangamuthu and two others*, (1990) T.N.L.J. 335, wherein Srinivasan, J. has held that a party shall not be allowed to set up a new case or new cause of action in between original plaint and the amendment sought for. The learned Judge has therefore upheld the

order of the lower court refusing amendment. In that case, the suit was filed by the petitioners for bare injunction in the plaint and it was stated that the petitioners had purchased the properties on 6.8.1985 and since then they were in exclusive possession thereof. Apart from the allegation that the first defendant with a view to grab the suit properties along with the second defendant attempted to encroach the suit properties and cut the trees standing thereon from 17.5.1986, no other details were mentioned. The prayer in the suit was only for grant of injunction on the footing that the parties were in possession.

9. In the application for impleading parties to the suit, it is stated in the affidavit filed in support of the application that the petitioners entered into an agreement of sale on 17.5.1974 with the prior owner and paid the entire sale consideration and that possession was handed over to the petitioner on 17.5.1974 itself. This new case put forward in the affidavit is directly contrary to the case put forward in the original plaint that the petitioners were in possession since the date of sale on 6.3.1986. The affidavit proceeded to state that some other persons claimed to have obtained patta and the sale patta had been fraudulently obtained. It was alleged that the persons who claimed to have obtained patta had no right, title or interest in the suit properties and some officers belonging to the community of the defendants were working in the Revenue and Survey Department in Srivaikundam Taluk and with their help and at the instigation of the defendants patta had been fraudulently issued. It was further alleged that at the time of Commissioner's visit, the persons, who were sought to be impleaded as parties, were noted by the Commissioner to be in possession and therefore it was necessary to implead them as parties. But an allegation was made that those persons were never in possession of the property. At the same time, the application for amendment of the plaint was also made, the prayer is the application for amendment is to introduce certain paragraphs in the plaint and amend the prayer as one for declaration of exclusive title to the plaint property, for mandatory injunction directing the removal of the superstructure erected by the defendants and for injunction restraining the defendants from interfering with plaintiff's possession.

10. Thus it is seen that the case that is sought to be introduced by the amendment and by addition of

parties is entirely different from the one that was put forward in the plaint initially filed. It is not only a case but it is also based on a different cause of action which is a new one and it would certainly change the entire character and nature of the suit.

11. The court below has rightly dismissed the application taking the view that the remedy of the plaintiffs would be to file separate suit and not to amend the plaint in the present suit. In these revision petitions, learned counsel for the petitioners contends that the court below is in error in refusing to allow the amendment and implead the parties.

12. Learned counsel for the petitioners placed reliance on the judgment of the court in *P.K.Thimayya v. Krishnamma Naidu*, 89 L.W. 604 and that case will have no bearing on the present case. Learned Counsel for the petitioners referred to a judgment of the *Ganpat Singh v. Sher Bahadur Singh*, A.I.R. 1978 All. 66. That judgment will not apply to the facts of the present case. Learned counsel for the petitioners relied on the decision in A.I.R. 1976 Karn. 89. The facts of that case were entirely different and the dictum will have no bearing on the present case. Learned counsel for the petitioners relied on the ruling of the Supreme Court in *Gopi Pillai v. Dr.Swamy* (1990) 1 L.W. 363. That decision has no bearing on the present case.

13. The petition is governed by the ruling of the Supreme Court in *A.K.Gupta & Sons Ltd. v. Damodar Valley Corporation*, A.I.R. 1967 S.C. 96: (1967) 1 S.C.J. 223, Court holding that in the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case of a new cause of action particularly when a suit on the new cause of action is barred. It had also pointed out that where the amendment does not constitute the addition of a new cause of action or raise a different case, but it would only be a different or additional approach to the same facts, the amendment should be allowed even after the expiry of the statutory period of limitation. Applying this ruling laid down by the Supreme Court to the facts of the present case, it is seen that a new cause of action is introduced and entirely a different case is being brought in by the proposed amendment as well as addition of parties, I had already pointed out the inconsistency between the original pleading and the pleading that is sought to be introduced by the present proceedings. In

these circumstances, if the dictum of the Supreme Court in *A.K.Gupta & Sons Ltd. v. Damodar Valley Corporation*, A.I.R. 1967 S.C. 96: (1967) 1 S.C.J. 223, is applied to the facts of this case, the petitioners are not entitled to reliefs prayed for by them. Hence, the court below is right in dismissing the applications."

14. In the present case, the plaintiff has stated all the facts with regard to his title and also his possession and by way of this amendment, he seeks to introduce a new prayer based on the pleadings already brought by him in the plaint. Applying the ratio in the afore mentioned decision, the plaintiff is entitled to have the plaint amended and the contention of the learned counsel for the respondent that the plaintiff is trying to introduce a new cause of action or a new case cannot be countenanced. Even after the closing of the evidence, the plaint was allowed to be amended in the judgment reported in *Gopi Pillai v. Dr.Swamy*, 93 L.W. 317.

15. Therefore, the defendant will not be prejudiced in allowing this amendment and in the circumstances, the order of the lower court refusing to amend the plaint is not in accordance with law. Under the said circumstances, the order of the lower court is set aside and the civil revision petition is allowed without costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Ratnam and Somasundaram, JJ.

W.A.No.281 of 1989

21st September, 1992.

L.Lakshmikantham

...Appellant

v.

The Tindivanam Co-operative Urban Bank Ltd.

...Respondent.

Constitution of India (1950), Art.311(2) - (After the Forty-second amendment) - Domestic enquiry - Delinquent not supplied with copy of enquiry report along with second show cause notice proposing punishment issued by disciplinary authority - Final order passed - Legality.

It is the settled position of law that where the disciplinary authority and the enquiring authority are different authorities and when the enquiry officer sends a report of the enquiry proceedings to the disciplinary authority, the delinquent is entitled to a copy of the report of the enquiry officer and the failure on the part of the disciplinary authority to send a copy of the report of the enquiry officer to the delinquent along with the second show cause notice proposing the punishment would amount to violation of the principles of natural justice and will render the final order illegal. [Para.7]

Case referred to:

Union of India v. Mohd. Ramzan Khan, A.I.R. 1991 S.C. 471. [Para 7]

Appeal under Clause 15 of the Letters Patent against the Order of S.Ramalingam, J. dated 30.8.1988 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.960 of 1982 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus*, calling for the records from the first respondent relating to his orders dated 12.3.1977 and the records from the 2nd respondent relating to his appellate orders in T.S.E Case No.37 of 1979, dated 14.7.1981 quash both orders and to direct the first respondent to reinstate the petitioner as clerk with effect from 26.2.1976 with all monetary and service benefits deeming as if the petitioner continued in service without any blemish.

The Judgment of the Court was delivered by *Somasundaram, J.*:- This writ appeal has been filed against the order in W.P.No.960 of 1982 dismissing the writ petition praying for the issue of a writ of *certiorarified mandamus* to quash the order of the first respondent dated 12.3.1977 as confirmed by the order of the 2nd respondent in T.S.E. Case No.37 of 1979 dated 14.7.1981 and to direct the first respondent to reinstate the appellant as a clerk with effect from 26.2.1976 with all monetary and service benefits.

2. The appellant was a clerk in the first respondent Co-operative Urban Bank. On 28.2.1976 a memo of charge listing out 8 charges was served on the appellant and she was called upon to offer her explanations within 7 days. On 6.5.1976, the appellant submitted her reply. The Special Officer of the first respondent bank appointed an advocate as enquiry officer to conduct the

domestic enquiry against the appellant. The enquiry officer issued notice to the appellant to appear for the enquiry on three occasions viz., 2.8.1976, 26.11.1976 and 7.12.1976. The appellant did not appear on any of these three occasions. Hence, the enquiry officer conducted the enquiry and examined all the witnesses who were available to depose in support of the charges framed against the appellant and gave his report on 31.1.1977 to the disciplinary authority, the first respondent herein, holding that all the charges framed against the appellant were proved. Thereafter, the second show-cause notice proposing the punishment of dismissal from service was issued to the appellant on 5.2.1977 by the first respondent calling upon her to submit her reply to the proposed punishment. The appellant submitted her reply to the second show-cause notice on 15.2.1977. The Special Officer of the first respondent bank passed orders on 12.3.1977 terminating the services of the appellant, stating that the explanation offered by her was not convincing. As against the order dated 12.3.1977, the appellant preferred an appeal to the 2nd respondent. Before the 2nd respondent the appellant as well as the first respondent bank let in oral and documentary evidence. On a consideration of the evidence that was tendered, the second respondent by his order dated 14.7.1981 upheld the order of termination dated 12.3.1977 passed by the first respondent. As against the said order of the 2nd respondent dated 14.7.1981, the appellant filed W.P.No.960 of 1982.

3. Before the learned single Judge, the following contentions were urged on behalf of the appellant:

“(A) Along with the charge memo the appellant was not furnished with the list of documents and list of witnesses relied on in support of the charges and the failure to furnish the list of documents and the list of witnesses will vitiate the entire proceedings.

(B) The appellant should have been furnished with the copies of the statements of witnesses recorded earlier to enable her to effectively cross examine the witnesses at the time of enquiry and the failure on the part of the first respondent to furnish the copies of the statement of the witnesses would also vitiate the entire disciplinary proceedings.

(C) The wording of the charges itself would indicate that there is preconceived conclusion arrived at even at the time of framing of the

charges and therefore, the domestic enquiry conducted against the appellant was not fair and proper.

(D) The enquiry officer after completing the enquiry submitted a report of his enquiry proceedings to the disciplinary authority and the disciplinary authority failed to furnish a copy of the report of the enquiry officer to the appellant and the failure on the part of the disciplinary authority to supply a copy of the report of the enquiry officer would vitiate the enquiry since it is in violation of the principles of natural justice.

(E) During the period from 26.3.1976 to 12.3.1977 the appellant was not paid the subsistence allowance and the failure to pay the subsistence allowance to the appellant has prejudicated the defence of the appellant.

(F) The proceedings initiated against the appellant are *mala fide* and initiated at the instance of the Special Officer of the bank who had a personal animosity against the appellant.

(G) The punishment imposed against the appellant is disproportionate to the gravity of the alleged misconduct."

4. The learned single Judge did not accept any one of the contentions put forth on behalf of the appellant and consequently dismissed the writ petition. This writ appeal is directed against the order of the learned single Judge.

5. Before us, Mr.P.K.Rajagopal, the learned counsel for the appellant confined his submissions only to the following two points:

"(1) Admittedly the report of the enquiry officer holding that the charges framed against the appellant have been proved was not supplied to the appellant in spite of specific demand made by her for a copy of the enquiry report and the failure on the part of the disciplinary authority to furnish the copy of the report to the enquiry officer along with the second show-cause notice proposing punishment to be imposed on the appellant, will vitiate the entire proceedings and will render the orders challenged in the writ petition invalid.

(2) The appellant was not paid any subsistence allowance during the period from 26.2.1976 to 12.3.1977 and such non-payment of the subsistence allowance to the appellant for the period mentioned above will render the disciplinary

proceedings invalid."

6. As far as the first contention of the learned counsel appearing for the appellant is concerned, the Special Officer of the first respondent bank has appointed an enquiry officer for the purpose of conducting the domestic enquiry into the charges framed against the appellant and the enquiry officer after completing the domestic enquiry submitted his report to the disciplinary authority stating that the charges framed against the appellant have been proved. Thereafter the 1st respondent sent a second show-cause notice dated 5.2.1977 to the appellant asking her to show-cause why she should not be removed from service of the bank. Admittedly the report of the enquiry officer sent to the disciplinary authority holding that the charges framed against the appellant have been proved was not supplied to the appellant along with the second show-cause notice dated 5.2.1977. Ex.A-5 is the reply dated 15.2.1977 sent by the appellant to the provisional conclusion about the punishment to be imposed. The appellant also sent another letter marked as Ex.A-6 in this case to the Special Officer of the first respondent bank requesting him to furnish a copy of the report of the enquiry officer. Ex.A-7 is the letter sent by the Special Officer, to the appellant declining to furnish the copy of the enquiry report on administrative reasons. The Special Officer of the first respondent bank has not stated what are the administrative reasons which disabled the first respondent bank from furnishing the copy of the report of the enquiry officer to the appellant.

7. It is the settled position of law that where the disciplinary authority and the enquiring authority are different authorities and when the enquiry officer sends a report of the enquiry proceedings to the disciplinary authority, the delinquent is entitled to a copy of the report of the enquiry officer and the failure on the part of the disciplinary authority to send a copy of the report of the enquiry officer to the delinquent along with the second show-cause notice proposing the punishment would amount to violation of the principles of natural justice and will render the final order illegal. In *Union of India v. Mohd. Ramzan Khan*, A.I.R. 1991 S.C. 471, the Supreme Court had occasion to deal with the question whether with the alteration of the provisions of Art.311(2) under the Forty Second Amendment of the Constitution doing away with the opportunity of showing cause

against the proposed punishment, the delinquent has lost his right to be entitled to a copy of the report of enquiry in the disciplinary proceedings. The Supreme Court answering the question in negative has held as follows:

"Deletion of the second opportunity from the scheme of Art.311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Art.311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the 42nd amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with the recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position."

The Supreme Court further observed as follows:

"We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against, it, if he so desires, and non-furnishing of the report would amount to

violation of rules of natural justice and make the final order liable to challenge hereafter."

8. In the present case, admittedly the disciplinary authority has not supplied a copy of the report of the enquiry officer to the appellant inspite of specific demand made by the appellant for the copy of the report of enquiry officer. Therefore, in view of the settled position of law on this aspect, we have to hold that the failure on the part of the first respondent to furnish a copy of the report of the enquiry officer to the appellant along with the second show-cause notice, would amount to violation of the principles of natural justice which would render the final order of the 1st respondent dated 12.3.1977 as confirmed by the order of the second respondent dated 14.7.1981 invalid and therefore they are liable to be quashed. The appellant is entitled to succeed in this appeal on this ground alone. In these circumstances, we are unable to agree with the reason given by the learned single Judge in para 5 of his order in the writ petition, for not accepting the contention advanced on behalf of the appellant that the failure on the part of the first respondent to furnish the appellant with a copy of the report of the enquiry officer would vitiate the entire disciplinary proceedings.

9. As we are accepting the first contention of the learned counsel for the appellant and that the appellant is entitled to succeed on that ground alone as pointed out earlier it is not necessary to deal with the second contention of the learned counsel for the appellant that the non-payment of subsistence allowance to the appellant during the period from 26.2.1976 to 12.3.1977 would vitiate the disciplinary proceedings.

10. In view of the above discussion of ours we are obliged to interfere with the order of the learned single Judge in this writ appeal. Consequently, the writ appeal is allowed, the order of the learned single Judge is set aside and the W.P.No.960 of 1982 shall stand allowed. No costs.

B.S.

Appeal allowed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

[Special Original Jurisdiction]

Present: *K.S.Bakthavatsalam, J.*

W.P.No.12676 of 1992

14th October, 1992

R.Srinivasan

...Petitioner

v.

Government of Tamil Nadu and others

...Respondents.

(A) Education - Admission - Applications for - Not in order or bereft of particulars - Effect.

(B) Education - Admission cannot be granted contrary to rules and regulations and against conditions of admission as noted in the prospectus.

The petitioner who belongs to a Backward Class and is a handicapped person appeared for the entrance examination for the B.L. evening course for the academic year 1992-93. He applied for the course under the handicapped quota. According to newspaper reports, he was selected against the quota. But he did not receive any intimation card. He contacted the Principal of the Law College, Madras, but did not get any response. He filed a petition for the issue of a writ of *mandamus* directing the respondents to admit the petitioner in the B.L. evening course. The respondent contended that another candidate who had secured more marks than the petitioner in the Entrance Examination was selected under the category of scheduled tribe, that later as he informed that he belonged only to a Backward Class and was handicapped and that therefore he might have to be selected in the place of the petitioner as he had got more marks.

Held: It is well-settled that in cases of admission, the applications have to be rejected if they are not in order or bereft of particulars. When a candidate sends an application form with incorrect particulars, the result always will be that the application has to be rejected summarily. *[Para 9]*

The petitioner should not suffer because of the action of the respondent authorities who have erred in discharging their duties as per the norms prescribed for admission. The respondent cannot take shelter stating that a candidate who described himself as belonging to a scheduled tribe now wants to get an allotment in the backward

community-handicapped quota stating that he belongs to backward community. If the admission is granted contrary to the Rules and Regulations meaning thereby against the conditions of admission as noted in the prospectus, the respondents cannot take such a stand before this Court and try to explain why the petitioner has not been admitted into the B.L. course even though he was selected. Hence, the respondents are directed to admit the petitioner into the B.L. three year evening degree course. *[Para 9]*

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus*, directing the respondents herein to admit the petitioner in the B.L. Evening Course at Dr.Ambedkar Government Law College Madras-1.

K.S.Gnanasambandam, for Petitioner.

M.M.Sundaresh, Government Advocate, for Respondents.

The Court made the following

ORDER: By consent of both parties, the main writ petition itself is taken up for final disposal, when the miscellaneous petition came up for hearing.

2. The petitioner has come up to this Court praying to issue a writ of *mandamus* directing the respondents herein to admit the petitioner in the B.L. evening course at Dr.Ambedkar Government Law College, Madras.

3. The facts leading to the filing of the writ petition are as follows:

The petitioner applied for B.L. Evening course for the academic year 1992-93 and appeared for the entrance examination. The petitioner belongs to Hindu Vaniyar community which is a backward class and he seems to be a handicapped candidate and as such he applied for the B.L. course under the handicapped quota wherein certain seats have been reserved for handicapped candidates. As per the entrance examination results published in the newspapers dated 7.8.1992, the petitioner seems to have been selected against the handicapped quota. When the petitioner did not receive the intimation card, he met the third respondent herein on 18.8.1992 complaining that he did not receive the intimation card. It seems the third respondent has not explained as to why the petitioner did not receive any such communication. The petitioner

alleges in the affidavit that apart from securing good marks in the entrance examination he is entitled for the allotment of seats against the quota for physically handicapped persons. The petitioner also states that even though his entrance examination number found a place in the selected list he was not given admission in the Law College, Madras so far. At this stage, the petitioner has come up before this Court, with the prayer stated supra.

4. I ordered notice to respondents.

5. Learned Government Advocate appears with instructions. On instructions, the learned Government Advocate states that two candidates from backward class were provisionally selected to the 3 year evening course in Dr. Ambedkar Government Law College, Madras; that the petitioner is one among them, with marks 43.65 and the other candidate is one Dhanasekaran with 47.62 marks. On instructions, the learned Government Advocate states that the petitioner could not get admission for certain reasons. One Mr. M.R. Mani, a candidate for admission to three year (Evening) course in Dr. Ambedkar Government Law College, Madras applied for admission for 1992-93 under scheduled tribe category indicating the relevant code numbers in his application and in the coding sheet; that he has secured 45.25 marks in the entrance examination and was selected in the main list under scheduled tribe category. On instructions, the learned Government Advocate states that at the time of despatching selection intimation to the said M.R. Mani, it was found that he had not submitted his community certificate along with the application and that he was called upon by the Principal, the third respondent therein to produce the community certificate. The learned Government Advocate, on instructions also states that by letter dated 18.8.1992, the said M.R. Mani informed the principal, the third respondent herein that he is a physically handicapped candidate, that he belongs to backward class that he does not belong to scheduled tribe community, that he has committed a mistake in his application by mentioning that he belonged to scheduled tribe community and that he requested to admit him in the three year B.L. (Evening) Degree Course against the seats reserved for backward class-physically handicapped candidates. It seems that when the matter is under consideration of the department, the respondents herein, the petitioner has come

up to this Court, as mentioned above.

6. Learned Government Advocate, on instructions states that in case the department decides to concede the request of the said M.R. Mani, to be considered as a backward class-physically handicapped quota, he may have to be selected in the place of the petitioner herein since the said M.R. Mani has got higher marks than the petitioner in the same category and that in such an event, the petitioner herein cannot be selected also.

7. I have considered the arguments on both sides.

8. The question to be decided in this writ petition is whether the petitioner has to be given a seat for which he was selected as published in the newspapers or the petitioner has to fall out because of the other candidate who comes later stating that he belongs to backward community and that he had mistakenly noted in the application that he belongs to scheduled tribe candidate.

9. It is well-settled that in cases of admission, the applications have to be rejected if they are not in order or bereft of particulars. The peculiarity in this case is that the candidate who has described himself as belonging to scheduled tribe has got admission in that category and when it was found that he did not belong to scheduled tribe category, he comes with a request to treat him in the backward class-handicapped quota. I do not see anything wrong in that request. But that request, if conceded, will effect the petitioner's admission into Law College. The petitioner has correctly filled up the application form stating that he belongs to backward class and he is also a handicapped candidate. As such, he had been provisionally selected in that category. The sudden confusion has been created because of the respondents, who have not verified the applications and community certificates at the first instance *i.e.*, even before issuing the Hall tickets to appear for the entrance examination. If it had been done so earlier *i.e.*, either before issuing hall-tickets to appear for the entrance examination or before the publication of the entrance test, this kind of confusion would not have occurred. Only after the publication of the list of admission, the said M.R. Mani made a request to change over from one community to another Community quota and wants to snatch away the seat from the petitioner herein. It is true that the said M.R. Mani has got more marks than the petitioner herein. It is also true that merit

alone has to be considered in selecting the candidates for admission. But considering the peculiar facts and circumstances of the case on hand, I am of the view that the petitioner should not suffer for the inaction on the part of the authorities in the sense that they have not verified the application forms and the community certificates before the publication of results. In my view, the candidates like that of the petitioner should not be penalised for the fault of the authorities. It is true that there is only one seat left vacant. But I am of the view that the petitioner should not be denied that seat because another student comes with a new story that he belongs to backward class-handicapped category who had not followed the instructions shown in the application form in consonance with the prospectus issued for B.L. degree three years evening course. When a candidate sends an application form with incorrect particulars, the result always will be that the application has to be rejected summarily. That apart, the student, M.R.Mani, who now claims to belong to backward class-handicapped, has not sent the relevant community certificate with the application form. I do not understand how the respondent authorities entertained such an application even at the first instance, without valid verification of the community of the candidate. That apart, it is disheartening to note that the authorities, placed in the position as they are to admit students, have discharged their duty in a slipshod manner and have sent the intimation cards without verifying the particulars and comparing the certificate with the application form submitted by the candidates. This situation has arisen because of the indifference and negligent attitude of the respondent authorities concerned when scrutinising the applications of various candidates for admission before the publication of results. The petitioner before me had a legitimate expectation to get admission into the course when his register number is found in the selection list published in the newspapers and as such I am of the view that the petitioner should not suffer because of the action of the respondent authorities, who have erred in discharging their duties as per the norms prescribed for admission. I do not think the respondents can take shelter stating that a candidate who described himself as belonging to scheduled tribe now wants to get an allotment in the backward community-handicapped quota stating

that he belongs to backward community. If the admission is granted contrary to the Rules and Regulations meaning thereby, against the conditions of admission as noted in the prospectus, I do not think that the respondents can take such a stand before this Court and try to explain as to why the petitioner has not been admitted into the B.L. course even though he was selected. Such sort of behaviour on the part of respondent authorities is bound to generate a sense of resentment and frustration in the minds of the unfortunate young students. The respondents have got a duty to act fairly and objectively while making the selection for admission into courses like the B.L. three years (evening) degree course. As such, the authorities who have selected the petitioner and the other candidate by ignoring the rules and regulations for admission, cannot be allowed to contend now that only one candidate can be accommodated in the backward class handicapped quota. In view of that, I am fully satisfied, taking into consideration the peculiar facts and circumstances of the case that this is a case where the petitioner has got to be admitted into B.L. three years evening degree course, taking into account that he is a candidate belonging to backward class and also that he is a handicapped candidate suffering from 'Polio Meningitis' and the impairment is 60%. If necessary it is open to the respondents to get an increase of one more seat to the handicapped quota-backward class and admit the petitioner into B.L. three year evening degree course. This Court is not concerned with what decision the respondents are going to take with regard to another candidate *i.e.*, the said M.R.Mani. This writ petition is allowed and the respondents are directed to receive the fees and admit the petitioner into the B.L. three year evening degree course, on production of a copy of this order. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

S.A.No.464 of 1982 and C.M.P.No.15259 of 1992
16th November, 1992.

Rajammal (died) and others ...Appellants
v.

The Idol of Sri Thanthonneeswaraswami by its hereditary trustee K.Appathurai ...Respondent.

(A) *Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.1(3) (as amended by Act of 1979) - Tenancy created prior to amendment - Act, if applies to.*

(B) *Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.9 - Right to purchase vacant site - Claim for - Separate written application, if necessary.*

(C) *Tamil Nadu City Tenants' Protection Act (III of 1922), Secs.9 and 9-A - Tenant filing application for receiving additional written statement and supporting affidavit denying title of landlord - Additional written statement not received by Court - Tenant, whether could be said to have denied title of landlord - Denial of title of landlord after filing of suit for eviction - Tenant if disentitled to benefits of Act.*

The respondent filed a suit, by its hereditary trustee for the possession of the suit land after removal of the superstructure put up therein by the appellant and for a sum of Rs.144. The defendant-appellant claimed the benefits of the Tamil Nadu City Tenants' Protection Act in the written statement and did not file any separate application for it. The appellant also denied the title of the landlord to the suit site in an application for acceptance of additional written statement and the supporting affidavit. But the additional written statement was not received. The trial Court held that the appellant was not entitled to the benefits of the Act as he did not establish that the tenancy began prior to 1955. On appeal, the lower appellate court set aside the decree and judgment of the trial court and directed the appellant to deliver possession of the suit land after removing the superstructure. The lower appellate court did not deal with the question whether the appellant was entitled to the benefits of the Act. The appellant preferred an appeal. The respondent contended that as the appellant did not file a separate

application under Sec.9 of the Act, he was not entitled to claim the benefits of the section and that he was not entitled to purchase the site as he had denied the title of the landlord. The appellant on the other contended that the denial of title was only in application for receipt of additional written statement which should not be taken and subsequent to the filing of the suit.

Held: The trial Court was in error in assuming that only to tenancies prior to 1955, the Act applies. In view of the amendment to Sec.1(3) of the Act by the Amendment Act of 1979 which came into force from 3.3.1980, the Act will be applicable even to a tenancy which came into being prior to the said amendment. There is also no dispute and that the abovesaid tenancy came into being prior to 3.3.1980.

The decisions in the *Mouna Mutt Kuttalai Estate v. Andiappan*, 82 L.W. 77 (S.N.) and *Raghava Naicker v. Abdul Hussain Hazarally and Co.*, 1936 M.W.N. 1096, holding that a separate written application under Sec.9 of the Act was not necessary lay down the correct law.

It cannot be contended that what is contained in the additional written statement and the supporting affidavit to the application should not be taken note of in deciding the suit. The said additional written statement, though was not actually received, in view of the dismissal of the application for its reception, yet the affidavit filed in support of the said application cannot be said to be not a part of the record in the suit. There in a sworn statement, the defendant has stated that she has denied the title of the plaintiff to the suit site and if she is not allowed to file the said additional written statement she would be put to great loss. So from the said affidavit itself, it is clear that the defendant has denied the title of the landlord/plaintiff.

The principle on which *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46, held that the denial of title would disentitle the defendant to get the benefits of the Act would equally apply to a case where denial of title is subsequent to the commencement of the suit.

[Paras 12 and 14]

Cases referred to:

S.Palanivelu v. K.Varadammal, (1978)1 M.L.J. 212. [Paras 2, 5]

The Mouna Mutt Kuttalai Estate v. Andiappan, 82 L.W. (S.N.) 77. [Para 6]

Raghava Naicker v. Abdul Russain Nazarally & Company, 1936 M.W.N. 1096. [Para 6]

Bhargavakula Nainargal Sangam v. Arunachala Udayar, (1990)1 L.W. 46. [Paras 9, 10]

M.Subbarao v. P.V.K.Krishna Rao, A.I.R. 1989 S.C. 2187. [Paras 10, 14]

Bhargavakula Nainargal Sangam v. Chakravarthi, (1992)2 M.L.J. 83. [Paras 10, 14]

Balasubramania Iyer v. S.P.Muthu Kumaraswamy Devasthanam, (1983)1 M.L.J. 280. [Para 16]

Sri Kothandaramaswamy Devasthanam v. Gopal Naidu, (1992)2 L.W. 363. [Para 16]

Duraiswami Mudaliar v. Ramaswami Chettiar, 92 L.W. 144. [Para 17]

Ramrup Rai v. Gheodhari Kuer, A.I.R. 1980 Pat. 197. [Para 17]

M.N.Padmanabhan, for Appellants.

M.V.Krishnan, for Respondents.

The Court delivered the following

JUDGMENT: The defendant is the appellant. She having died pending this second appeal, her legal representatives have been brought on record as appellants 2 and 3. The respondent, the idol of Sri Thanthoneeswarasami by its hereditary trustee, K.Appathurai, filed the suit O.S.No.430 of 1978 on the file of the District Munsif of Tiruchirappalli for possession of the suit land after removal of the superstructure put up therein by the defendant and for a sum of Rs.144. The suit was dismissed so far as the possession relief is concerned, but decreed only with reference to the abovesaid money claim for Rs.144, which was claimed as arrears of rent at the rate of Rs.4 per month, that is for three years, till date of the plaint, viz., 27.3.1978. The case of the plaintiff is that suit house (with land) was leased out to the defendant while the case of the defendant is that only suit vacant site was leased out and the defendant put up the superstructure therein.

2. The defendant mainly claimed benefits under the Tamil Nadu City Tenants' Protection Act, 1921 (hereinafter referred to as 'the Act'). The trial Court after holding that the lease was only of the site and that the superstructure was that of the defendant, held that the defendant was not entitled to the benefits of the Act on the ground that the defendant did not establish that the tenancy began prior to 1955. But it held that the defendant's possession was protected in view of the decision in *S.Palanivelu v. K.Varadammal*, (1978)1 M.L.J. 212. On that reasoning, the

possession relief was negated by the trial Court. Further, in the appeal filed by the plaintiff in A.S.No.95 of 1981, on the file of the lower appellate court, the lower appellate court set aside the judgment and decree of the trial Court and allowed the appeal, directing the defendant to deliver possession of the suit land after removing the abovesaid superstructure on the land. The lower appellate court did not deal with the question of the abovesaid arrears at all. The lower appellate court did not also deal with the question whether the defendant was entitled to the benefits of the Act, but only held that as a leasee, the defendant was bound to deliver possession of the suit site, after removing the superstructure.

3. Aggrieved by the said decision of the lower appellate court, the defendant has preferred the abovesaid second appeal. It may also be stated that the plaintiff did not prefer any appeal or cross-objection regarding the abovesaid arrears of rent.

4. After the arguments were over in this appeal and just before the judgment was reserved, the appellant filed C.M.P.No.15259 of 1992 to receive two documents, one dated 18.9.1979 and another dated 21.11.1979, as additional evidence in this appeal. But, this petition is absolutely without any merit, because the proposed documents are of the year, 1979, one of them being an order passed by the Additional Collector, Tiruchirappalli on 18.9.1979 and the other a memo dated 21.11.1979 of the Tahsildar. They could have easily filed them even while the suit was pending, since the suit was disposed of only on 19.3.1982. Not even in the first appeal they were filed with a petition seeking reception of them. The affidavit in support of the present petition also does not say anything as to why these documents were not filed in any of the courts below. Therefore, there is no justification for receiving these documents under O.41, Rule 27, C.P.C. Hence, this application is dismissed *in limine*.

5. Even at the outset, I may state that the above referred to *S.Palanivelu v. K.Varadammal*, (1978)1 M.L.J. 212, which appears to be based on Sec.51 of the Transfer of Property Act will have no application to the present case since even the defendant admits that she is only the lessee. The initial dispute was no doubt whether the lease was of the site only or of the site with the building thereon. The Courts below have concurrently held that the lease is of the site only. So, the argument of both

the counsel in this second appeal proceeded only on the basis that the lease was of the site only. Further, I should also state that the trial court was also in error in assuming that only to tenancies prior to 1955, the Act applies. In view of the amendment to Sec.1(3) of the Act by the amendment Act of 1979, which came into force from 3.3.1980, the Act will be applicable even to a tenancy which came into being prior to the said amendment. There is also no dispute that the abovesaid tenancy came into being prior to 3.3.1980. 6. So, the only main argument that is addressed before me by the learned counsel for the appellant is that the trial Court erred in concluding that the defendant is not entitled to the benefits of the Act and that the lower appellate court erred in holding that the defendant is bound to deliver possession of the suit site, without deciding the abovesaid question whether the defendant is entitled to the benefits of the Act. According to the said learned counsel, the defendant is entitled to purchase the suit site as per Sec.9 of the Act and she cannot be evicted from the suit site. No doubt, the defendant has not filed any separate application under the said Sec.9 for the purchase of the suit land. But, according to the learned counsel, in view of the following averment in the written statement, the said written statement itself should be treated as the application under the said Sec.9:

"The property leased was only a vacant site. The defendant's husband took the vacant site on lease and put up superstructure at his own cost..... The defendant's husband became a tenant of the suit vacant site 40 years back..... The defendant has been paying the Municipal tax for number of years. This defendant after the death of her husband is the owner of the superstructure and has been in possession and enjoyment of the same for a long period of over 40 years. Thus, the defendant is entitled to the benefits of the City Tenants' Protection Act. The plaintiff has only to sell the suit site to this defendant according to the market value as per the provisions of the City Tenants' Protection Act."

In this connection, the learned counsel relied on the decision in *Mouna Mutt Kuttalai Estate v. Andiappan*, 82 L.W. 77 (S.N.). Dealing with the question whether a separate written application is necessary under the abovesaid Sec.9 for claiming right to purchase given thereunder, Ramaprasada

Rao, J. (as he then was) observed in the abovesaid decision as follows:

"It need not be in writing. There is no form prescribed for it. It, therefore, follows, that if the tenant brings to the notice of the Court, within the prescribed time, that he intends making a request to gain the statutory benefit, it is sufficient compliance of the content of Sec.9. An unreserved lodging of the request for the grant of the benefits and protection under the Act through the written statement in a suit in ejectment filed by the landlord, is enough to satisfy the requirements of law. It would be too technical a view to take, as to insist upon a written formal application to project a statutory right, when no such mandate is there under the Act and when otherwise, the intentment of the law can be satisfied by making a request in an acceptable manner and bringing the matter to the notice of the court."

In this decision, an earlier decision in *Raghava Naicker v. Abdul Hussain Hazarally and Co.*, 1936 M.W.N. 1096, has also been relied on. The learned counsel seeks to further point out from the following notes recorded in the notes paper of the trial Court that the written statement has been filed within the abovesaid one month's time:

"F.hearing: 8.6.78.

Defendant absent. Summons affixed. Fresh summons through post by 30.6.78.

30.6.78: Not returned. Thiru N.C.Vellaya files vakalath for defendant. Written statement by 14.7.78.

14.7.78: Written statement time extended till 28.7.78. (Friday).

28.7.78: Written statement filed."

7. On the other hand, the learned counsel for the respondent-plaintiff contends that the abovesaid decisions cited require reconsideration and that the defendant having not filed a separate application under Sec.9 of the Act, cannot claim benefits of the Act.

8. So far as the abovesaid decisions, I think they lay down the correct law and I do not think that any reconsideration is necessary. However, the other question is, whether the abovesaid written statement, if that is to be treated as an application under Sec.9, has been filed within the abovesaid one month's time prescribed under Sec.9. From the abovesaid notes paper it is not known when actually, service was effected and the defendant

received the suit summons. No doubt, the order on 8.6.1978 was "fresh summons through post by 30.6.78". The note made on 30.6.1978 only states "Not returned. Thiru N.C.Vellaya files vakalath for defendant..." Thus, though on 30.6.1978, vakalath was filed for the defendant, it is not known from the abovesaid note, when actually the defendant received the suit summons. It cannot be taken, as contended by the learned counsel for the appellants, that service was effected on 30.6.1978 only. The direction was no doubt to serve the summons "by 30.6.78". But, from that alone, it cannot be concluded that the service was effected only on 30.6.1978. No doubt, if the service was effected on 30.6.1978 filing of written statement on 28.7.1978 will be within time, it being within the one month period prescribed under Sec.9 of the Act. But, if the service was effected prior to 27.6.1978, then, the "application" contained in the written statement will be out of time. So, unless the learned counsel for the appellant is able to establish before me that the written statement was filed within the prescribed one month's period, I cannot hold that the application under the abovesaid section has been filed within time. Therefore, I cannot hold that the defendant is entitled to purchase the suit land as per Sec.9 of the Act.

9. This apart, the learned counsel for the respondent submits that the defendant has denied the title of the plaintiff and hence also disentitled to the benefits of the Act. For this he relies on *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46 (D.B.). So far as the factum of denial of title, it is not there in the written statement or in the evidence recorded. But the learned counsel for the respondent points out the following passage from the trial court's judgment:

"In order to deprive defendant of any benefits under City Tenants' Protection Act, counsel for plaintiff pointed out that defendant had preferred to deny even the title of plaintiff. It is true that if a tenant denied the title of a landlord in the site then the former will not be entitled to the benefits of City Tenants' Protection Act. But in this case no such denial is able to be found on the available records. It is only in the dismissed petition to receive the reply statement defendant had so averred."

So according, to the learned counsel for the respondent, the trial court itself finds that there

was such a denial of title by the defendant in some document filed into Court by the defendant. The said document was actually petition to receive additional written statement, which was sought to be filed by the defendant and not a petition to receive the reply statement as stated in the abovesaid passage of the trial court. The learned counsel for the respondent also produced before me a copy which was served on the respondent of the said additional written statement and of the supporting affidavit to the application for reception of it. In the abovesaid additional written statement it is stated thus:

"The plaintiff has no title to the suit site itself. Government is the owner. On this ground as well the suit has got to be dismissed."

In the supporting affidavit also it has been stated thus:

"I have to deny the title of the plaintiff also the suit site....If I am not allowed to file additional statement, I will be put to great loss."

10. On the other hand, the learned counsel for the appellant argues that what is found in the abovesaid additional written statement or the supporting affidavit thereof cannot be taken note of in deciding the suit, particularly when there is no such denial of title either in the written statement filed or in the deposition given by the defendant. According to the said counsel, what has been said in any interlocutory application cannot be taken note of in the trial of the suit. The said counsel also argues that the abovesaid *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46, cannot be applied to the present case since that decision related to a case where the denial of title was prior to the filing of the suit. On the other hand, the learned counsel for the respondents draws my attention to the decision in *M. Subbarao v. P.V.K. Krishna Rao*, A.I.R. 1989 S.C. 2187, which was relied on in *Bhargavakula Nainargal Sangam v. Chakravarthi*, (1992)2 M.L.J. 83, by this Court, to contend that even if the denial is subsequent to the suit, that is, in the course of the proceedings, the tenant will not be entitled to the benefits of the Act.

11. I have given due consideration to the abovesaid submissions. First of all, I am unable to accept the proposition of the learned counsel for the appellants that what is contained in the abovesaid additional written statement and the supporting affidavit to the application should not be taken

note of in deciding the suit. The said additional written statement, though was not actually received in view of the dismissal of the application for its reception, as stated by the trial court, yet the affidavit filed in support of the said application, cannot be said to be not a part of the record in the suit. There in a sworn statement, the defendant has stated that she has denied the title of the plaintiff to the suit site and if she is not allowed to file the said additional written statement, she would be put to great loss. So, from the said affidavit itself it is clear that the defendant, has denied the title of the landlord-plaintiff.

12. The other contention of the learned counsel for the appellant that the abovesaid decision in *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46, is not applicable to the present case, also does not appeal to me. Maybe in the abovesaid decision, the denial of title was prior to the suit. But, I am of the view that the principle, on which the abovesaid ruling was given in the abovesaid case would apply even to a case where the denial of title is subsequent to the commencement of the suit. Further, the question that was referred to the abovesaid Division Bench, which decided the abovesaid case is only in general terms, viz. "Whether a tenant in respect of a vacant site, who denies title of the landlord, is entitled to the benefits of the Madras City Tenants Protection Act." To the said question, the answer of the Division Bench was in the negative and the Division Bench finally concluded as follows:

"Consequently, we hold that the benefits under the Act can be given only to certain class of tenants who claim right under a tenancy agreement and not to the persons who claim to be the owners of the properties or set up title in others."

13. The principle under which the said decision was given is stated as follows:

"The Act in question is intended to give protection against the eviction of tenants, who have constructed buildings on others' land so long as they pay rent for their lands. Therefore, the basic requirement for invoking the provisions of the Act is that ownership and tenancy rights must vest in different persons. Once a person claims ownership in himself, the question of tenancy does not arise for consideration. We have already referred to the definition of tenant under Sec.2(4) of the Act, wherein

it is specifically mentioned that the benefit would accrue only to a tenant whose tenancy agreement is determined. A cumulative effect of the provisions would lead to the inference that protection is available only to the statutory tenants whose possession is protected under the provisions of a statute. We are unable to find any provision in the Act to consider the tenant who has denied the title as a statutory tenant. We have come to the conclusion from the preamble and the definition of "tenant" found in the Act that the benefit is intended to be given only to certain class of tenants who claim right under a tenancy agreement and not to the persons who claim to be owners or set up title on others. In this connection, it is unnecessary to enter into discussion about the provisions contained in Sec.111(g) of the Transfer of Property Act."

The same principle would apply even to a case where the tenant denies title subsequent to the filing of the suit. No doubt, the learned counsel for the appellant originally also sought to be build up an argument based on Sec.111(g) of the Transfer of Property Act, but subsequently gave it up on the footing that it has no bearing. It is also so mentioned in the abovesaid *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46.

14. Further, the other decision cited by the learned counsel for the respondent also expressly lays down that even if the denial is in the course of the proceedings, the tenant who makes such a denial will be disentitled to the benefits of the Act. That decision is the above quoted *Bhargavakula Nainargal Sangam v. Chakravarthi*, (1992)2 M.L.J. 83 and the relevant observation therein is as follows:

"In the present case, the denial of title was even prior to the institution of the suit in the reply notice issued by the tenant. Even if the denial is made in the course of the proceedings for eviction, it is held by the Supreme Court recently that such a denial would be a ground for eviction. (*vide: Subbarao v. Krishna Rao*, A.I.R. 1989 S.C. 2187).

This case is also under the City Tenants' Protection Act, though the above referred to Supreme Court decision relied on therein relates to Tamil Nadu Buildings (Lease and Rent Control) Act. The argument of the learned counsel for the appellants in this connection is two fold. One is, what has been held under the Rent Control Act,

where denial of title is one ground for eviction, cannot be applied to the present situation under the City Tenants Protection Act, and consequently according to him, the abovesaid observation of the learned Judge, who decided the abovesaid *Bhargavakula Nainargal Sangam v. Chakravarthi*, (1992)2 M.L.J. 83, is only obiter because his observation relating to a case where the denial is after the suit, did not relate to the facts of the case in hand before him. Anyway without going into this question any further, in view of my earlier reasoning I hold that the principle on which *Bhargavakula Nainargal Sangam v. Arunachala Udayar*, (1990)1 L.W. 46, held that the denial of title would disentitle the defendant to get the benefits of the Act, would equally apply to a case where denial of title is after the suit also.

15. Thus, so far as the abovesaid main argument of the learned counsel for the appellant I hold that the defendant has no right to purchase the suit land under Sec.9 of the Act. No doubt, the lower appellate court erred in not considering the abovesaid question whether the defendant is entitled to the benefits of the Act. Yet, instead of remanding back to the lower appellate court, as pleaded by the learned counsel for the appellants, in view of the fact that the second appeal itself has been pending in this Court for about ten years and in view of the fact that there is no necessity to call for any fresh factual finding, but there is sufficient evidence to pronounce judgment on that question I have myself decided the said question as stated above. Sec.103, C.P.C., also enables me to do so.

16. The learned counsel for the appellants argues that the defendant is entitled to a notice of three months before the institution of the suit, as provided under Sec.11 of the Act, which admittedly has not been given for terminating the tenancy. But, this argument also cannot be accepted because, I have already held that he is not entitled to any benefits under the Act, which would also include the benefits which accrued to her in view of the abovesaid Sec.11. Further, this notice-question having not been raised in the written statement, the said conduct would amount to waiver of notice (*vide: Balasubramania Iyer v. S.P.Muthu Kumaraswamy Devasthanam*, (1983)1 M.L.J. 280 and *Sri Kothandaramaswamy Devasthanam by its Fir Person and E.O., Chingleput v. Gopal Naidu and another*, (1992)2 L.W. 363.) The net result is the suit for possession has been rightly dismissed by

the lower appellate court.

17. But the learned counsel for the appellants states that the appellants should be given atleast compensation for the superstructure. But even the benefits under the said Sec.3, they cannot claim, in view of my abovesaid decision. Under the Transfer of Property Act, the tenant cannot claim as of right, that when the landlord takes possession of the land, he should pay compensation for the superstructure put up by the tenant; the tenant can only remove the superstructure. No doubt, under the general law, the landlord alone has got option either to pay compensation for the superstructure and take the superstructure along with the land, or to take the land alone. In the latter case, the tenant has only to remove the superstructure if he so desires. Therefore, there is nothing wrong in the decree that has been given by the lower appellate court. However, opportunity should be given to the appellants to remove the superstructure by themselves. Accordingly I grant a month's time for the appellants to remove the superstructure themselves. If within that time they do not remove the superstructure, the respondent-plaintiff could execute the decree and take possession of the land along with the superstructure. It has also so held in *Duraiswami Mudaliar v. Ramaswami Chettiar*, 92 L.W. 144 and *Ramrup Rai v. Gheodhari Kuer*, A.I.R. 1980 Pat. 197 and also my own judgment in *S.A.Azizullah and another v. Sakthivelu and others*, C.R.P.No.173 of 1992, dated 16.10.1992.

18. In the result, subject to the above grant of one month's time for the appellants to remove the superstructure themselves, the appeal is dismissed with costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Ratnam and Somasundaram, JJ.

W.A.Nos.202 of 1989 and 662 of 1989

3rd September, 1992.

**The Management of Indian Oil Corporation Ltd.,
Madras** ...Appellant

**The Presiding Officer, II Additional Labour Court,
Madras and another** ...Respondents.

Disciplinary proceedings - Misconduct of number of workmen - Evidence with regard to, identical - Different punishments, if can be meted out to different workmen.

It is settled position of law that when the evidence with regard to the misconduct of a number of workmen is identical, the employer must give rational or reasonable explanation for awarding different punishments to the different workmen on the same evidence. In other words, if different workmen are similarly placed with regard to the nature of evidence let in against them by the management in the domestic enquiry and if the workmen are covered by the same set of facts and circumstances, the employer cannot single out a particular workman for discriminatory treatment while awarding punishment. If some of the workers are arbitrarily weeded out for discriminatory and more severe treatment than those who were similarly situated, the courts will not hesitate to frown upon such discriminatory treatment.

[Para 5]

Cases referred to:

Workman of the Motor Industries Company Ltd. v. Management of Motor Industries Company Ltd., A.I.R. 1969 S.C. 1280; (1969) 19 F.L.R. 375.

[Para 4]

Bimbardhar v. Orissa State, A.I.R. 1956 S.C. 469; (1956) 2 M.L.J. (S.C.) 13; 1956 S.C.J. 441; 1956 Cr.L.J. 831. [Para 4]

Brathiv. State of Punjab, A.I.R. 1991 S.C. 318; 1991 Cr.L.J. 402; (1991) 1 S.C.C. 519. [Para 4]

Sengara Singh v. State of Punjab, (1984) 1 L.L.J. 161. [Para 5]

Pyare Lal Sharma v. Managing Director, J.K. Industries Ltd., A.I.R. 1989 S.C. 1854. [Para 7]

Central Bank of India Ltd., New Delhi v. Prakash

Chand Jain, (1969) 2 L.L.J. 277. [Para 7]

A.V.Krishnamoorthy v. Government of Tamil Nadu, (1985) 1 L.L.J. 46. [Para 7]

Appeals under Clause 15 of the Letters Patent against the Order of Venkataswami, J., dated 20.12.1988 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.7344 of 1982 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records and papers connected with the award of the Presiding Officer II, Additional Labour Court, Madras, the 1st respondent herein passed in I.D.No.379 of 1979, dated 17.12.1981 and published in the Tamil Nadu Government Gazette, dated 9.6.1982 in supplement of Part II, Sec.2 and to quash the aforesaid award of the 1st respondent in so far as it negated the claim of the petitioner for reinstatement in service.

M.R.Narayanaswamy, Senior Counsel, for *T.S.Gopalan, P.Ibrahim Kalifullah and S.Ravindran*, for Appellant.

A.L.Somayaji, for *K.S.Janakiraman* and *K.K.Ramesh*, for Respondent No.2.

The Judgment of the Court was delivered by *Somasundaram, J.*:- These writ appeals arise out of the Order of Venkataswami, J. made in W.P.No.7344 of 1982. W.A.No.202 of 1989 has been filed by the Management, 2nd respondent in W.P.No.7344 of 1982 against the order of the learned single Judge, allowing the Writ Petition and setting aside the order of dismissal passed against the workman, the petitioner in W.P.No.7344 of 1982. W.A.No.662 of 1989 has been filed by the workman, the petitioner in W.P.No.7344 of 1982 against the portion of order in W.P.No.7344 of 1982, imposing the punishment of withholding of 2 annual increments with cumulative effect. For the sake of convenience, the parties are referred to in this judgment as per their nomenclature in W.P.No.7344 of 1982.

2. The petitioner while working as Kalasi in the second respondent corporation (hereinafter called 'the Corporation'), was charge sheeted for certain misconduct. The charge sheet served on the petitioner reads as follows:

"On 25.10.1975 you were assisting Shri V.Radhakrishnan Tank Truck Driver, who was entrusted with 16 K.L. of ATF in our Corporation tank truck No.TMY 89 to be delivered to Meenambakkam AFS vide Challan No.42272,

dated 25.10.1975.

At Meenambakkam after decanting 8 K.L. of ATF from compartment No.F1 & M2, the balance quantity of 8 KL in compartments No.M3 and M4 was despatched to Tambaram AFS at about 11 a.m. vide their stock transfer challan No.34929 with 8 KL of ATF and all the four valves and the manifold caps were duly sealed before the truck was released from Meenambakkam, AFS.

At about 12.00 p.m. of the same day the above truck was found parked near Pallavaram Municipal office by Station Manager of Meenambakkam AFS Shri N.N.Chopra and Shri Balakrishnan, Shift Superintendent. On examination of the truck it was discovered that the seals of the decanting valves of compartments M3 and M4 and the manifold caps were broken and that the manifold cap was loose and product was dripping from the manifold. A funnel which was apparently used for removing the product was also found in the chassis of the truck. On checking the dips it was found that the dip of the compartment No.3 was approximately 6 mm short. It was later ascertained by physical measurement that the loss of product from this compartment was approximately 40 litres.

Under the above circumstances, it is evident that you have with the connivance of the tank truck driver Shri V.Radhakrishnan removed unauthorisedly about 40 litres of ATF and disposed of the said quantity clandestinely.

In view of the above facts you have allegedly committed the following acts of misconduct.

1. Negligence or neglect of duty, and
2. Theft, dishonesty and misappropriation in connection with Corporation's property.

You are hereby required to submit your written explanation within seven days of the receipt of this charge-sheet. Any representation that you may make in your written explanation in this connection will be taken into consideration by the competent authority before it decides to hold. In case the competent authority decides to hold an enquiry against you, the enquiry committee, date, time of enquiry etc., will be intimated to you later.

In case your written explanation found satisfactory and acceptable to us, the enquiry against you in the matter shall not be held and you

shall be informed accordingly. Otherwise the enquiry committee shall hold the enquiry against you in the matter as stated above.

Please acknowledge receipt on the duplicate copy."

On the same facts, one V.Radhakrishnan, tank truck driver, was also charge-sheeted and the acts of misconduct alleged against the said driver Radhakrishnan read as follows:

1. Negligence or neglect of duty.
2. Theft, dishonesty and misappropriation in connection with the Corporation's property; and
3. Act subversive of discipline."

With regard to the charges framed against the petitioner and the driver Radhakrishnan, a common domestic enquiry was conducted and after examining the witnesses and after perusing the documents filed during the course of enquiry, the enquiry committee came to the conclusion that there was no collusion or connivance between the petitioner and the driver Radhakrishnan to commit theft and steal and dispose of 2nd respondent-Corporation's property. The enquiry committee also found that the truck driver Radhakrishnan was guilty of negligence only and not guilty of any act of theft, dishonesty or misappropriation in connection with the Corporation's property and consequently it found him guilty of the act subversive of discipline. The enquiry committee found that the petitioner is guilty of theft, dishonesty and misappropriation in connection with the Corporation's property. The disciplinary authority of the Corporation accepted the findings of the enquiry committee and dismissed the petitioner from service and so far as the truck driver Radhakrishnan was concerned, the disciplinary authority withheld three annual increments with cumulative effect. Aggrieved by the order of dismissal, the petitioner raised an Industrial dispute and the same was referred under Sec.10(1)(c) of the Industrial Disputes Act to the Labour Court. The Labour Court, by its award dated 17.12.1981, held that the non-employment of the petitioner was justified and that he was not entitled to any relief. As against the award of the Labour Court dated 17.12.1981, the petitioner filed W.P.No.7344 of 1982 to issue a writ of *certiorari* to quash the award of the Labour Court dated 17.12.1981.

3. Before the learned single Judge it was *inter alia* contended on behalf of the petitioner that the

whole enquiry was vitiated by reason of the violation of principles of natural justice inasmuch as a pre-planned differential treatment was meted out to the driver Radhakrishnan on the one hand and the petitioner on the other, though the charges and the statement of facts and the evidence let in before the enquiry committee are common to both the petitioner and the driver Radhakrishnan. It was further contended before the learned single Judge the failure to refer the past conduct of the petitioner in the show-cause notice and at the same time placing reliance on the past conduct without affording an opportunity to the petitioner will vitiate the entire proceedings. It was also urged before the learned single Judge that the punishment awarded to the petitioner was disproportionate to the gravity of the charge and contrary to the spirit of Sec.11-A of the Industrial Disputes Act. On the basis of the materials available on record, the learned single Judge came to the conclusion that on the same set of facts and circumstances, the petitioner alone was chosen for discriminatory treatment by awarding the punishment of dismissal, whereas the driver was given the benefit of doubt and awarded lesser punishment and therefore, the order of the disciplinary authority as confirmed by the Labour Court dismissing the petitioner from service suffers from the vice of arbitrariness and is violative of Art.14 of the Constitution of India. The learned Single Judge further found that the charge framed against the petitioner relating to theft, dishonesty and misappropriation of the Corporation property has not been proved and that the findings rendered by the enquiry committee and the Labour Court with regard to the said charge of theft, dishonesty and misappropriation are not based on acceptable legal evidence. Consequently, the learned single Judge allowed the writ petition and set aside the order of the disciplinary authority as confirmed by the Labour Court, dismissing the petitioner from service. However, the learned single Judge confirmed the findings given by the enquiry committee and the Labour Court on the charge regarding negligence or neglect of duty and directed that the petitioner could be awarded the punishment of withholding of two annual increments with cumulative effect. Aggrieved by the order of the learned single Judge the second respondent Corporation has filed W.A.No.202 of 1989. Not satisfied with the order of the learned

single Judge imposing the punishment of withholding of two annual increments with cumulative effect, the petitioner has filed W.A.No.662 of 1989.

4. Mr.M.R.Narayanasamy, the learned Senior Counsel appearing for the appellant in W.A.No.202 of 1989 contended in the first place that there is no discrimination in this case in the matter of awarding punishment against the petitioner on the one hand and the driver Radhakrishnan on the other hand. The learned Counsel further contended that on the facts and circumstances of the case and on the basis of the evidence available on record the disciplinary authority and the Labour Court rightly awarded different punishments to the petitioner and to the driver Radhakrishnan. In support of his contention, the learned counsel for the second respondent Corporation, the appellant in W.A.No.202 of 1989, relied on the decisions in *Workman of the Motor Industries Company Ltd. v. Management of Motor Industries Company Ltd. and another*, A.I.R. 1969 S.C. 1280: (1969)19 F.L.R. 375, *Bimbadhar v. Orissa State*, A.I.R. 1956 S.C. 469: (1956)2 M.L.J. (S.C.) 13: 1956 S.C.J. 441: 1956 Crl.L.J. 831, *Brathi v. State of Punjab*, A.I.R. 1991 S.C. 318: 1991 Crl.L.J. 402: (1991)1 S.C.C. 519.

On the other hand, Mr.A.L.Somayaji, the learned counsel for the petitioner would submit that the driver Radhakrishnan was entrusted with not only the vehicle, but also the contents namely 16 KL of ATF for delivery at Meenambakkam AFS and the petitioner was directed to assist the said Radhakrishnan in the process of delivering the said 16 KL of ATF in the manner directed by the management; that the petitioner was visited with two charges whereas the driver Radhakrishnan was visited with identical charges with an additional one; that though the evidence let in by the management against the petitioner and the driver is common, the disciplinary authority imposed punishment of dismissal on the petitioner whereas the lesser punishment of stoppage of increments for three years with cumulative effect was imposed on the driver and the above facts and circumstances go to show that the petitioner was singled out of discriminatory treatment.

5. Let us first examine the position of law on this aspect before going to the factual details. It is settled position of law that when the evidence with regard to the misconduct of a number of workmen

is identical, the employer must give rational or reasonable explanation for awarding different punishments to the different workmen on the same evidence. In other words, if different workmen are similarly placed with regard to the nature of evidence let in against them by the management in the domestic enquiry and if the workmen are covered by the same set of facts and circumstances, the employer cannot single out a particular workman for discriminatory treatment while awarding punishment. If some of the workers are arbitrarily weeded out for discriminatory and more severe treatment than those who were similarly situated, the Courts will not hesitate to frown upon such discriminatory treatment. In *Sengara Singh and others v. State of Punjab and others*, (1984) 1 L.L.J. 161, the State of Punjab initiated disciplinary action and dismissed about 1, 100 members of Police force for participation in police agitation. Criminal prosecution was launched against large members of agitators. Subsequently, the Government reinstated 1, 000 dismissed members of the police force in their original post and withdrew the criminal cases. There was no allegation in that case that the police constables who are not reinstated were leaders or indulged in more violent activities. The aggrieved police constables who were dismissed, but not reinstated to their original post filed writ petitions before the Punjab High Court. The Punjab High Court dismissed the writ petitions. Thereafter, the aggrieved police constables filed appeal before the Supreme Court. The Supreme Court while allowing the appeal of the dismissed police constables held that there is no iota of evidence which would distinguish the case of the appellants from those who were originally dismissed, but subsequently reinstated in their original post. The Supreme Court further pointed out that the appellants have been arbitrarily weeded out for the discriminatory and more severe treatment than those who were similarly situated. In the above decision, the Supreme Court has further held as follows:

“What then should be done? The appellants have been accused of participating in a procession taken out by the members of the police force for ventilating their grievances about their service conditions. May be that still having not reached the state of tolerance for formation of associations amongst police personnel, the demonstrators may be looked upon

with disfavour. But approaching the matter from this angle, all the 1,100 dismissed members of the police force were guilty of same extent and degree as the present appellants. Now if the indiscipline of a large number of personnel amongst dismissed personnel could be condoned or overlooked and after withdrawing the criminal cases against them, they could be reinstated, we see no justification in treating the present appellants differently without pointing out how they were guilty of more serious misconduct or the degree of indiscipline in their case was higher than compared to those who were reinstated. Respondents failed to explain to the court the distinguishing features and, therefore, we are satisfied in putting all of them in same bracket. On that conclusion the treatment meted to the present appellants suffers from the vice of arbitrariness and Art.14 forbids any arbitrary action which would tantamount to denial of equality as guaranteed by Art.14 of the Constitution. The court must accordingly interpose and quash the discriminatory action.”

6. Coming to the facts of the present case, it is not in dispute that the driver Radhakrishnan was in charge of the vehicle and its contents. The entrustment of particular quantity viz., 16 KL of ATF to the driver is also admitted. The petitioner was only a helper, who was to assist the driver in several ways, in discharge of his duty. In the domestic enquiry conducted by the enquiry committee, the evidence let in by the management is common against both the driver and the petitioner. The evidence of P.W.1 Shri C.Kallappa is that when he questioned the driver Radhakrishnan, he told him that he heard a sound on the rear and stopped the vehicle and found the rear wheel punctured and the driver instructed the helper to jack up the wheel and remove the punctured wheel and went for tea. The driver also told P.W.1 that when he came back he found that the seals of compartment No.M-3 and B4 and the manifold seals were broken. Shri Balakrishnan and Shri V.N.Chopra who were examined as witnesses on behalf of the management also gave evidence to the same effect. On the basis of the evidence on record, the enquiry committee recorded the following finding:

“It has been demonstrated before us very clearly that there was no puncture at all and the

starter was alright. This alibi was taken by the driver and the helper only to justify their action of stopping the vehicle on the road. It may be mentioned that stopping the vehicle on the road is not authorised by ICC."

The records show that the enquiry committee conducted enquiry on the charges framed against the petitioner and the driver Radhakrishnan on 25.3.1976, 26.3.1976, 17.4.1976, 19.4.1976 and 7.5.1976. The materials available on record shows that after all the witnesses on the side of the management were examined, the driver Radhakrishnan gave a further reply to the charge sheet on 7.5.1976 and the relevant of the further reply dated 7.5.1976 reads thus:

"On 25.10.1975 after delivering 8 KL of ATF at Meenambakkam AFS, I carried the balance 8 KL to Tambaram AFS in my TT TMY 89. When I was driving towards Tambaram, I was feeling giddy and hence I stopped the vehicle near Pallavaram Municipal Office for taking some tea and rest.

After some time, after taking tea, when I came to the TT I was surprised to see the seals of the valves were broken and oil was leaking. There was a funnel on the chassis which made me feel worried, because I did not carry any funnel in the T.T. When I questioned the helper, he was very rash to me and meanwhile the S.M., and the Shift Superintendent. of Meenambakkam AFS also came. They questioned both of us about the broken seal, oil leak and presence of a funnel.

I was very much scared. I feared to tell that I stopped the vehicle for taking tea and went to take tea. Hence I told them that the tyre was weak or punctured.

Actually there was no tyre puncture or self starter repair. The helper of truck was involved in a case previously. My fear was that I would be implicated in this case."

The enquiry committee accepted the case of the driver set up by him in his further reply dated 7.5.1976 and found that the driver was not guilty on the charge of theft, dishonesty and misappropriation in connection with the Corporation property. The enquiry committee is not at all justified in accepting the case of the driver set up by him at a belated stage in his further reply dated 7.5.1976, as it runs counter to the evidence of the witnesses examined on behalf of the Management and his

own earlier version. Therefore, we have no hesitation in holding that no reliance can be placed on the further reply submitted by the driver on 7.5.1976. If the statement of the driver dated 7.5.1976 is excluded, the evidence let in by the management with regard to the charges framed against the driver and the petitioner is common and identical. Therefore, the driver and the petitioner are similarly placed so far as the evidence let in by the management is concerned. If on the basis of the evidence let in by the management before the enquiry committee, the driver cannot be found guilty of the charge of theft, equally, on the same evidence the petitioner also cannot be found guilty on the charge of theft. Further, on the basis of the materials available on record, the Labour Court in para 36 of the award has found that it cannot totally agree with the finding of the enquiry committee that the driver was not in collusion with the helper in indulging in activity of dishonesty and misappropriation with regard to the Corporation property. The Labour Court, having disagreed with the finding of the enquiry committee on the question of collusion between the driver and the petitioner, is not justified in approving the benefit of doubt being given to the driver by the enquiry committee with regard to the charge of theft framed against him. We must also add that the enquiry committee and the Labour Court completely overlooked the fact that the vehicle and its contents were entrusted to the driver and that the driver was responsible for the safe custody of the vehicle and its contents. As rightly pointed out by the learned single Judge, the enquiry committee and the Labour Court have not given cogent reasons for accepting *in toto* the case of the driver even though he has given varying versions at different stages. The Labour Court took the view that the past record of the service of the petitioner warrants the accord of a different treatment to the petitioner on the question of punishment. As rightly pointed out by the learned single Judge, the Labour Court has really misread the evidence available on record with regard to the past record of service of the petitioner. The materials on record go to show that the petitioner had been charged on an earlier occasion for gross neglect of duty and act subversive of discipline. In the said proceeding initiated against the petitioner on an earlier occasion, it was ultimately found that there was no loss of property, but he was found guilty

only of an act subversive of discipline. As pointed out by the learned single Judge, a reading of the order of the Labour Court seems to suggest that it proceeded on the basis that on the earlier occasion the petitioner was found guilty of an offence relating to theft, dishonesty and misappropriation. Therefore, the conclusion reached by the Labour Court that there was no differential treatment to similarly situated persons is not correct, particularly when the Labour Court has not accepted the finding of the enquiry committee on the issue of collusion of the driver with the petitioner concerning the charge of theft, dishonesty and misappropriation. A perusal of the report of the enquiry committee shows that it has not given any reason in support of its finding that the driver was entitled to the benefit of doubt on the charge of theft. In the above circumstances, it has to be held that there is no valid reason as to why the driver was let off with a lighter punishment and the petitioner was dismissed from service. Therefore, the learned single Judge rightly found that on the same set of facts and circumstances, the petitioner alone was chosen for discriminatory treatment and the order dismissing the petitioner from service suffers from the vice of arbitrariness and is violative of Art.14 of the Constitution of India. In these circumstances, we have no hesitation in rejecting the first contention of the learned counsel for the appellant that there is no discrimination in the matter of awarding punishment of dismissal from service against the petitioner and the lesser punishment of dismissal from service against the petitioner and the lesser punishment of withholding the increments against the driver Radhakrishnan. The decisions relied on by the learned counsel for the appellant in W.A.No.202 of 1989 are not helpful to the appellant because the above decisions are clearly distinguishable on facts.

7. The second contention of the learned senior Counsel Mr.M.R.Narayanasamy is that the learned single Judge is not correct in coming to the conclusion that there was no acceptable legal evidence to support the finding of the enquiry committee and the labour court that the petitioner is guilty of theft, dishonesty and misappropriation in connection with the Corporation property. The learned counsel contended that the report of the enquiry committee shows that there is legal evidence against the petitioner. The learned counsel further submitted that even if the finding with regard to the

charge of theft is set aside, the punishment of dismissal from service awarded to the petitioner can be sustained on the basis of the finding on the other charge viz., the charge of negligence or neglect of duty. In support of this contention, the learned counsel relied on the decision in *Pyare Lal Sharma v. Managing Director, J.K. Industries Ltd.*, A.I.R. 1989 S.C. 1854. We are unable to accept the above contention of the learned counsel for the appellant. In *Central Bank of India Ltd., New Delhi v. Prakash Chand Jain*, (1969) 2 L.L.J. 277, the Supreme Court has enumerated two circumstances under which the findings of the enquiry officer against the workman can be interfered with, in the following terms:

"Thus, there are two cases where the findings of a domestic tribunal like the enquiry officer dealing with disciplinary proceedings against a workman can be interfered with, and these two are cases in which the findings are not based on legal evidence or are such as no reasonable person could have arrived at on the basis of the material before the tribunal. In each of these cases, the findings are treated as perverse."

In *A.V.Krishnamoorthy v. Government of Tamil Nadu and others*, (1985) 1 L.L.J. 46, a Division Bench of this Court while holding that any conclusion which may be reached by the domestic tribunal must be on the basis of acceptable evidence has observed as follows:

"It is well settled that disciplinary proceedings before a Departmental Tribunal are quasi-judicial in character and any conclusion to be reached by such tribunal must be on the basis of acceptable evidence. Such evidence must have some degree of definiteness. It is true that the enquiry held by the Departmental Tribunal is not governed by the strict and technical rules of evidence. But, if the departmental tribunal has rendered a finding based on no acceptable evidence, that could be regarded as an error of law to be corrected by a writ of *certiorari*. Suspicion, inference, assumption and presumption cannot take place of proof by means of acceptable evidence in disciplinary proceedings before a departmental tribunal."

8. In the light of the above position of law, let us now examine whether the findings of the enquiry committee as confirmed by the Labour Court is supported by acceptable legal evidence in this case. There is evidence in this case that there is a

shortage of 40 litres of AFT. The question is who is responsible for this shortage of 40 litres of AFT. The only evidence available in this case is that one of the witnesses of the management saw some persons suspiciously moving near the stationary lorry with tins and cans. Except this, no one was examined and there is absolutely no evidence to connect the petitioner with the charge of theft, dishonesty and misappropriation of the Corporation property. In these circumstances, the learned single Judge rightly held that the findings of the enquiry committee as confirmed by the Labour Court that the petitioner is guilty of theft, dishonesty and misappropriation of corporation property, are not based on any acceptable evidence. Once it is held that the findings of the enquiry committee and the Labour Court that the petitioner is guilty of theft, dishonesty and misappropriation are not based on acceptable evidence, the order of the disciplinary authority as confirmed by the Labour Court dismissing the petitioner from service, is liable to be set aside. We are unable to accept the other contention of the learned Senior Counsel Mr. M. R. Narayanasamy that the order of the disciplinary authority as confirmed by the Labour Court dismissing the petitioner from service can be sustained on the finding on the other charge namely that the petitioner is guilty of negligence or neglect of duty, because the disciplinary authority imposed only the punishment of withholding of three annual increments with cumulative effect on the driver for an identical charge. Therefore, the learned single Judge rightly set aside the order of the disciplinary authority as confirmed by the Labour Court dismissing the petitioner from service. However, the learned single Judge confirmed the finding of the disciplinary authority and the Labour Court that the petitioner is guilty of other charge viz., negligence or neglect of duty and imposed the punishment of withholding of 2 annual increments with cumulative effect. In view of the above discussion of ours, we see no infirmity in the order of the learned single Judge warranting interference in W.A.No.202 of 1989.

9. Now let us consider whether there is any merit in the other W.A.No.662 of 1989 filed by the petitioner against the order of the learned single Judge so far as it is against him viz., the imposition of the punishment of withholding of 2 annual increments with cumulative effect. There is ample

evidence in this case both oral and documentary which go to show that the petitioner is guilty of negligence and neglect of duty. The disciplinary authority, the Labour Court, and the learned single Judge on the basis of the evidence available on record rightly held that the petitioner is guilty of negligence and neglect of duty. On the basis of the above findings, the learned single Judge rightly imposed the punishment of withholding of two annual increments with cumulative effect. As a matter of fact, on the basis of the same evidence, the driver was also found guilty of negligence and neglect of duty and he was also awarded similar punishment of withholding of three annual increments with cumulative effect. Therefore, we do not see any merit in W.A.No.662 of 1989 also.

10. In the result, both the writ appeals are liable to be dismissed and accordingly they are dismissed. No costs.

B.S.

Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Arunachalam and Thangamani, JJ.*

C.M.A.No.486 of 1986 and Memo of cross objections
21st September, 1992.

**M/s. United India Assurance Company Ltd.,
Namakkal** ...Appellant

Bankarappa Naicker and others ...Respondents.

Motor Vehicles Act (IV of 1939), Sec.110-A - Death in motor accident - Compensation for parents of deceased minor child - Assessment of - Factors to be considered.

The paramount consideration of the claims tribunal must be to protect the interest of the claimants so that the amount awarded to them by way of compensation serves the purpose and object of recompensing them for the loss occasioned by the tragedy of the accident. As a general rule, parents are entitled to recover the present cash value of the prospective service of the deceased minor

child. In addition, they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. How he would have turned out in life later is at best a guess. But there is a reasonable probability of the child becoming a successful man in life if he had been a bright boy in the school and his parents could afford him a good education. The thing to be valued is not merely the prospect of length of life, but the prospect of a predominantly happy life of the deceased. This, undoubtedly would vary from case to case, depending upon the family environment, members of the family, health and age of the victim, his outlook in life, the interest which his parents were taking to show whether the victim would have a predominantly happy life or life of misery or a life of despondence or an insipid life. Even though it depends upon very many uncertain factors, the tribunal has to take an overall picture and form its estimate, though to some extent, it must be based upon speculation. A just and fair calculation of compensation would be what the beneficiaries would have received from the deceased as support for their maintenance had the deceased lived and earned. Keeping in view our social norms parents do have a legitimate expectation of financial support from their children, particularly in their old age when their children are gainfully employed. But the extent of such monetary assistance must, of course, depend upon the circumstances of the parents and the deceased child and also upon other surrounding circumstances. And it is well-established that there can be no exact uniform rule for measuring the value of the human-life and the measure of damage cannot be arrived at by precise mathematical calculations. It is also equally well-established that in assessing damages, the court must exclude all considerations of matters which rest in speculation or fancy though conjecture to some extent is inevitable.

[Paras 5 and 9]

Cases referred to:

Kuncharamu v. Kerala State Road Transport Corporation, 1987 A.C.J. 1017. [Para 6]

Parvathi Ammal v. Pallavan Transport Corporation, 1984 A.C.J. 342. [Para 7]

United India Insurance Company v. Gurdev Singh, 1990 A.C.J. 946. [Para 8]

K.S.Narasimhan, for Appellant.

A.Sivaji, for Respondents.

The Judgment of the Court was delivered by

Thangamani, J.:- On 22.2.1984 at about 11.00 a.m. Subburaj the eldest son of the claimants was proceeding on his bicycle along Sathur-Kovilpatti main road. When he was nearing Ezhayiram Farm diverse road the lorry bearing Registration No.M.E.P.2338 came from the opposite direction and knocked down the boy. As a result of the injury sustained in the accident Subburaj died instantaneously. The parents of the deceased Subburaj filed M.C.O.P.No.86 of 1984 on the file of the Motor Accidents Claims Tribunal (Subordinate Judge) at Srivilliputhur claiming a compensation of Rs.85,000 from the owner of the vehicle and the Insurance Company alleging that the accident was due to the rash and negligent driving of the lorry. The Insurance Company contested the claim on the ground that the accident took place only because the boy suddenly took a right turn and that in any event they were liable to pay Rs.15,000 the no-fault liability alone. After enquiry the tribunal awarded Rs.50,000 with interest at 6% per annum from the date of petition as compensation. Aggrieved by the said award while the Insurance Company has preferred this civil miscellaneous appeal, the claimants have come forward with this cross objection.

2. The owner of the lorry involved in the accident remained *ex parte* before the tribunal.

3. P.W.2 Subba Naicker speaks about the accident. It is his version that while he was grazing cattle near south of branch road, deceased Subburaj was coming in his cycle keeping to the left side of the main road. The lorry came from the south at a great speed and dashed against him. Ex.P-8 is the copy of the F.I.R. given by him in Sathur Police Station regarding the incident. In this he has narrated in detail how the accident took place. This F.I.R. prepared within 15 minutes of the accident amply corroborates the version of P.W.2 Subba Naicker. Besides we find from Ex.P-4 that in the Criminal Court the driver of the lorry has voluntarily pleaded guilty. This conduct on the part of the driver also goes in support of the contention of the claimants that the accident was only due to the rash and negligent driving of the lorry. And the tribunal has rightly fastened the liability to pay compensation on the appellant herein.

4. The main controversy in this appeal relates to quantum of the compensation award. While the Insurance Company pleads that the sum of Rs.50,000 awarded is not based on any settled legal

principles, in the cross objections the claimants extend that they are entitled to the full amount of Rs.85,000 asked for in the application. We find from the claim petition that the parents of the deceased were aged 60 and 45 respectively at the time of the accident. In the application the age of the deceased is given as 14. The first claimant Sankarappa Naicker states in his evidence that his son was studying in the 10th Standard in A.V.S. High School at the time of his death. Ex.P-1 the extract from the Register of admissions and withdrawals discloses that deceased Subburaj joined the school in 1979-80 and he was studying in the 10th Standard when the accident took place. His date of birth is given as 12.7.1969 which indicates that he was nearly 1 1/2 years old on the crucial date. Ex.P-2 is the certificate given by the Head Master of the School on 20.3.1984 stating that the deceased was an obedient and intelligent student. The tribunal has taken the view on the basis of this certificate that the boy had a bright future. However, taking into account that he would not have spent his entire future earnings on the claimants and that subsequent to his marriage his contribution to the parents would be reduced, the sum of Rs.50,000 has been awarded. In this connection it may be borne in mind that the claimants have not filed the mark sheets of the deceased boy to assess how far he was good in his studies. In the absence of any evidence on this aspect we cannot hold with certainty that the boy would have come up very well later in his life. Besides there is also no evidence on the resources of the family. It is seen from the petition that the first claimant was a retired Police Constable aged about 60. The second claimant was only a housewife aged about 45. There is no indication in the claim petition that the parents had the necessary wherewithal to educate the boy upto the maximum extent possible. P.W.1 Sankarappa Naicker the first claimant describes himself as a coolie. His evidence is conspicuously silent about his capacity to educate the boy. He admits in cross-examination that he owns only an extent of one acre and 70 cents of dry land depending upon rain. He does not speak anything about his earnings. While so, we are not in a position to assess how far the deceased would have come up in life.

5. The paramount consideration of the claims tribunal must be to protect the interest of the claimants so that the amount awarded to them by

way of compensation serves the purpose and object of compensating them for the loss occasioned by the tragedy of the accident. As a general rule, parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition, they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. How he would have turned out in life later is at best a guess. But there is a reasonable probability of the child becoming a successful man in life if he had been a bright boy in the school and his parents could afford him a good education. The thing to be valued is not merely the prospect of length of life, but the prospect of a predominantly happy life of the deceased. This undoubtedly would vary from case to case, depending upon the family environment, members of the family, health and age of the victim, his outlook in life, the interest which his parents were taking in the boy and the totality of circumstances tending to show whether the victim would have a predominantly happy life or life of misery or a life of despondence or an insipid life. Even though it depends upon very many uncertain factors, the tribunal has to take an overall picture and form its estimate, though to some extent, it must be based upon speculation. A just and fair calculation of compensation would be what the beneficiaries would have received from the deceased as support for their maintenance had the deceased lived and earned.

6. In *Kuncharamu v. Kerala State Road Transport Corporation*, 1987 A.C.J. 1017, the deceased was studying in the S.S.L.C. class. According to the petitioners, the deceased was very intelligent, smart and healthy. They claimed Rs.50,500 as compensation. Held: To sustain a claim of compensation under Sec.110-A of the Motor Vehicles Act, it is not necessary that the deceased was actually earning money. Parents always reasonably expect to be supported in their old age by their children. The possibility of the deceased becoming successful in life cannot be ruled out. As the parents of the deceased could have reasonably expected pecuniary benefits when the deceased had completed his education and started a career or avocation and as their expectations were shattered as under due to the unfortunate accident they can very well claim compensation from those persons who were responsible for it. Merely on the ground that the

deceased was not actually earning any amount at the time of death, compensation claimed by the parents cannot be legally denied. And the Kerala High Court in this awarded a compensation of Rs.27,000.

7. In *Parvathi Ammal v. Pallavan Transport Corporation*, 1984 A.C.J. 342, the deceased was 18 years and he was a student in the B.A. Class at the time of his death. The mother of the deceased claimed that the father of the deceased was an established film producer and distributor and so the deceased would have had the advantage of the wisdom and experience of his father, and therefore, he would have entered the cine field and earned several lakhs of rupees. Her case was that the deceased was expected to have a predominantly happy life but for the untimely death brought about by the accident, and that having regard to the above circumstances the sum of Rs.2,50,000 claimed by her was a reasonable compensation for the death of her son. A Division Bench of this Court held that it is not necessary that the deceased should have been actually earning money or contributing to the support of the claimant at the time of his death. But in order to succeed, the claimant must necessarily show that he has lost a reasonable probability of pecuniary advantage. However, having regard to the fact that the deceased was studying in B.A. degree course in the College, there is every possibility of his taking up some employment or of his entering a business after the completion of his course, and so some amount has to be awarded towards the loss of pecuniary advantage as part of his earnings would have gone to the benefit of the claimant. Though the parents of the deceased expected him to enter the film business, the deceased might have had his own plans. But it is not possible to predict that the deceased would have entered the film business and would have earned lakhs of rupees by utilising the wisdom and experience of his father. There was a reasonable probability that his parents could have afforded him a good education and a good footing in a business. And having regard to the fact that the deceased would in all probability marry at the age of 25, the benefit of the earnings of the deceased would have gone to the appellant subsequently only upto a period of 7 years i.e., till the deceased would have married. Subsequently to the marriage, he will have a family of his own to maintain, and therefore, the benefit that will go to the mother

out of his earnings would considerably be reduced. Taking all these facts into consideration, the Division Bench enhanced the compensation from Rs.17,000 to Rs.30,000.

8. Relying on the citations referred to above the learned counsel for the appellant Insurance Company argued that the sum of Rs.50,000 awarded by the Tribunal was on the high side. Whereas the learned counsel for the respondents 1 and 2 claimants cited the decision of a single Judge of Punjab and Haryana High Court in *United India Insurance Company v. Gurdev Singh*, 1990 A.C.J. 946 and pleaded for raising the compensation amount to the sum of Rs.85,000 asked for. In that case the deceased was 16 years old student and the compensation awarded was Rs.50,000. The learned counsel for the claimants contended that the facts therein are similar to those of the present case and hence it cannot be said the sum Rs.50,000 awarded by the tribunal herein is excessive. But it is seen that both the parents of the deceased in the case cited are teachers and it is, therefore, reasonable to assume that they would both have been interested to ensure good education for their son and what is more, they were also capable for providing him the necessary facilities for it. So we do not think that the amount awarded therein is any guide for our present purpose.

9. Keeping in view our social norms, parents do have a legitimate expectation of financial support from their children, particularly in their old age when their children are gainfully employed. But the extent of such monetary assistance must, of course, depend upon the circumstances of the parents and the deceased child and also upon other surrounding circumstances. And it is well established that there can be no exact uniform rule for measuring the value of the human life and the measure of damage cannot be arrived at by precise mathematical calculations. It is also equally well established that in assessing damages, the court must exclude all considerations of matters which rest in speculation or fancy through conjecture to some extent is inevitable. Taking all the facts present into consideration in this case we are inclined to hold that a sum of Rs.37,000 would be a just one.

10. In the result, the award is modified and the Insurance Company is directed to pay Rs.37,000 with interest at 12 per cent per annum from the date of petition till the date of realisation as

compensation. The parties are directed to bear their own costs throughout. The civil miscellaneous appeal and cross objections are ordered accordingly.

B.S. ---- Appeal and cross objections ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction]

Present:- Mishra and Arumugham, JJ.

O.S.A.No.98 of 1986 27th October, 1992.

M/s. Glaxy Agencies, Madras ...Appellant
v.

**The Food Corporation of India, represented by its
Joint Manager (Port Operations), Madras**

...Respondent.

Arbitration Act (X of 1940), Sec.20 - Limitation Act (XXXVI of 1963) Schedule I, Art.137 - Clause in arbitration agreement stipulating a period of limitation - Suit under Sec.20 filed beyond that time, if barred - Limitation for applications under Sec.20.

Held:- Since there is no limitation, separately created for any application under Sec.20 of the Arbitration Act, it is only Art.137 of the Limitation Act which prescribes a period of three years, when the right to apply accrues, is attracted as held by the Supreme Court in *Kerala State Electricity Board, Trivandrum v. T.P.K.K. Amson and Besom, Kerala, A.I.R. 1977 S.C. 282*. There can be no doubt any further as to this. [Para 2]

In order to be a valid claim for reference under Sec.20 of the Arbitration Act, it is necessary that there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and thirdly that must be within time as stipulated in Sec.20 of the Act. It is indeed a mistake to mix up the two aspects and it will be necessary on the facts of each case to see whether the application in Court under Sec.20 is beyond the time limit prescribed under Art.137 of the Limitation Act or not. [Para 3]

Cases referred to:

Kerala State Electricity Board, Trivandrum v. T.P.K.K. Amson & Besom, Kerala, A.I.R. 1977 S.C. 282. [Paras 1, 2]

Union of India v. M/s. L.K. Ahuja & Company, A.I.R. 1988 S.C. 1172. [Paras 1, 2]

*Sterling General Insurance Company Ltd. v. Plin-
ters Airways (P) Ltd., A.I.R. 1975 S.C. 415. [Para 2]*
Wazirchand Mahajan v. Union of India, A.I.R. 1967 S.C. 990. [Para 2]

*Mohd. Usman, Military Contractor, Jhansi v. Union
of India, A.I.R. 1969 S.C. 474. [Para 2]*

Appeal under Clause 15 of the Letters Patent against the order of Venkataswami, J., dated 3.7.1984 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.489 of 1982 on the file of this Court.

The Judgment of the Court was delivered by Mishra, J.:- A learned single Judge of this Court has held that since a clause in the arbitration agreement contemplated a period of limitation of one year, the plaintiff's appellant's suit under Sec.20 of the Indian Arbitration Act, 1940 was filed beyond time. We record, however, before we state the facts that the impugned judgment cannot be sustained for the reason of the authoritative pronouncement of the Supreme Court of India in the case of *Kerala State Electricity Board, Trivandrum v. T.P.K.K. Amson and Besom, Kerala, A.I.R. 1977 S.C. 282* and another authoritative pronouncement of the Supreme Court in the case of *Union of India v. M/s. L.K. Ahuja & Company, A.I.R. 1988 S.C. 1172*. Facts which are not in dispute are that the appellant herein was appointed by the respondent Corporation to transport foodgrains, fertilizers, etc. from Madras Port to Air Field (vacant space of their storage) at Sholavaram for a period of three months from 6.4.1976. After furnishing the required security deposit, the appellant carried on and completed the work of transport of foodgrains and fertilizers, as stated above. It appears, however, that after the completion of work the appellant furnished a detailed statement to the respondent on 9.7.1976. The respondent issued a cheque for Rs.7,517.09 purported to be in full and final settlement of the claims of the plaintiff/appellant on 25.8.1977. The respondent while issuing the cheque deducted Rs.17,482.91 from the security deposit of Rs.25,000 of the appellant towards transit dues and transit loss. On 27.8.1977 the appellant wrote to the respondent that any deduction from the security deposit was

unwarranted and requested for reconsideration and refund of the said amount. The appellant issued a lawyer's notice on 10.10.1977 in which besides requesting refund of the full security deposit the appellant also alleged that it had incurred a loss to the tune of Rs.74,760 on account of the alleged detention of the lorries at the Air Strip during nights on several days without being unloaded and demanded the respondent to compensate the loss. The respondent replied to the above on 2.11.1977 repudiating all claims of the appellant. On 8.4.1980 the appellant issued a letter demanding appointment of an arbitrator under Clause 19 of the terms and conditions of the agreement. It followed the said letter by reminders on 11.6.1980, 7.7.1980, 6.8.1980 and 19.12.1980. The only reply to all these, however, came from the Joint Manager in the Office of the respondent on 25.2.1981 stating that the request for appointment of an arbitrator could not be considered. The appellant then came to the Court and filed the suit, C.S.No.489 of (AA) under Sec.20 of the Indian Arbitration Act, 1940.

2. Learned single Judge has considered the question of limitation after quoting the proviso to Clause 19 of the agreement and thereafter saying "Now, it is for consideration whether there is justifiable reason for invoking Sec.37(4) of the Indian Arbitration Act, 1940" and then quoting Sec.37(4) to finally say:

"A reading of Sub-sec.(4) of Sec.37 of the Act clearly envisages that the terms of the agreement including the term relating to limitation for referring the dispute to Arbitration, will prevail subject to the condition that the party aggrieved in appropriate cases, can invoke the benefit of Sub-sec.(4) of Sec.37 of the Act. In the present case, the defendant, at any rate has clearly negated the claim of the plaintiff by a letter dated 25.8.1977. Again, the defendant denied its liability on 2.11.1977. Strictly speaking, the plaintiff should have asked for a reference to the Arbitrator within one year from 5.7.1976 or at least within one year from 2.11.1977. However, the plaintiff, for reason best known to itself, has called upon the Managing Director of the Food Corporation of India to appoint an Arbitrator under Clause XIX of the Contract by a letter dated 8.4.1980. It is clear from the dates given above, that the request for appointment of an Arbitrator under

Clause XIX of the Contract is hopelessly barred by limitation. In para 10 of the pleadings which has been set out above in full, except vaguely claiming that the applicant is entitled to claim the benefits of Sec.37(4) of the Act, it has not been satisfactorily explained as to how and why the appellants should be given the benefit of Sec.37(4) of the Act. In addition to claiming the benefit of Sec.37(4), the applicant has also stated that the request for arbitration has been made within three years from 25.8.1977 and therefore, the plaintiff was well within time in its claim for referring the dispute to an Arbitrator. It is not clear under what provision of law this period of three years is claimed. As noticed above, the terms of the agreement including the term for fixing the time for referring the dispute to an Arbitrator will prevail among the parties and therefore, the claim of the plaintiff that it is entitled to demand for an arbitration within three years from 25.8.1977 is not sustainable. As pointed out already, no evidence, oral or documentary, has been let in support of the claim. This is an additional factor against the plaintiff."

He has proceeded further, after referring to a judgment of the Supreme Court in *Sterling General Insurance Company Ltd. v. Plinters Airways (P) Ltd.*, A.I.R. 1975 S.C. 415, to say as follows:

"Even applying the principles set down by the Supreme Court in the said case, I do not consider that the plaintiff has made out a case for invoking the benefits of Sec.37(4) of the Act. As pointed out above, there are no clear averments in the affidavit to explain the long delay in demanding the defendant to refer the dispute to an Arbitrator and further more, no evidence oral or documentary in support of the claim has been let in. Taking all these factors into consideration, I am inclined to think that the suit is liable to be dismissed on the ground of limitation."

There has been some doubts, on account of certain judgments of the courts including a judgment of the Supreme Court in the case of *Wazirchand Mahajan v. Union of India*, A.I.R. 1967 S.C. 990, and another judgment of the Supreme Court in *Mohd. Usman Military Contractor, Jhansi v. Union of India*, A.I.R. 1969 S.C. 474, on the question how to determine in a proceeding under Sec.20 of the Arbitration Act any issue of limitation as to

arbitration, which has been finally settled by the Supreme Court in the case of *Kerala State Electricity Board, Trivandrum v. T.P.K.K. Amson & Besom, Kerala, A.I.R. 1977 S.C. 282* and reiterated by the Supreme Court in the case of *Union of India v. M/s. L.K. Ahuja & Company, A.I.R. 1988 S.C. 1172*, that there is no relation between the limitation for a proceeding under Sec.20 of the Arbitration Act and the limitation for the arbitration by appointment of an arbitrator in accordance with an arbitration agreement, that Art.137 would apply to any petition or application filed under any Act to a civil court, that the words 'any other application' under Art.137 cannot be read on the principle of *ejusdem generis* to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division, and that all that is required in order to be entitled to ask for a reference under Sec.20, there must be an entitlement to money and a difference or dispute in respect of the same. It will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Sec.20 and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order under Sec.20 to be barred by limitation. To quote the words of the Supreme Court in this behalf in the case of *Union of India v. M/s. L.K. Ahuja & Company, A.I.R. 1988 S.C. 1172*:

"In view of the well settled principles we are of the view that it will be entirely wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Sec.20 of the Act, and secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order under Sec.20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Sec.20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable."

Since there is no limitation, separately created for any application under Sec.20 of the Arbitration Act, it is only Art.137 of the Limitation Act which prescribes a period of three years, when the right to apply accrues, is attracted as held by the Supreme Court, there can be no doubt any further as to this.

3. As we have already noticed, there are two aspects: (1) Whether the claim made in the arbitration is barred by limitation? and (2) whether the claim made by an application under Sec.20 of the Arbitration Act is barred by limitation. In order to be a valid claim for reference under Sec.20 of the Arbitration Act, it is necessary that there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and thirdly that must be within time as stipulated in Sec.20 of the Act. It is indeed a mistake to mix up the two aspects and it will be necessary on the facts of each case to see whether the application in court under Sec.20 is beyond the time limit prescribed under Art.137 of the Limitation Act or not. Learned single Judge has not adverted to this aspect of the law at all. The facts are so mixed up that it is not possible for us, without a further opportunity afforded to the parties, to show how for the purpose of Sec.20 of the Arbitration Act an application is sought to be maintained and whether the application is within the time stipulated for the said purpose. Since we have already noticed that if on admitted facts a claim is found, at the time of making an order under Sec.20 of the Arbitration Act, to be barred by Limitation, the Court may decline to refer the case to the arbitrator, we are inclined to observe that it will be necessary on such facts as are available to decide afresh whether the proviso aforementioned of the arbitration clause in the agreement in fact could be applied as the rule of limitation in the instant dispute between the parties. The proviso has taken care of saying that the demand for arbitration should be made within one year of the date of termination or completion (expiry of the period) of the contract. That will mean, when the work was completed, that is to say 5.7.1976 in the instant case, or, when the payment was made in full and final settlement by the respondent on 25.8.1977. There is a possibility, however, to think that there can be no commencement of any dispute for arbitration between the parties on 5.7.1976, or, even until 25.8.1977, that is

until the deduction of Rs.17,482.90 from the security deposit of the appellant, there was no dispute between the parties and this 25.8.1977 dispute matured only by repudiation of the claims of the appellant by the respondent on 2.11.1977. Will it then be possible to say that termination or completion of the contract will stand extended until payment in full and final settlement was made by the respondent on 2.11.1977? If the answer to this is in the negative, it is obvious the proviso shall not be available for the purposes of limitation to either party. If that will go as the special rule of limitation between the parties, the only rule of limitation that will be available will again be as one found in Art.137 of the Limitation Act read with Sec.37 of the Arbitration Act. Since we are of the opinion that a serious error of law has been committed on account of the mixing up of the two aspects of the case, as indicated above, and since we have reasons not to enter into these two aspects ourselves separately, we are inclined to interfere with the impugned judgment and remit the case for rehearing and disposal in accordance with law. 4. In the result, the appeal is allowed, the impugned judgment is set aside and the case is remitted to the learned single Judge for rehearing and disposal in accordance with law. No costs.

B.S. ---- Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Thanikkachalam, J.

C.R.P.Nos.2729 of 1989, 395, 429 and 1130 of 1991 and C.M.P.No.3148 of 1992 25th September, 1992.

Chekka Ramaniah and another ...Petitioners
v.
S.Mariappan and another ...Respondents.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960, as amended by Act XXIII of 1973), Sec.10(3)(a)(iii) - Premises in occupation of more than one tenant - Landlord requiring building for own occupation - One single petition for eviction against all the tenants, if maintainable.*

In *V.K.S.Raghavan v. K.B.Dayavathi*, 100 L.W. 303, this Court while considering the petition for eviction filed under Sec.14(1)(b) of the Act held that one common petition against all the tenants is sufficient and separate petitions against each one of the tenants need not be filed. It remains to be seen that eviction of a part or portion of the building can be asked under Sec.14(1)(b) of the Act as in the case of filing a petition for eviction with regard to a portion of the building under Sec.10(3)(a)(iii) of the Act. Therefore, the principle adumbrated in the abovesaid decision in *V.K.S.Raghavan v. K.B.Dayavathi*, 100 L.W. 303, will also be applicable to the facts of the case. Hence one petition can be filed against all the tenants if the entire building is required under Sec.10(3)(iii) of the Act. A similar view was taken by this Court while considering the petition filed under Sec.10(3)(c) of the Act in *T.K.Krishnamurthy v. M/s. Jagat Textiles*, 94 L.W. 160. In the present case also, the landlords required the entire premises under Sec.10(3)(a)(iii) of the Act. Therefore, one petition for eviction against all the tenants under Sec.10(3)(a)(iii) of the Act is maintainable and no separate petition against each one of the tenants need be filed.

[Para 10]
(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960, as amended by Act XXIII of 1973), Sec.10(3)(a)(iii) Proviso (d) - Applicability - Lease agreement providing that if tenant committed default in payment of rent for consecutive period of two months, petition for eviction can be filed - Petition for eviction on such ground during subsistence of lease agreement if barred by the proviso.*

The proviso (d) to Sec.10(3)(a)(iii) of the Act prohibits filing a petition for eviction under this Sub-section before the expiry of the lease period if such lease agreement is in existence between the landlord and the tenant. In the present case, even according to the lease deed, if the tenant commits default in payment of rent for a consecutive period of two months, then petition for eviction can be filed. Therefore, the said proviso will not be applicable to the facts of this case.

[Para 11]
(C) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960, as amended by Act XXIII of 1973), Sec.10(2)(i), 11(4) - Petition for eviction filed under Sec.10(2)(i) on ground of wilful default in payment of rent pending - Further arrears of rent after filing petition - Landlord, if can file another*

petition under Sec.10(2)(i) or should only resort to proceedings under Sec.11(4).

Sec.11(4) is intended to prevent defaulters from continuing in possession of the property taking advantage of the pendency of an application without at the same time performing their own part of the obligations. The disability imposed by the Section attaches only to the tenant. A proceeding under Sec.11(4) of the Act is intended to accelerate the long drawn proceedings under the Act. Therefore, if the landlord chooses to file another petition for eviction on the ground of wilful default in payment of rent, for the subsequent period when an earlier petition on the same ground is pending, he can do so and there is no impediment for the same. There is no express prohibition in the Act preventing the landlord from filing a second petition for eviction on the ground of wilful default in payment of rent while the earlier petition on the same ground is pending. Therefore, in view of the decision of the Full Bench of this Court in *K.Perumal Chettiar v. Muthusami*, (1962)2 M.L.J. 218 (F.B.), the present eviction petition filed by the landlord herein under Sec.10(2)(i) of the Act is maintainable. [Para 26] **Cases referred to:**

V.K.S.Raghavan v. K.B.Dayavathi, 100 L.W. 303. [Para 10]

T.K.Krishnamurthy v. M/s.Jagat Textiles, 94 L.W. 160. [Para 10]

Smt.Chandravalli Bai Purshothamdass v. Poonamchand Mittal, (1976)1 M.L.J. 89. [Para 5]

Modern Hotel, Gudur represented by M.N.Narayanan v. K.Radhakrishnaiah, A.I.R. 1989 S.C. 1510: (1989)2 S.C.C. 686. [Para 16]

KAppa Rao v. Commissioner of Income-tax, Madras, (1962)2 M.L.J. 280. [Para 17]

Durgai Ammal v. R.T.Mani, (1989)1 L.W. 155. [Paras 16, 24, 25]

KPerumal Chettiar v. V.Muthusami, (1962)2 M.L.J. 218 (F.B.). [Paras 16, 24, 25]

Petitions under Sec.25 of the Tamil Nadu Buildings (Lease and Rent Control) Act amended by Act 23 of 1973, praying the High Court to revise the Orders of the Court of Small Causes (VIII Judge) Madras dated 24.7.1989 and 19.11.1990 and made in R.C.A.Nos.405 of 1988, 639, 647 and 648 of 1987 (R.C.O.P.Nos. 3354 of 1985 and 3406 of 1984, respectively, Court of Small Causes, Madras). etc.

R.Krishnamoorthy, Senior Counsel, for

R.Sundararajan, Paul Bright Singh, P.Haridass and Miss K.Bhanumathi, for Petitioners.

R.Sundaravaradan, Senior Counsel, for *M.Kumarasamy*, for Respondents.

The Court delivered the following

ORDER: The tenants are the petitioners in all these revisions. The first respondent is the husband of the second respondent. The respondents are the owners of the premises bearing door No.290, Bharathi Salai, Pycrofts Road, Triplicane, Madras-5. The petition for eviction was filed against all these tenants on the ground of owner's occupation under Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 (hereinafter referred to as 'the Act'). In so far as the tenants in C.R.P.Nos.2729 and 395 of 1991 are concerned, the eviction petitions were also filed on the ground of wilful default in payment of rent under Sec.10(2)(i) of the Act. The petitioners in C.R.P.Nos.2729 of 1989 and 395 of 1991 are the joint tenants under the respondents herein for the entire premises except three shops in the front portion of the ground floor on a monthly rent of Rs.1,000. The petitioner in C.R.P.No.429 of 1991 is in occupation of one shop in the front portion of the ground floor on a monthly rent of Rs.300. The petitioner in C.R.P.No.1130 of 1991 is in occupation of one shop in the ground floor on a monthly rent of Rs.175.

2. In so far as the petition for eviction filed under Sec.10(3)(a)(iii) of the Act is concerned, the landlord filed one single petition against all the tenants. The case of the landlords is as under:

The respondents herein purchased the petition premises under a sale deed dated 30.4.1984. Soon after the execution of the sale deed, this fact was intimated to the tenants by the present landlords as well as by the prior owners. Some of the tenants attorned their tenancy in favour of the present landlords. The landlords are carrying on medical shop business at No.274, Bharathi Salai, Triplicane, Madras-5, which is a rented building. They are now under the threat of eviction since their landlord filed a petition for eviction against them on the ground of additional accommodation. The first respondent herein is a chemist in Simpson & Co., and he has got wide experience in dealing with medicines. The landlords wanted to carry on their business in medicines in a big way, in the entire petition premises consisting of only ground and the first floor. The landlords are not in occupation

of any other non-residential building of their own in the city of Madras. The landlords sent notices to the tenants on 24.8.1984 calling upon them to quit and deliver vacant possession of the petition premises. The petitioners in C.R.P.No.2729 of 1989 evaded the service of notice. Some of the tenants sent their replies on 6.9.1984 and on 14.9.1984 expressing their refusal to vacate the premises.

3. The case of the tenants is as under:

The petition for eviction is not maintainable since the business at No.274, Bharathi Salai, Triplicane is being carried on by Hindu undivided family, in which the first respondent is the kartha. The landlords are not carrying on any business of their own individually. There are four different portions let out separately to four different tenants. Each portion is a building and therefore the landlord cannot file a single petition for eviction for his own occupation against all the tenants. The landlords failed to prove their *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act in the case of each one of the tenants. The landlords are now carrying on their business at No.274, Bharathi Salai, Triplicane, in a portion admeasuring about 100 sq.ft. The petition premises on the whole admeasuring about 4,000 sq.ft. Hence, the entire petition premises may not be necessary for the landlords to carry on their small medical shop. The first petitioner in the eviction petition is employed in Simpson & Co. It is not known whether he is carrying on his business in medicines. It was therefore submitted that there is no *bona fide* on the part of the landlords in requiring the petition premises under Sec.10(3)(a)(iii) of the Act.

4. Mariappan examined himself as P.W.1. Jacob Ramaniah, S.Shanmugham, K.Sureshkumar and Arjun Hariram were examined as respondents' witnesses. The landlord filed 19 documents. The tenants filed five documents. Considering the facts arising in these cases, the rent controller came to the conclusion that the landlords established their *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. Accordingly eviction was ordered against all the tenants. Aggrieved, the tenants preferred appeals before the Rent Control Appellate Authority. Before the rent control Appellate Authority, the landlord filed 39 additional documents and the tenants filed four additional documents. One Nageswararao was examined as additional witness on the side of the tenants. P.W.1 also gave additional oral evidence.

Considering the facts arising in these cases, the rent control appellate authority confirmed the order of eviction passed by the Rent Controller against all the tenants. Aggrieved, the tenants are in revision before this Court.

5. The learned Senior Counsel Mr. R.Krishnamoorthy, appearing for the petitioners in C.R.P.No.2729 of 1989 submitted as under:

The authorities below failed to consider that the single petition filed against all the tenants is not maintainable, in law and contrary to the ratio of the decision of this Court in *Smt. Chandravalli Bai Purshothandass v. Poonamchand Mittal*, (1976) 1 M.L.J. 89, recognising a part of the building, as a unit by itself under the Act. A single petition for one requirement against different tenants occupying different units is not maintainable. The petition was filed by the individuals and the business was carried on by the Hindu undivided family and that P.W.1 is an employee in Simpson and Co., and therefore his evidence ought to have been rejected. The business alleged to have been carried on in a rented premises by the landlords is a small medical shop in an area of about 100 sq. feet and therefore the requirement of the landlords requiring the different units under the occupation of different tenants totally of an extent of 4,000 sq.ft. is patently *mala fide* especially in the absence of any claim for expansion of business or any evidence relating thereto. There is a lease deed executed between the prior landlord and the tenants for a period of 5 years and before the expiry of the said five years period, the petition for eviction under Sec.10(3)(a)(iii) of the Act cannot be filed. The authorities below failed to consider the sufficiency of the occupation as required by the landlords for the purpose of carrying on his small medical shop. The *bona fide* requirement in the case of each of the tenant was not considered separately. Application for additional document was allowed without giving any opportunity to explain those documents. No opportunity was given to cross-examine Mariappan after his additional oral evidence. There is inconsistency in the evidence of P.W.1. The report of the Commissioner ought not to have been relied on. The Commissioner was not examined to prove his report. The premises No.47, Nagappa Iyer Street, Madras-5 was converted into non-residential premises in the ground-floor as can be seen from Ex.P-58 series. Exs.P-20 to P-58 are not proved

and they are also not relevant documents. It was, therefore, pleaded that the order of eviction may be set aside.

6. The learned counsel Mr. Haridoss and Miss Bhanumathy appearing for the other tenants in their revisions while adopting the arguments advanced by the learned senior counsel Mr. R. Krishnamoorthy, highlighted certain special features arising in their individual cases.

7. The learned senior Counsel Mr. R. Sundaravaradhan, appearing for the respondents/landlords submitted as under:

The first respondent is a Chemist. He was working in Simpson and Company as Chemist and he is now retired. They are doing their medical shop business at No. 274, Bharathi Salai, Triplicane, which is a rented premises. Since the landlord of the said premises required the same for his occupation, the respondents herein filed the present petition for eviction against the tenants. No doubt, the landlords are doing their medical shop business in a rented premises, which admeasures approximately about 100 sq. ft. The petition premises is consisting of the ground floor and the first floor. The plinth area of the petition premises would be about 3,000 sq. ft. The landlords now wanted to shift their medical shop business from the rented premises and they desired to conduct their medical business in a big way in the petition premises. Therefore, it is not correct on the part of the tenants to suggest that since the landlords are now doing their business in a smaller place and hence their requirement of the petition premises, which is larger in size is not *bona fide*. Since the landlords required the entire premises *bona fide* one single petition is sufficient for seeking eviction against all the tenants. In a petition for eviction under Sec. 10(3)(a)(iii) of the Act, what is necessary to prove is the *bona fide* requirement of the landlord. In the present case, the landlords established their *bona fide* in requiring the entire petition premises under Sec. 10(3)(a)(iii) of the Act. Therefore, it is not correct on the part of the tenants to state that the *bona fide* requirement was not established in the case of each tenant. The petition premises was purchased for the purpose of doing their business. In clause (4) of the lease deed executed between the tenants and the prior owner of the premises, it is stated that if the tenant committed wilful default in payment of rent, for the two consecutive months, then the landlord is

entitled to ask for eviction. In the present case, the tenants in C.R.P. Nos. 395 of 1991 and 2729 of 1989 committed wilful default in payment of rent. Therefore, when the forfeiture clause begins to operate, it is open to the landlords to file a petition for eviction on any one of the grounds available to them. Therefore, the proviso (d) to Sec. 10(3)(a)(iii) of the Act is not applicable to the facts of this case. 8. After the respondents examined their additional witnesses and filed their additional documents, P.W. 1 was examined and his additional documents were also filed. Therefore, it cannot be said that no opportunity was given to the respondents to rebut the evidence produced by the landlords. It is not open to the tenants to suggest whether the accommodation sought for is sufficient or suitable to the business of the landlords. It is submitted that both the authorities below came to the concurrent conclusion that the requirement of the landlords is *bona fide* under Sec. 10(3)(a)(iii) of the Act. Hence, no interference is called for.

9. I have heard the rival submissions.

10. The petitioners in the eviction petition are husband and wife. They purchased the petition premises at No. 290, Bharathi Salai, Triplicane, Madras-5, under a sale deed dated 30.4.1984. According to the landlords, they are carrying on their medical shop business at No. 274, Bharathi Salai, Triplicane, Madras-5, which is a rented building. The landlords are now under threat of eviction. Hence they required the petition premises *bona fide* under Sec. 10(3)(a)(iii) of the Act. The first petitioner in the eviction petition is a Pharmacist. He was working as Pharmacist in Simpson and Company. The landlords filed a petition for eviction against five tenants and the sixth respondent is the sub-tenant under the fifth tenant. According to the petitioners, herein the landlords cannot file one single petition for eviction against all the tenants, since the portion under the occupation of each tenant is a separate building as contemplated under the Act. Therefore, according to the tenants, the landlords ought to have filed separate petitions for eviction against each of the individual tenant. The fact remains that the landlords required the entire petition premises for the purpose of running their own medical shop, which they are carrying on in a rented premises. Since the landlords are requiring the entire petition premises for the purpose of carrying on

their own business, the authorities below came to the conclusion that one single petition for eviction against all the tenants under Sec.10(3)(a)(iii) of the Act is maintainable. In the decision reported in *V.K.S.Raghavan v. K.B.Dayavathi*, 100 L.W. 303, this Court while considering the petition for eviction filed under Sec.14(1)(b) of the Act held that one common petition against all the tenants in the petition premises is sufficient and separate petitions against each one of the tenants need not be filed. The learned counsel for the tenants pointed out that the abovesaid decision was rendered while considering a petition filed under Sec.14(1)(b) of the Act and hence that decision will not be applicable to the present case, where the petition was filed under Sec.10(3)(a)(iii) of the Act. It remains to be seen that eviction of a part or portion of the building can be asked under Sec.14(1)(b) of the Act as in the case of filing a petition for eviction with regard to a portion of the building under Sec.10(3)(a)(iii) of the Act. Therefore, the principle adumbrated in the abovesaid decision in *V.K.S.Raghavan v. K.B.Dayavathi*, 100 L.W. 303, will also be applicable to the facts of this case. Hence one petition can be filed against all the tenants if the entire building is required under Sec.10(3)(iii) of the Act. A similar view was taken by this Court while considering the petition filed under Sec.10(3)(c) of the Act in *T.K.Krishnamurthy v. M/s.Jagat Textiles*, 94 L.W. 160. In the present case also, the landlords required the entire premises under Sec.10(3)(a)(iii) of the Act. Therefore, one petition for eviction against all the tenants under Sec.10(3)(a)(iii) of the Act is maintainable and no separate petition against each one of the tenants need be filed.

11. The learned counsel for the tenants contended that the medical shop business which is being carried on at No.274, Bharathi Salai, Triplicane, Madras-5, is a joint family business and the petitioners herein does not require the petition premises for the joint family business, but they require the petition premises for their own individual business. Hence, the present petition filed by the landlords is not maintainable. The authorities below pointed out that the owner of the premises at No.274, Bharathi Salai, Triplicane Madras-5, filed petition for eviction against the landlords herein. Ex.P-1 is the copy of the order passed by the Rent Controller in H.R.C.O.P.No.3819 of 1983. This would go to show that the first

respondent herein is having a Pharmacist certificate and the licence to conduct the medical shop at No.274, Bharathi Salai, Triplicane Madras-5, Exs. P-2 to P-9 would go to show that the medical shop in premises at No.274, Bharathi Salai, Triplicane, Madras-5 was a proprietary concern of the first respondent herein. Therefore, the contention of the tenants that the medical shop business conducted at No.274, Bharathi Salai, Triplicane, was joint family business cannot be accepted. The tenants contended that there was a lease agreement between the tenants in C.R.P.No.395 of 1991 and the prior owner of the petition premises one Mr.R.Shanmugham dated 24.5.1980, which was marked as Ex.R-3. According to Clause (4) in the rental agreement dated 24.5.1980, if the tenant committed wilful default in payment of rent, for a consecutive period of two months then, it is open to the landlords to file a petition for eviction on any of the available grounds. In the present case, it was stated that the petitioners in C.R.P.No.395 of 1991 committed wilful default in payment of rent for more than two months and therefore the landlords filed a petition for eviction and the eviction was also ordered by the authorities below and the revision is pending before the Court. There is no such lease deed between the prior landlord and the other tenants. The proviso (d) to Sec.10(3)(a)(iii) of the Act prohibits filing a petition for eviction under this sub-section, before the expiry of the lease period if such lease agreement is in existence between the landlord and the tenant. In the present case, even according to the lease deed, if the tenant commits default in payment of rent for a consecutive period of two months, then petition for eviction can be filed. Therefore, the said proviso will not be applicable to the facts of this case. Hence, the eviction petition under Sec.10(3)(a)(iii) is maintainable in so far as the tenant in C.R.P.No.395 of 1991 is concerned. The tenants contended that the landlords are conducting their medical shop business in a place admeasuring about 100 sq.ft. and if they required any portion for carrying on their own business in the petition premises, they can ask for eviction with regard to a part of the building. Hence the requirement of the entire petition premises is not justifiable. Further, the requirement of the entire building which stands in an area of 4,000 sq.ft. will be excessive for their use and therefore, the requirement of the landlords of the petition premises is

not *bona fide*. It remains to be seen that the first respondent herein is a Pharmacist. He is conducting a medical shop under the name and style of 'Shobana Medicals' at No.274, Bharathi Salai, Triplicane, Madras-5. He wanted to conduct the said business in a big way in the petition premises. The petition premises is stated to be consisting of ground floor and the first floor, and the total plinth area according to the landlords would be about 3,000 sq.ft. Hence, according to the landlords for the purpose of conducting their business in a big way, the entire petition premises would be sufficient for them. Ex.P-55 is the certified copy of the order passed in H.R.C.O.P.No.3405 of 1984. According to Ex.P-55, eviction was ordered against the respondent in C.R.P.No.429 of 1991. The landlords filed Exs.P-20 to P-54 as additional documents. A perusal of those documents would go to show that Mariappan vacated the rented premises in which he was carrying on his medical shop business and at present he is conducting his shop at No.39, Parthasarathy Naidu Street, Triplicane, Madras-5. Mariappan is residing at No.47, Nagappa Iyer Street. A Commissioner was appointed to find out the nature of this building. According to the Commissioner's report, the premises at No.47, Nagappa Iyer Street is a residential building. Exs.P-20 to P-22 would go to show that at No.39, Parthasarathy Naidu Street, Triplicane, Madras-5, Shobana Medical stores is being conducted. It is stated that it is a rented building. But this was neither accepted nor denied by the tenants. According to Ex.P-23 relating to the medical shop, the turnover is Rs.5,55,434. Exs.P-23 to P-25 are Balance Sheets. Ex.P-26 balance sheet which relates to the medical shop at Parthasarathy Naidu Street which shows a turnover of Rs.3,00,000 till 31.3.1990. So also, Ex.P-27 balance sheet shows the turnover is more than Rs.3,00,000. Exs.P-29 to P-33 relates to the medical shop at No.39, Parthasarathy Naidu Street, Triplicane. Ex.P-34 is the ledger for the year 1986-87. Ex.P-35 is the day-book for the year 1986-87. Ex.P-36 is the day-book for the year 1988-89. So also, Exs.P-37 to P-41 are all ledgers from the year 1987-88 to 1989-90. Ex.P-54 is the copy of the order rendered by the Supreme Court dated 16.3.1988. Exs.P-44 to P-55 would go to show that the landlords after vacating the premises at No.274, Bharathi Salai, Triplicane, conducted their medical shop business at No.37, Parthasarathy Naidu

Street, Triplicane, Madras-5. This is also a rented building. One Nageswara Rao was examined as an additional witness on the side of the tenants. His evidence also would go to show that the landlords are conducting their business in a rented premises. The documents filed by the landlords would go to show that their business is going on expanding and their turnover is also steeply increasing. Therefore, there is justification on the part of the respondents herein in requiring the entire petition premises for the purpose of carrying on their own business. Therefore, it cannot be said that the plinth area of the petition premises is over and above their requirement.

12. Considering all these aspects, the authorities below came to the conclusion that the business of the landlords is expanding and therefore the requirement of the entire petition premises is *bona fide*. Further, it is not for the tenants to suggest that the petition premises is not suitable or insufficient or more than sufficient for the purpose of conducting their (landlords) business. Before the Rent Control Appellate Authority both the tenants as well as the landlords filed additional documents and adduced additional oral evidence. Therefore at this stage, it is not fair to contend that adequate opportunity was not given by the Appellate Authority either to cross-examine the witness or to prove the additional documents. Both the courts below on considering the facts and the evidence adduced both oral and documentary concurrently came to the conclusion that the landlords established their *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. In view of the said facts, I am unable to interfere with the order of eviction passed under Sec.10(3)(a)(iii) of the Act. On a careful consideration of the facts arising in these cases, I am also of the opinion that the landlords established their *bona fide* in requiring the petition premises under Sec.10(3)(a)(iii) of the Act. Hence, I am unable to interfere with the order of eviction passed by the authorities below under Sec.10(3)(a)(iii) of the Act in respect of all the tenants. Accordingly, the order of eviction passed under Sec.10(3)(a)(iii) of the Act against all the tenants stands sustained. Accordingly, the revisions are dismissed.

13. C.R.P.No.2729 of 1989 relates to the order passed under Sec.10(2)(i) of the Act in R.C.O.P.No.3354 of 1985. The petitioners herein

are joint tenants under the respondents herein in respect of the petition premises, except three shops in the front portion. The tenants are paying a monthly rent of Rs.1,000. The building is non-residential. According to the landlords the tenants are chronic defaulters in payment of rent. The landlords purchased the petition premises under a sale-deed dated 30.4.1984. The landlords requested the tenants to attorn the tenancy and pay the rent with effect from 1.5.1984. The tenants agreed to pay the rent. Even then, the rent for two months was not paid. Again another notice was issued calling upon the tenants to pay the arrears of rent. The tenants evaded the notice. Hence, R.C.O.P.No.3405 of 1984 was filed for eviction under Sec.10(2)(1) of the Act. In the said petition, the tenants filed vakalath, but no arrears of rent was paid. Since the counter was not filed, an *ex parte* order was passed in the petition, and that order was set aside on payment of costs on 11.1.1985. Subsequently, on 23.1.1986, the tenants paid a sum of Rs.2,000 towards rent for May and June, 1984. Again, they paid a sum of Rs.2,000 on 30.3.1985. Subsequently they did not pay any rent. In R.C.O.P.No.3405 of 1985 the default is from May to August, 1984. In the present petition the default is from September, 1984 onwards and not for the period mentioned in R.C.O.P.No.3405 of 1984. Therefore, according to the landlords, the tenants committed wilful default in payment of rent in the present petition from September, 1984 onwards.

14. In the counter filed by the tenants, they submitted as under:

They did not commit wilful default in payment of rent as alleged by the landlords. They admit that they are the tenants in respect of the petition premises on a monthly rent of Rs.1,000 under the present landlords. It is not correct to state that they evaded the notice sent by the landlords. It is not correct to state that the rent for the months of May and June, 1984 was not paid. The tenants came in as tenants under the prior owner of the petition premises. At the time of inception of the tenancy they paid an advance of Rs.10,000 to the prior owner. According to the agreement out of the monthly rent of Rs.1,000 payable Rs.200 is to be adjusted towards the advance amount. Hence, the tenants were asked to pay only Rs.800 per month. Accordingly they used to pay only Rs.800 per month till the advance amount is wiped out.

The tenants tendered the rent as usual after deducting Rs.200 from the monthly rent of Rs.1,000 but the same was refused by the landlords. The landlords are fully aware of the fact that a sum of Rs.10,000 was paid by way of advance to the prior owner. The tenants have paid several amounts both in court and outside the court. Only on account of refusal of the landlords to receive the sum of Rs.800 towards rent, the arrears accrued. Therefore, according to the tenants they never committed wilful default in payment of rents as alleged.

15. Mariappan examined himself as P.W.1. Raghavendra Rao was examined as R.W.1. Exs.P-1 to P-7 were filed on the side of the landlords. The tenants did not file any document. Considering the facts arising in this case, the Rent Controller came to the conclusion that the tenants committed wilful default in payment of rent for the petition period. Accordingly eviction was ordered. On appeal, the Rent Control Appellate Authority confirmed the order of eviction passed by the Rent Controller and dismissed the appeal. Aggrieved, the tenants are in revision before this Court.

16. The learned senior counsel Mr. R.Krishnamoorthy appearing for the tenants/petitioners herein submitted as under:

The authorities below failed to understand the scope of Sec.10(2)(1) of the Act. The tenants have paid a sum of Rs.10,000 as advance at the time of inception of the tenancy to the prior landlord. This was proved by examining the prior landlord in R.C.O.P.No.3405 of 1984. The Rent Control Appellate Authority erred in dismissing the application filed for sending the records in R.C.O.P.No.3405 of 1984. There was a lease deed between the tenants and the prior landlord dated 24.5.1980 for a period of five years with an option to renew the same for another five years. Therefore, the petition for eviction cannot be filed at this stage. When the earlier petition R.C.O.P.No.3405 of 1984 was pending, the landlords have no right to file another petition R.C.O.P.No.3354 of 1985 as laid down by the Division Bench of this Court reported in *Duragai Ammal v. R.T.Mani*, (1989) 1 L.W. 155. During the subsistence of the lease period, the landlords cannot file a petition for eviction as per the decision of the Supreme Court in *Modern Hotel, Gudur represented by M.N.Narayanan v. K.Radhakrishnaiah*, A.I.R. 1989 S.C. 1510; (1989) 2 S.C.C. 686. The

earlier petition filed by the landlords for wilful default in payment of rent in R.C.O.P.No.3405 of 1984 was dismissed by the Rent Controller, the landlords have filed R.C.A.No.207 of 1989, the appellate authority refused to hear both the appeals together. All the records have been filed by the tenants in R.C.O.P.No.3405 of 1984 and therefore necessary records could not be produced in the present case before the Rent Controller. The receipt dated 22.5.1980 evidencing the payment of Rs.10,000 was filed as Ex.R-9 in R.C.O.P.No.3405 of 1984. The landlords did not inform the tenants about the purchase of the petition premises. Shanmugham was examined as a witness, who confirmed the payment of Rs.10,000 by way of advance. When the first petition for eviction is pending, if there is any subsequent default in payment of rent, the landlords can file a petition under Sec.11(4) of the Act. Instead of that, a second petition for eviction under Sec.10(2)(1) of the Act is not possible. Therefore, H.R.C.O.P.No.3354 of 1984 is liable to be dismissed *in limine*, since the tenants did not commit wilful default in payment of rent as alleged by the landlords. Therefore, the eviction order passed by the authorities below are not sustainable.

17. The learned senior counsel Mr.Sundaravaradan, appearing for the landlords submitted as under:

The petition premises was purchased by the landlords on 30.4.1984. The fact that the landlords purchased the petition premises was informed to the tenants directly, and in spite of that the tenants refused to pay the rent from 1.5.1984 onwards. The tenants in fact agreed to pay the rent to the present landlords. The landlords sent a notice on 24.8.1984. The tenants wilfully evaded this notice. On 24.9.1984, the landlords filed R.C.O.P.No.3405 of 1984 against the tenants for eviction on the ground of wilful default in payment of rent for May, June, July and August, 1984. On the same date, H.R.C.O.P.No.3406 of 1984 was also filed against all the tenants under Sec.10(3)(a)(iii) of the Act. Both the petitions were posted for hearing on 31.10.1984. Though, the counsel for the tenants took time for vakalath, no payment of arrears was made. Since the arrears of rent was not paid and the counter was also not filed. In R.C.O.P.No.3405 of 1984 the tenants were set *ex parte*. The tenants filed M.P.No.11 of 1984 for setting aside the *ex parte* order and the *ex parte* order was set aside on payment of costs on 11.1.1985.

After taking several adjournments, the tenants paid a sum of Rs.2,000 towards rent for May and June, 1984. Thereafter, the tenants paid another Rs.2,000 on 30.3.1985 being the rent for July and August, 1984. Thereafter they never paid any amount towards arrears of rent. Therefore, the tenants committed wilful default in payment of rent from May to August, 1984. For this arrears of rent R.C.O.P.No.3405 of 1984 was filed since even after filing the first petition, the tenants had committed wilful default in payment of rent. Hence, the present petition was filed for eviction under Sec.10(2)(i) of the Act, since the tenants committed wilful default in payment of rent from September, 1984 till the end of September, 1985. During the pendency of the evidence petition filed on the ground of wilful default in payment of rent, if the tenants refused to pay the rent, or again committed wilful default in payment of rent, it is open to the landlords to file another petition under Sec.10(2)(1) of the Act. It is not always necessary that the landlords should resort in a matter like this to proceedings under Sec.11(4) of the Act. There is no evidence on record to show that the tenants paid a sum of Rs.10,000 to the prior landlord as advance. In the rental agreement between the tenants and the prior landlord, there was no mention about the payment of Rs.10,000 and the mode of adjustments as pleaded by them. Even if a sum of Rs.200 is adjustable towards advance, the advance would have been wiped out much earlier. There is no request or demand made by the tenants to adjust the alleged advance. While rendering the decision in *K.Appa Rao v. Commissioner of Income-tax, Madras*, (1962)2 M.L.J. 280 (D.B.), the Full Bench decision of this Court on this point in *Durgai Ammal v. R.T.Mani*, (1989)1 M.L.J. 155, was not brought to the notice of the Division Bench. It was, therefore, pleaded that both the authorities below were correct in coming to the conclusion that the tenants committed wilful default in payment of rent for the petition period. Since the conclusions arrived at by both the authorities below are concurrent, no interference is called for.

18. The tenants filed C.M.P.No.3148 of 1992 in C.R.P.No.2729 of 1989 to receive the copy of the order passed in R.C.O.P.No.3405 of 1984 as additional document in this revision. The landlords filed a counter opposing this petition.

19. I have heard the rival submissions.

20. The fact remains that the landlords filed a petition for eviction under Sec.10(2)(i) of the Act. The fact that the petitioners herein are tenants in respect of petition premises under the respondents herein is not denied. The rent is stated to be Rs.1,000 per month. This fact was also not denied. The tenants were in occupation of the petition premises even prior to the purchase of the premises by the present landlords. The respondents herein purchased the petition premises on 30.4.1984. According to the landlords, the tenants committed wilful default in payment of rent from September, 1984 till September, 1985. The landlords have already filed a petition for eviction on the ground of wilful default in payment of rent against the tenants herein in R.C.O.P.No.3405 of 1984. In that petition, the period of default is from May to August, 1984. During the pendency of R.C.O.P.No.3405 of 1984, the present R.C.O.P.No.3354 of 1985 was filed. According to the landlords, they intimated the fact about the purchase of the petition premises to the tenants, and they have also issued a notice calling upon them to pay the arrears of rent. But according to the landlords, that the service of notice was evaded by the tenants. Therefore, according to the landlords, the tenants committed wilful default in payment of rent for the petition period and thereby rendering themselves liable to be evicted. According to the tenants they did not commit wilful default in payment of rent as alleged by the landlords. According to the tenants at the time of inception of the tenancy they have paid a sum of Rs.10,000 by way of advance to the prior landlord Shanmugham. There was also an agreement between the prior landlord and the tenants to adjust Rs.200 out of the rent payable every month. Therefore, according to them, they have got to pay Rs.800 per month and not Rs.1,000 per month. The tenants tendered the rent at the rate of Rs.800 per month but the landlords refused to receive the same. Hence, there is no wilful default in payment of rent.

21. Thiru Mariappan examined himself as P.W.1 and filed Exs.P-1 to Ex.P-7. On the side of the tenants they did not come to the witness box but examined one Ragavendra Rao as D.W.1. No document was filed. The landlords purchased the petition premises on 30.4.1984. On 30.5.1985 they sent a notice Ex.P-1 to the tenants. This was received by the tenants as evidenced by Ex.P-2 acknowledgment. In the said notice, it is clearly

stated that the monthly rent is Rs.1,000. In order to prove that the tenants have already paid a sum of Rs.10,000 by way of advance to the prior landlord and there was an agreement between them, to adjust the said advance from the rent payable every month, no document was filed. In Ex.R-3 (exhibit in previous matter) the rental agreement, between the prior landlord and the tenants, there is no mention about the payment of Rs.10,000 by way of advance as alleged by the tenants. According to Ex.P-4, dated 23.1.1985, the tenants paid a sum of Rs.2,000 in court. According to Exs.P-6 and P-7, a sum of Rs.2,000 was paid on 21.3.1984 and another sum of Rs.800 was paid on 10.10.1984 by way of pay order. This was not accepted by the landlords. According to the landlords, they returned this pay order, because when the rent is Rs.1,000 per month, the tenants have no business to send Rs.800 per month. Therefore it was returned. On 3.5.1985, 9.12.1985 the tenants paid Rs.2,000 and Rs.4,000 respectively. According to the landlords, the rent is due for a period of thirteen months from September, 1984 till September, 1985. The petition was filed on 17.10.1985. The tenants paid Rs.2,000 and Rs.4,000 totalling Rs.6,000. The arrears of rent for thirteen months comes to Rs.13,000. Therefore there is still arrears of rent payable by the tenants.

22. There is no particulars as to what is the date on which this Rs.10,000 was paid to the prior landlord. Assuming if this amount of Rs.10,000 is to be adjusted at the rate of Rs.200 per month from the date of lease deed, viz., 24.5.1980, the said amount of Rs.10,000 would have been wiped out by 24.7.1984. On September, 1984, there was nothing left in the said amount of Rs.10,000 yet to be adjusted. Even though no document was filed in the present proceedings by the tenants before the authorities below to show that they have paid a sum of Rs.10,000 by way of advance to the prior landlord, the tenants now sought to file by way of additional evidence, the order passed in R.C.O.P.No.3405 of 1984 dated 25.11.1988 in C.M.P.No.3148 of 1992. The landlords/respondents herein filed a counter opposing this application. The parties herein are parties in R.C.O.P.No.3405 of 1984. In that proceedings, it was the case of the tenants that they have paid Rs.10,000 by way of advance to the prior landlord. Therefore, this fact was known to the landlords. No prejudice will be caused if this document is permitted to be filed as an additional

document. Further, it is an order of court and a public document. Therefore, the certified copy of the order in R.C.O.P.No.3405 of 1984 is permitted to be filed as an additional document and the same is marked as Ex.R-1. Accordingly C.M.P.No.3148 of 1992 stands allowed.

23. According to the facts arising in R.C.O.P.No.3405 of 1984, the petitioners herein came as tenants under Shanmugham on 24.5.1980 as per the lease deed dated 24.5.1980. It is stated that two days prior to the date on 22.5.1980, the tenants herein paid Rs.10,000 as advance to the said R.Shanmugham and he also issued a receipt for having received that amount from the tenants. That was filed as Ex.R-9 in R.C.O.P.No.3405 of 1988. the landlords herein contended in the said R.C.O.P.No.3405 of 1984 that the said receipt Ex.R-9 is not a true document. Further it is not known as to why the tenants did not say in the counter filed in the present proceedings that a sum of Rs.10,000 was paid to R.Shanmugham two days prior to execution of the lease agreement dated 24.5.1980. Further more that receipt is not now before this Court for verification. Ex.R.9 in R.C.O.P.No.3405 of 1984 appears to be a collusive document. If the document was a true, the existence of which would have been disclosed in the present proceedings. There was no explanation by the tenants herein as to why the existence of the said receipt Ex.R-9 was not disclosed in the present proceedings. Further, it is not the case of the tenants herein that in Ex.R-9 it was stated that the said sum of Rs.10,000 will be adjusted by way of Rs.200 per month from the rent. At least the tenants could have examined the said Shanmugham as a witness in the present proceedings. That was also not done in this case. Again, the order passed in R.C.O.P.No.3405 of 1984 is under appeal/revision. Therefore, I consider that even by producing the order copy in R.C.O.P.No.3405 of 1984, the tenants were unable to establish that they have paid Rs.10,000 by way of advance to the prior landlord. Even assuming that Ex.R-9 is a genuine document and Rs.10,000 was paid as an advance two days prior to 24.7.1980, the advance amount would have been wiped out by July, 1984 itself. Therefore, in September, 1984 there was no advance amount remaining to be adjusted. In view of all these facts, I hold that the tenants were unable to establish that they have paid an advance of Rs.10,000 to the prior landlord and that was to

be adjusted by way of Rs.200 per month out of the rent payable. Therefore, admittedly there is arrears of rent payable by the tenants for the petition period and hence the tenants are liable to be evicted under Sec.10(2)(1) of the Act.

24. Another ground raised in this revision was that when the first petition for eviction under Sec.10(2)(i) is pending, another petition under Sec.10(2)(1) cannot be filed and if there is any arrears of rent even after filing of the first petition, the landlords should resort to the proceedings under Sec.11(4) of the Act, and not to file another petition for eviction under Sec.10(2)(1) of the Act for the default in payment of rent for the subsequent period. To support this proposition, the learned senior counsel for the tenants relied upon a decision of the Division Bench of this Court reported in *Durgai Ammal v. R.T.Mani*, (1989)1 L.W. 155. On the other hand, the learned counsel appearing for the landlords pointed out that two petitions under Sec.10(2)(1) are possible for two different periods and it is not necessary for the landlords to resort to the proceedings under Sec.11(4) of the Act when the tenant committed wilful default in payment of rent after the first petition was filed. To support this proposition, the learned counsel relied upon a Full Bench decision of this Court reported in *K.Perumal Chettiar v. V.Muthusami*, (1962)2 M.L.J. 218 (F.B.). It remains to be seen that before the Division Bench which rendered the decision in *Durgai Ammal v. R.T.Mani*, (1989)1 L.W. 155, the decision of the Full Bench of this Court on this point was not brought to its notice. 25. In *Durgai Ammal v. R.T.Mani*, (1989)1 L.W. 155, while delivering a separate but concurrent judgment, His Lordship Justice Bellie while considering Sec.11(4) of the Act held that:

"36. Therefore if during the rent control proceedings, the tenant does not pay rent, the landlord can file an application in that respect before the Controller and the Controller on his satisfaction will terminate the proceedings and direct the tenant to put the landlord in possession of premises. Thus in the Act a special machinery has been provided to deal with non-payment of rent by the tenant during pendency of the rent control proceedings. The landlord in disregard of or by-passing this provision cannot institute a fresh proceeding on the ground of non-payment of rent. This apart, even as per the petition itself during the

proceedings the tenant was paying rent in lump sum some time even once in 12 months and the landlord has received them. Therefore non-payment of 7 months rent cannot be said to be wilful. It is not the landlord's case that this was not paid in spite of demands. Therefore, the present petition *i.e.*, H.R.C.No.3487 of 1981, as regards the ground of non-payment of rent cannot be sustained. Hence, the findings of the appellate authority that the tenant has committed wilful default and on this ground he is liable to be evicted has to be set aside."

This is a decision rendered by the Division Bench of this Court. But there is another Full Bench decision of this Court rendered in *K.Perumal Chettiar v. V.Muthusami*, (1962)2 M.L.J. 218 (F.B.), on this aspect wherein while considering the proviso to Sec.7 of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) the Full Bench held as under:

"Under the Proviso to Sec.10(7) of the present Act (XVIII of 1960) though the language used is not quite clear, a landlord can file an application complaining of default for subsequent months during the pendency of an application on the ground of default in payment of rent for earlier months. The word 'other grounds' in the Proviso must relate to the necessary grounds other than those which form the subject-matter of the previous petition."

It is significant to note that the Full Bench decision of this Court in *K.Perumal Chettiar v. V.Muthusami*, (1962)2 M.L.J. 218 (F.B.), was not brought to the notice of the Division Bench of this Court, while rendering its decision in *Durgai Ammal v. R.T.Mani*, (1989)1 L.W. 155.

26. Further, Sec.11(4) is intended to prevent defaulters from continuing in possession of the property taking advantage of the pendency of an application without at the same time performing their own part of the obligations. The disability imposed by this section attaches only to the tenant. A proceeding under Sec.11(4) of the Act is intended to accelerate the long drawn proceedings under the Act. Therefore, if the landlord chooses to file another petition for eviction on the ground of wilful default in payment of rent, for the subsequent period, when an earlier petition on the same ground is pending, he can do so, and there is no impediment for the same. There is no express prohibition in the Act preventing the

landlord from filing a second petition for eviction on the ground of wilful default in payment of rent while the earlier petition on the same ground is pending. Therefore, in view of the above cited decision of the Full Bench of this Court, the present eviction petition filed by the landlord herein under Sec.10(2)(i) of the Act is maintainable.

27. Thus on a careful consideration of the facts arising in this case, I am of the view that the tenants committed wilful default in payment of rent for the petition period. The explanation offered by the tenants would go to show that the default was committed deliberately. Hence, I consider that the authorities below were correct in coming to the conclusion that the tenants committed wilful default in payment of rent for the petition period. Therefore, I am not inclined to interfere with the order of eviction passed by the authorities below on this ground. Accordingly, this revision is also dismissed.

28. In the result, all the revisions are dismissed. There will be no order as to costs. Time for eviction three months.

B.S.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: A.R.Lakshmanan, J.

C.R.P.Nos.2692 of 1992 and 2807 of 1992

5th January, 1993.

S.Sukumar and another

...Petitioners

v.

M.Rammohan Shanmugham

...Respondent.

Private Trust - Scheme decree - Appointment of trustees - Person applying for a specific post must be considered for appointment to that post only - Scheme decree authorising appointing authority not to rigidly follow the norms - Interpretation violating the interest and objectives of trust ought not to be permitted. Held:- Normally when one applies for a specific post, the consideration for appointment must be only for that post. It is elementary. While so, the

respondent is appointed not for what he prayed for but for a different post. This is clearly an error apparent from the face of the record. It is true that clause 5(c) of the scheme decree authorises the court "not to rigidly adhere" to the norms if efficient administration of the trust requires. But the 'rigid' used in the scheme decree only means to state that the appointing authority, viz., the court, ought not to be restricted in a manner against the objects of the Trust. If any interpretation sought to be placed on the word 'rigid' is understood as violating the intent and objectives of the Trust it ought not to be permitted. [Paras 10 & 11]

Cases referred to:

Ajantha Transports (P) Ltd. v. T.V.K. Transports, (1975) 2 S.C.J. 320: A.I.R. 1975 S.C. 123. [Para 6] *R. Krishnamoorthy*, Senior Advocate, for *R. Muthukumaraswami*, for Petitioner in C.R.P.No.2692 of 1992.

A.S. Venkatachalamurthy, for Petitioner, in C.R.P.No.2807 of 1992.

V. Sridevan, Senior Advocate, for *R. Santhanam*, for Respondents in both the Petitions.

The Court made the following

ORDER: These two revisions can be dealt with together, as both of them arise from the same order dated 9.9.1992 in O.S.No.68 of 1948 as amended in O.S.No.17 of 1960 of the (Scheme Court), Subordinate Judge, Mayiladuthurai. Brief history of the case is as follows:

A.V. Charities, Mayiladuthurai, is a Trust which is governed by a Scheme Decree made in O.S.No.68 of 1948 dated 24.7.1951 on the file of Sub Court, Mayavaram as amended in O.S.No.17 of 1960 on the file of the same court. As per the said Scheme Decree, the Management of the Trust vests in a Board of Trustees consisting of a Chairman and five Trustees to be appointed by the Scheme Court from among the members of the original five families that gave the original endowment. The five families that gave the original endowment are: (1) Anbanathapuram family, (2) Enathimangalam family, (3) Pallavarayapet family, (4) Karugudi family, and (5) Kanganamputhur family.

Every member of the Board appointed by the court is entitled to hold office for a period of five years from the date of his appointment. The Scheme Decree also provides that the appointment of a trustee in any vacancy caused by efflux of time by resignation, removal, death or disqualification shall be filled up by the Scheme Court from among the

male members, of the five families having due regard to the representation of the aforesaid five families. Right from the inception the Board of Trustees of the aforesaid Trust has been represented by one member from each one of the aforesaid five families and the sixth member from any one of the said families which vacancy has been termed as 'general vacancy'. Thus, as and when vacancy arose in the office of the Trustee, the same was filled by appointment by the court from among the male members of the respective family. Two vacancies were intimated, by the Manager of the Charities to the Scheme Court in August, 1992. One of the vacancy arose out of the expiry of the period of office of Trusteeship of the first petitioner S. Sukumar belonging to Kanganamputhur family. The second vacancy arose on account of the expiry of the period of office of the respondent who was holding the office under the 'general vacancy'. The Scheme Court issued a notice on 12.8.1992 inviting applications for filling up both the above vacancies. Pursuant to the aforesaid Notification 13 applications were made to the Scheme Court. The petitioners 1 and 2 in C.R.P.No.2692 of 1992 and Thiru Sadayappan petitioner in C.R.P.No.2807 of 1992 belong to the Kanganamputhur family and therefore they claimed appointment to the vacancy of Trusteeship in respect of the said family. The other ten applicants claim in respect of the general vacancy. The Scheme Court has passed an order on 9.9.1992 rejecting the claims of the petitioners and Thiru Sadayappan for appointment to the office of the Trusteeship in respect of the Kanganamputhur family and appointing the respondent herein as a Trustee in the place of the outgoing Trustee belonging to the Kanganamputhur family. By the said order the Scheme Court has also appointed Dr. Chockalingam belonging to one of the families in the general vacancy. Aggrieved by the order of the Scheme Court appointing the respondent as a Trustee in respect of a vacancy caused by the expiry of the term of office belonging to Kanganamputhur family, the petitioners filed the two revisions. According to them the order of the court below is patently illegal, opposed to the provisions of the Scheme Decree besides being opposed to the orders of this Court which have considered the scope of the provisions of the Scheme Decree. The Board of Trustees who comprise of six persons from among the male members of the five families having due

regard to the representation of all the five families. According to the petitioners, at present there is no representative from the Kanganamputhur family while there are two representatives for Pallavarayapet family and Enathimangalam family. In terms of the Scheme Decree, only one family can have two representatives, one representing the family earmarked for them and the other in the general vacancy. The appointment of the respondent is thus patently illegal having regard to the fact that his appointment has been made to a Kanganamputhur family's vacancy and in particular having regard to the fact that the petitioners and the other person belonging to the said family are not found to be disqualified to hold the said office.

2. The revision petitions were resisted by the respondent Mr. Rammohan Shanmugham. According to the respondent, the impugned order of the scheme Judge appointing him as one of the Trustees is quite reasonable, and that the Scheme Court has got powers to appoint from among the general vacancies to the vacancy of any particular family. It is submitted that there is no illegality or irregularity in the order of Scheme Court. The Scheme Court has considered all the relevant materials for assessing the entitlement of various claimants to the two vacancies in the Board of Trustees and has ample powers to pass the order under revision.

3. I have heard Mr. R. Krishnamurthy, learned Senior Advocate and Mr. A. S. Venkatachalamurthy for the petitioners and Mr. V. Sridevan, learned Senior Advocate for respondent in both the above revisions. Clause 5(c) of the Scheme Decree which is heavily relied on by both parties runs thus:

"(C) The appointment of a Trustee in any vacancy caused on the Board of Trustees by efflux of time, by resignation or removal or death or disqualification, shall be made by the court, from among male members of the five families as far as possible. It shall be the duty of the Manager provided for, herein, to intimate the occurrence of any vacancy to the court within three weeks of the occurrence and the court shall proceed to call for applications and make appointment to the vacancy having due regard to representation of the five families known as Anbanathapuram, Enathimangalam, Pallavarayapet, Karkudi and Kanganamputhur families. A Trustee should be a major and

should not be disqualified under the rules. It is open to the court, not to rigidly adhere to representation of each group, if efficient administration requires "a light departure."

Mr. R. Krishnamoorthy submits as under:

(A) The Scheme Court has committed a grave error in misconstruing the scope and content of Clause 5(C) of the Scheme Decree which has led the said court to come to the conclusion that it is permissible to ignore or bypassing a representation from a family.

(B) The lower court has erred in misconstruing the scope of the words 'not to rigidly adhere to representation of each group' and the words 'from among male members of five families as far as possible'.

(C) The finding of the court below that once a trustee representing a family resigns or dies it is not necessary that another person should be selected only from that family is clearly opposed to the content and scope of the Scheme-Decree. Therefore it is submitted that the order appointing the respondent in relation to a vacancy belonging to Kanganamputhur family is patently illegal and is liable to be set aside.

(D) The lower court has patently erred in appointing the respondent as a Trustee in the vacancy earmarked for Kanganamputhur family when his application itself was only for the general vacancy. In this view alone the order of the lower court is liable to be set aside.

(E) A vacancy arising out of the resignation or death of a Trustee belonging to a particular family can be filled from among the members of any other family only in the event of the fact that the applicant/applicants from that particular family is disqualified under the Scheme.

(F) It is an admitted fact by the respondent that the petitioners are not in any manner disqualified by the Rules to hold the office of Trusteeship. Hence the order ignoring their claim is patently illegal and irregular and liable to be set aside.

(G) The reasoning given by the lower court to reject the claims of the petitioners are perverse since the lower court's order is based on irrelevant and extraneous consideration.

4. Mr. A. S. Venkatachalamurthy has also adopted the arguments of Mr. R. Krishnamurthy and has also submitted specifically that no family should be denied the representation in the Trust Board if

they do not suffer any disqualification.

5. Mr.V.Sridevan, learned Senior Advocate appearing for Mr.Rammohan Shanmugham submits as follows:

(A) The scheme decree contemplates six Trustees. It does not say that there should be one representative from each family. On the other hand, it gives the power to the Scheme Court even to select an outsider if the circumstances warrant.

(B) This Court should cautiously exercise its power under Sec.115 of the Code of Civil Procedure even if this Court comes to a different conclusion on the materials available.

(C) It is open to the court to appoint a stranger if there are no fit persons in the families available.

(D) What is paramount is efficient administration and not representation of each group.

(E) Not impleading of the necessary parties is fatal to the case in C.R.P. Dr.E.S.Chockalingam, who was made respondent 2 in C.R.P.No.2807 of 1992 was given up with some ulterior motive and *mala fide* intention, when such non-joinder makes it impossible to deal equitably and sufficiently with the matter in controversy between the parties in revision.

(F) The High Court cannot while exercising its jurisdiction under Sec.115 correct errors of fact however gross they may be or even errors of law. It can only do so when the said errors have relation to the jurisdiction of the court to try the dispute itself.

(G) The decision of the lower court on all questions of law and fact and not touching its jurisdiction is final and however erroneous such a decision may be, it is not revisable under Sec.115 of the Code of Civil Procedure.

6. Mr.V.Sridevan in support of his legal submissions cited a number of decisions which deal with scope of Sec.115 of the Code of Civil Procedure. Mr.R.Krishnamoorthy cited the decision reported in *Ajantha Transports (P) Ltd. v. T.V.K. Transports*, (1975) 2 S.C.J. 320: A.I.R. 1975 S.C. 123, which also deals with the scope of Sec.115 of the Code of Civil Procedure. It says that the High Court can interfere on two contingencies viz., (a) grant of relief on totally irrelevant grounds, and (b) relevant grounds are unjustifiably ignored. Thus he submits that this Court can interfere in revision if both the above grounds are satisfied.

7. As I propose to dispose of the two revisions on a shorter ground, I feel it wholly unnecessary for me to deal with the extensive arguments of both the parties or the citations cited by them

8. C.R.P.No.2692 of 1992 is filed challenging the appointment of M.Rammohan Shanmugham, whereas C.R.P.No.2807 of 1992 is filed initially against the appointment of Dr.E.S.Chockalingam and Mr.Rammohan Shanmugham. It will thus be seen the appointment of Rammohan Shanmugham is challenged in both the civil revision petitions, whereas the appointment of Dr.E.S.Chockalingam challenged in C.R.P.No.2807 of 1992 is later given up. Thus parties challenging in both the civil revision petitions are aggrieved that the appointment of Rammohan Shanmugham is bad.

9. I feel that the giving up of challenge against the appointment of Dr.E.S.Chockalingam in C.R.P. No.2807 of 1992 raises some misgiving and suspicion, if the same is caused due to some manoeuvring after the civil revision petition has been filed in this Court. It is unnecessary for me at this stage to probe further into the matter in the nature of the order which I am passing in these revisions.

10. There is no dispute whatever among the parties to the civil revision petitions that all of them are well qualified to become members of the Board of Trustees. Hence the only question is whether the appointments actually made suffer or vitiated by any error of jurisdiction apparent from the records as contended by Mr.R.Krishnamoorthy, learned Senior Advocate and Mr. A.S.Venkatachalamurthy learned counsel for the petitioners. It is seen from the application of the respondent M.Rammohan Shanmugham that he has applied only for a general vacancy. It is seen from the publication made in the newspaper that the respondent Rammohan Shanmugham has applied only for the general vacancy. Normally when one applies for a specific post, the consideration for appointment must be only for that post. It is elementary. While so, he is appointed not for what he prayed for but for a different post. This is clearly an error apparent from the face of the record. The revision petitioners have specifically taken up this grounds as vitiating the order. I also do not see from the order of the lower court what prompted the learned Judge to make up such a deviation. Only he says that there is no need for rigid compliance in the matter of appointment of trustees to the Board which however in the

context in which the words are used cannot be interpreted to mean what the lower court believes it means.

11. In my opinion the words 'rigid' used in the Scheme Decree means to state that the appointing authority, viz., the court, ought not to be restricted in a manner against the objects of the Trust. If any interpretation sought to be placed on the word 'rigid' is understood as violating the intent and objectives of the Trust, I believe it ought not to be permitted. In my view, the lower court has erred in misconstruing the scope of the words found in clause 5(c). Viewing thus, it will be seen that an appointment of a person to a post for which he did not apply is clearly against the Scheme but also against the very wish of the applicant himself. The lower court has erred in finding that once a trustee representing a family resigns or dies it is not necessary that another person should be selected only from that family. The said finding in my view is opposed to the scope of the Scheme decree and therefore the order appointing the respondents in relation to a vacancy belonging to Kanganamputhur's family is patently wrong. This reasoning alone is sufficient for me to allow both the revisions and set aside the order of appointments of both Mr. Rammohan Shanmugham and Dr. E.S. Chockalingam. But I do not propose to state anything that might effect the chances of any one of the parties to this litigation getting affected by any opinion expressed by me in this regard in this order. Hence, I refrain from evaluating in any manner the credentials of any of the parties in any manner. The fact that there has been an error committed by the lower court in the matter of appointment is sufficient by itself to allow both the civil revision petitions. Such view of mine is also fortified by a tint of suspicion I was forced to take in the conduct of the challenge against Dr. E.S. Chockalingam (R-2 in C.R.P.No.2807 of 1992) at the beginning and change of stand later being given up. Ground Nos.8 and 10 in C.R.P.No.2807 of 1992 filed by Mr. Sadayappan will strengthen my suspicion. Ground Nos.8 and 10 in C.R.P.No.2807 of 1992 is reproduced herein for the sake of convenience:

Ground No.8: The other reasons given by the court below is that the petitioner may not find time to discharge his duties as a trustee. But at the same time the lower court has appointed another trustee by name Dr. E.S. Chockalingam

who is a Doctor.

Ground No.10: The other reasons given by the lower court for not appointing the petitioner as a trustee and instead appointing the respondents in that place are erroneous and unacceptable particularly in view of the fact the earlier decision of this Hon'ble Court.

Even in this regard it is only a suspicion. I must be clearly understood as having no bias against or in favour of the said party.

12. In this light I feel it is wholly unnecessary for me to deal with the arguments advanced by Mr. R. Krishnamoorthy, Mr. A.S. Venkatachalamurthy, learned counsel appearing for the petitioners and Mr. V. Sridevan, learned counsel appearing for the respondent relating to the merits of the respective causes or to the citations made in support of their arguments since I am remitting the matter to the lower court for being dealt with afresh in view of the error I have noticed as vitiating the order passed by the lower court. I also further feel that the matter after remand should be dealt with by a Sub Judge different from the one who dealt with the matter and pass the order in accordance with law. Thus I direct the learned Subordinate Judge of Nagapattinam to dispose of this matter within four weeks positively from the date of receipt of a copy of this order from this Court on merits and in accordance with law. The said court will give due notice to the parties. It is always better to direct a different mind to deal with the matter afresh on the controversies raised by parties.

13. In the result, the order of the lower court dated 9.9.1992 appointing Mr. Rammohan Shanmugham and Dr. E.S. Chockalingam as Trustees are set aside. C.R.P. Nos. 2692 and 2807 of 1992 are allowed. No costs.

14. Mr. E.S. Ganapathy, who is the Chairman of the A.V.C. College Education Committee, is permitted to draw cheques from the bank account for the purpose of disbursing the salary to the staff members of the College and also to incur necessary expenditures in that regard, till the disposal of the matter by the Sub Court, Nagapattinam. This is purely an interim arrangement till the disposal of the matter by the Sub Court, Nagapattinam. The Scheme Court shall not fill up the vacancies which has arisen for educational agency till the disposal of the matter by the said court.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.**Present:-** *Abdul Hadi, J.*

S.A.No.827 of 1982

15th December, 1992.

Ayyamperumal Chettiar (died) and others...*Appellants*

v.

Manivel Chettiar and others...*Respondents.*

Hindu Succession Act (XXX of 1956), Sec.14 - Scope and applicability - Widow executing sale deed before coming into force of Act but continuing to be in possession - Section if applies.

For Sec.14 to operate, the Hindu woman concerned should have been legally possessed of the property in question on the date when Hindu Succession Act came into force. It has also been held by the Supreme Court in *Mangal Singh v. Rattno*, A.I.R. 1967 S.C. 1786, that the expression "possessed by" in Sec.14(1) is not intended to apply to a case of mere possession without title. Further in *Meenakshisundaram v. Srinivasaga Reddiar*, (1971) 1 M.L.J. 44 (D.B.), it has been held that where widow had parted with title to the property by executing a sale deed before the coming into force of the Hindu Succession Act, but continued to be in possession of the same, she must be taken to have been in wrongful possession or at any rate, to be in possession without rightful basis or title therefor and that to such a case, Sec.14(1) will have no application. [Para 9]

Cases referred to:

Mangal Singh v. Rattno, A.I.R. 1967 S.C. 1786. [Para 9]

Meenakshisundaram v. Srinivasaga Reddiar, (1971) 1 M.L.J. 44 (D.B.). [Para 9]

N.Damodharan, for Appellants.

M.V.Krishnan, for Respondents.

The Court delivered the following

JUDGMENT:- The 2nd defendant is the appellant in this second appeal against the concurrent decree given by the courts below, declaring the title of the plaintiff 1st respondent to the suit property and granting consequential injunction. Pending appeal, the appellant died and his legal representatives were brought on record as appellants 2 to 8 likewise. The 2nd respondent also died and his legal representatives were brought on

records as respondents 3 to 6.

2. The suit property is a vacant site of about 5 cents. It originally belonged to Velayutham Chettiar and Subramania Chettiar was his son through the first wife and the 1st defendant who is the 2nd respondent herein and the 2nd defendant-appellant are the sons of the said Velayutham Chettiar through his second wife. In the family partition Ex.A-11, dated 28.8.1920 the suit property was allotted to the said Subramanian Chettiar. On his death in about 1927, Subramania Chettiar's wife Velayi Ammal enjoyed the said property. There are three daughters to the said Subramania Chettiar and Velayi Ammal. After the death of Subramania Chettiar, the said Velayi Ammal and her three daughters sold away the suit property under Ex.B-24, dated 9.10.1939 to one Ponnusami Muthiraian. There was also a rectification deed Ex.B-25, dated 24.10.1939, making some rectification relating to the description of the property found in Ex.B-24. The first defendant filed O.S.No.45 of 1943 against the Velayi Ammal and the abovesaid Ponnusami Muthiraian, the vendee under Ex.B-24 for a declaration of his title to the suit property and the property just north of it, described as ABHE property in that suit. Apart from the said declaration, possession was also sought for in the said suit. The said suit ended in a compromise and as per the compromise, the 1st defendant who was the plaintiff in the suit got a decree only in respect of the said property ABHE, which lay just north of the suit property. The said decree in the said suit is Ex.A-2, dated 17.7.1944. However, on 4.9.1944, the same 1st defendant herein filed another suit O.S.No.506 of 1944 against the same Ponnusami Muthiraian and Velayi Ammal and also against all the three daughters of Velayi Ammal (one of whom in Nacharammal, who is P.W.2 in this suit). This suit is for a declaration that the abovesaid Ex.B-24 and Ex.B-25 deeds are not binding on the 1st defendant in this suit and other reversioners of the abovesaid deceased Subramania Chettiar. The said suit was decreed as prayed for as borne out by Ex.A-8, dated 24.1.1947. The abovesaid Velayi Ammal died in 1959.

3. Now according to the plaintiff, after the death of Velayi Ammal, her abovesaid three daughters enjoyed the suit property and sold it to the plaintiff under Ex.A-3, dated 11.4.1977 and the plaintiff is in possession of the same by putting up a thatched house in it, but, the defendants are obstructing his

enjoyment.

4. The 1st defendant remained *ex parte*.

5. The defence of the 2nd defendant is Velayi Ammal was not enjoying the suit property till her life time and under Ex.B-24 Ponnusami Muthiraian alone was in possession; Velayi Ammal was not entitled to any legal possession on the date of Hindu Succession Act of 1956. Therefore, on her death, her daughters have not inherited the same. The defendants alone are entitled to the suit property as reversioners to late Subramanian Chettiar. After Ex.A-8 decree, Ponnusami Muthiraian had handed over possession of the suit property to the defendants. The defendants have partitioned the suit property in the year 1960 in two equal parts and are in possession of their respective shares.

6. Both the Courts have held that the limited estate enjoyed by Velayi Ammal enlarged into an absolute estate by virtue of Sec.14 of the Hindu Succession Act and that hence when Velayi Ammal died, her abovesaid three daughters inherited the suit property from her and consequently Ex.A-3 sale deed in favour of the plaintiff was valid.

7. The learned counsel for the appellants no doubt initially contended that there was no plea regarding the application of Sec.14 of the Hindu Succession Act, resulting in enlargement of Velayi Ammal's interest in the suit property into an absolute interest. But, I find that there is plea that Velayi Ammal enjoyed the suit property till her life time and thereafter, the suit property was inherited by her daughters. This shows that there is plea that she had absolute interest in the suit property, on her death. (There is evidence to show that she died in 1959). However, there is no explicit plea in the plaint regarding the applicability of Sec.14 of the Hindu Succession Act. But, in the written statement there is a specific plea as follows:

"The said Velayi Ammal was not possessed of the suit property nor she was entitled to any legal possession on the date of Hindu Succession Act of 1956. Therefore on her death, her daughters have not inherited the same."

This shows that the claim under Sec.14 of the Hindu Succession Act has been repudiated by the defendants. Further, I find from the judgment of the Courts below that both the parties proceeded in the trial that the said question regarding the applicability of Sec.14 is a question to be decided in the suit. Therefore, I do not think that it can be said that Sec.14 cannot be invoked by the plaintiff

in this proceedings simply on the ground of imperfection in the actual plea raised by the plaintiff.

8. Then, it has to be seen whether Velayi Ammal's interest actually enlarged into an absolute interest in the suit property pursuant to the abovesaid Sec.14. In this connection, the learned counsel for the appellants argues that since Subramania Chettiar died in 1927 itself, even prior to the commencement of the Hindu Women's Right to Property Act, 1937, and since Velayi Ammal had also sold away the suit property under Ex.B-24, she cannot be said to be legally possessed of the suit property in 1956 when the Hindu Succession Act came into force and that, therefore, there is no scope for application of Sec.14 of the Hindu Succession Act. This submission has to be accepted; first of all, since Subramania Chettiar died in 1927, Velayi Ammal did not get the widow's estate spoken to in the above said Hindu Women's Right to Property Act, 1937. Further as per Ex.B-24, she had sold away her interest in the suit property and it cannot also be said that by Ex.A-8 decree, the sale under Ex.B-24 has actually been set aside. What actually has been held in Ex.A-8 decree is that Ex.B-24 sale is not binding on the reversioners, who are the defendants 1 and 2. But obviously, that does not mean that Ex.B-24 does not bind Velayi Ammal. In other words, Velayi Ammal is bound by Ex.B-24. Then the question is when she had parted away her interest in 1939 itself under Ex.B-24, can she claim the benefit of Sec.14 of the Hindu Succession Act, when it came into force in 1956? No doubt, the learned counsel for the 1st respondent-plaintiff seeks to rely on Ex.A-2 - decree and contends that by virtue of the said decree, the 1st defendant, who was the plaintiff in that suit recognised the title of Velayi Ammal and the abovesaid Ponnusami Muthiraian who were defendants in that suit, over the suit property. But, this submission of the learned counsel for the 1st respondent has no force since, immediately after the decree in O.S.No.45 of 1943, dated 17.7.1944, the 1st defendant filed the abovesaid suit O.S.No.506 of 1944 on 4.9.1944 and obtained the decree that Ex.B-24 and Ex.B-25 sale deeds would not bind himself and the other reversioners to Subramania Chettiar. Therefore, I am of the view that Sec.14 of the Hindu Succession Act will not have any operation in the present case and that, therefore, her abovesaid daughters could not have inherited the suit property and that, therefore, their alleged sale

of the suit property under Ex.A-3 in favour of the plaintiff is not valid.

9. For Sec.14 to operate, the Hindu woman concerned should have been legally possessed of the property in question on the date when Hindu Succession Act came into force. It has also been held by the Supreme Court in *Mangal Singh v. Rattno*, A.I.R. 1967 S.C. 1786, that the expression "possessed by" in Sec.14(1) is not intended to apply to a case of mere possession without title. Further in *Meenakshisundaram v. Srinivasaga Reddiar*, (1971) 1 M.L.J. 44 (D.B.), it has been held that where a widow had parted with title to the property by executing a sale deed before the coming into force of the Hindu Succession Act, but continued to be in possession of the same, she must be taken to have been in wrongful possession or at any rate, to be in possession without rightful basis or title therefore and that to such a case, Sec.14(1) will have no application. In the present case also, Velayi Ammal had already sold the property under Ex.B-24 and Ex.B-25 and she cannot be held to be legally possessed of the suit property on the date of the commencement of the Hindu Succession Act.

10. No doubt, the learned counsel for the 1st respondent-plaintiff relies on the boundary recital in Ex.A-12 partition deed dated 10.5.1960, saying about Velayi Ammal's life interest. The said Counsel also points out the observation of the lower appellate Court based on Ex.A-12 stating that from the said document, it is clear that the property continued to be in the possession and enjoyment of Velayi Ammal. But, I do not think that from the abovesaid recital, the possession of the suit property be Velayi Ammal in 1960 is admitted by the defendants. That apart, even assuming that there is such an admission, Velayi Ammal's possession cannot be considered as legal possession as contemplated in Sec.14 of the Hindu Succession Act since she already sold away her interest long back in 1939 under Ex.B-24, and Ex.B-24. For the same reason, Exs.A-10, A-5, A-6 and A-7 voters' list, which are dated 1970 and thereafter, will be of no use to the plaintiff.

11. Therefore, the courts below have erred in holding that Sec.14 of the Hindu Succession Act applies in the present case. Therefore, the abovesaid daughters, the vendors of the plaintiff, had no title when they executed Ex.A-3 in favour of the plaintiff. Therefore, the plaintiff's suit has to be

dismissed and this second appeal has to be allowed.

12. Accordingly, the judgments and decrees of the Courts below are set aside and the suit is dismissed and this second appeal is allowed. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Thangamani, J.*

S.A.No.557 of 1982 and Cross objections

16th October, 1992.

Pe.Ramasamy Thevar

...Appellant

v.

Perumal Thevar and others

...Respondents.

Civil Procedure Code (V of 1908), O.1, Rules 1, 9, 13 and O.2, Rule 7 - Objection as to misjoinder of parties or cause of action - Objection not taken before settlement of issues - Effect.

A reading of the abovesaid provisions would make it clear that in the absence of any plea in the written statement on the misjoinder of parties and misjoinder of cause of action the trial court was not within its limits in framing issues on this aspect of its own accord and non-suiting the plaintiffs on the ground of misjoinder of parties. On the failure of the appellant to raise any objection regarding misjoinder of parties and cause of action before settlement of issues, the objection must be deemed to have been waived. [Para 7]

Cases referred to:

Srinivasan v. Subiamaniam, (1965) 2 M.L.J. 502. [Para 7]

Sethu Madhavarao v. Food Corporation of India, A.I.R. 1985 Guj. 27. [Para 7]

S.V.Jayaraman, for Appellant.

E.Padmanabhan, for Respondents.

The Court made the following

JUDGMENT:- The respondents are the plaintiffs in the trial court. They instituted O.S.No.464 of

1977 of the file of the District Munsif of Periyakulam for a declaration that the respondents 1 to 7 are entitled to suit items 1 to 7 respectively and that the 8th respondent has right in suit item No. 8 on the basis of an Othi and for consequential permanent injunction. Respondents 1 to 5 claimed title relying on the settlement deeds Exs. A-10, A-13, A-1, A-6 and A-3 respectively dated 25.5.1967 executed by the appellant/defendant. The 6th and 7th respondents based their claims on Ex. A-15, dated 5.7.1971 and Ex. A-19, dated 25.11.1967 the sale agreements respectively executed by the appellant. The 8th respondent as P.W.8 deposed that he was in possession of the 8th item as per an oral Othi entered into between himself and the appellant. The trial court though found title in favour of respondents 1 to 5 took the view that possession did not remain with them in respect of the respective suit items on the date of suit. It also found that respondents 6, 7 and 8 had no right in respect of items 6 to 8 and these respondents failed to prove that they were in possession on the date of suit. While the judgment was delivered on 7.11.1979, on the previous day 6.11.1979 two additional issues were framed *suo moto* on misjoinder of parties and maintainability of the suit. The parties were not put on notice regarding framing of the Additional issues and argument was also not heard on this aspect. After discussion the trial court took the view that there was misjoinder of parties and the suit as framed was not maintainable in law. Accordingly it dismissed the suit with costs.

2. The present respondents/plaintiffs took up the matter in appeal before the Principal Sub-Judge, Dindigul, in A.S.No.160 of 1979 on his file. The lower appellate court held that it had no reason to differ from the findings of the learned District Munsif, the plaintiffs 6 to 8 have not established their possession of items 6 to 8 of the suit properties. The findings of the learned District Munsif, regarding title to suit items 1 to 5 in favour of present respondents 1 to 5 were not challenged before the lower appellate court and they were upheld. The lower appellate court however, took the view that respondents 1 to 5 were in enjoyment of suit items 1 to 5 on the date of plaint. Accordingly it reversed the judgment and decree of the trial court on this aspect and decreed the suit in favour of present respondents 1 to 5 granting declaration and injunction in respect of the said

items. It dismissed the appeal by present respondents 6 to 8 in respect of suit items 6 to 8. The learned Principal Sub Judge also held that the respondents/plaintiffs are entitled to file a single suit against the appellant and that even assuming that there were misjoinder of parties, the decree could not be reversed or substantially varied in appeal under Sec.99 of the Code of Civil Procedure. While this second appeal has been preferred by the defendant in the suit against the said findings, the plaintiffs have come forward with cross objection against the non-suiting of plaintiffs 6 to 8.

3. Both the courts below have found as a matter of fact that title to the suit items 1 to 5 vested with present respondents 1 to 5 respectively and this has become final. The first respondent herein relied on Exs. A-11 and A-12 kist receipts for faslis 1385 and 1386 to prove his possession on the date of suit. While the second respondent pressed into service Ex. A-14 kist receipt for fasli 1385, the third respondent relied on Exs. A-33 and A-34 kist receipts for faslis 1386 and 1387 to prove their enjoyment. The fourth respondent has paid kist under Exs. A-7 to A-9 for faslis 1387, 1386 and 1385. The fifth respondent has paid kist under Exs. A-4, A-5 and A-35 for faslis 1387, 1386 and 1385. And the evidence of P.W.9 Village Munsif discloses that these kist receipts relate to the suit items. The appellant also as D.W.3 conceded that the kist receipt produced by the respondents/plaintiffs are in respect of suit properties. Further the settlement deeds executed by the appellant herein in favour of the respondents recite that the donees were put in possession of the respective properties on that date. Instead there is no document on the side of the appellant to prove his actual enjoyment of the properties subsequent to the settlement deeds. So the lower appellate court has rightly held that respondents 1 to 5 were in possession of their respective items on the date of plaint.

4. Admittedly plaintiffs 6 and 7 did not get any sale deeds executed in their favour pursuant to the alleged sale agreements Ex. A-15 dated 5.7.1971 and Ex. A-19 dated 25.11.1967 respectively. The claim of the 8th plaintiff was based only on an oral Othi and so both the Courts below have rightly negatived their title to the suit items 6 to 8. The conclusion of the trial court on this aspect was not challenged even before the lower appellate court. Evidently there is no merit in their

cross-objections.

5. The substantial questions of law framed in this second appeal are as under:

1. Whether the suit as framed for declaration of title and a consequential injunction in respect of different items of properties by different persons on different causes of action who have no common interest in the suit property is maintainable?
2. Whether the suit is bad for misjoinder of parties?
3. Whether the first appellate court can invoke Sec.99, C.P.C., in a suit in which the trial court has considered and found that the suit is bad for non-joinder of parties?
6. The learned counsel for the appellant assailed the granting of decree by the learned Sub-Judge in favour of respondents 1 to 5 in respect of suit items 1 to 5 respectively mainly on the ground that a single suit for all the reliefs claimed does not lie. He submitted that the subject matters and parties in this action are completely different from one another and all the remedies asked for could not be combined in one suit. The lower appellate court ought to have held that the suit as framed is not maintainable and it is bad for misjoinder of parties. Respondents 1 to 5 have claimed their title over the first five items of the suit properties by virtue of the five settlement deeds Exs.A-1, A-3, A-6, A-10 and A-13, dated 25.5.1967 respectively. The 6th and 7th respondents based their reliefs on the strength of sale agreements Ex.A-15, dated 5.7.1971 and Ex.A-19, dated 25.11.1967. The 8th respondent claimed right pursuant to an oral Othi. So different reliefs in respect of different properties by virtue of different transactions which took place on different dates are claimed by the respondents. The respondents have not instituted the suit for bare injunction. They have asked for declaration of title. So the origin of cause of action is execution of the settlement deeds. There is nothing in common as far as the respondents are concerned. In the absence of any common factor among them, they could not have joined in instituting one suit. The learned counsel for the appellant also raised an additional plea during his arguments in this second appeal that the suit is bad for misjoinder of cause of action.
7. However, as it has been rightly contended by the learned counsel for the respondents, there are no averments in the written statement regarding the

misjoinder of parties and cause of action. When the issues were settled on 6.7.1978, no issue was framed on misjoinder of parties. But on 6.11.1979 the trial court framed an additional issue on misjoinder of parties and the judgment was pronounced on 7.11.1979. After arguments were over, the additional issues were framed *suo moto* by the trial court. The respondents/plaintiffs were not put on notice of the framing of these issues. The judgment of the trial court does not indicate that any arguments were advanced by the parties on this aspect. O.1, Rule 1, C.P.C. reads that "all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise". But under O.1, Rule 9, C.P.C., "no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: Provided that nothing in this rule shall apply to non-joinder of a necessary party". Under O.1, Rule 13, C.P.C., "all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issue are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived". Under O.2, Rule 7, C.P.C. "all objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived". A reading of the above said provisions would make it clear that in the absence of any plea in the written statement on the misjoinder of parties and misjoinder of cause of action, the trial court was not within its limits in framing issues on this aspect of its own accord and non-suiting the plaintiffs on the ground of misjoinder of parties. On the failure of the appellant to raise any objection regarding misjoinder of parties and cause of action before settlement of issues, the objection must be deemed to have been waived. In *Srinivasan v. Subramaniam*, (1965)2

M.L.J. 502, a single Judge of this Court refused to permit the revision petitioner to succeed on a plea of misjoinder of cause of action, which he had not chosen to put forward at any earliest stage of that proceeding. In *Sethu Madhavarao v. Food Corporation of India*, A.I.R. 1985 Guj. 27. Held that the provisions of O.1, Rule 13 of the Code of Civil Procedure are mandatory. They provide that if such objection was not taken, it shall be deemed to have been waived. They must be taken at the earliest possible opportunity and they must be taken in all cases where issues were settled at or before such settlement, unless the ground of objection has arisen subsequently thereto. The lower appellate court has also held that even assuming that there is misjoinder of plaintiffs, the decree cannot be reversed or substantially varied in appeal if it does not affect the merit of the case under Sec.99 of the Code of Civil Procedure. This section lays down that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. It is the argument of the learned counsel for the appellant that the first appellate court could not have invoked this Sec.99, C.P.C., in a suit in which the trial court had found that it was bad for misjoinder of parties. But, it does not appear that there is any substance in this claim. In any event in view of the provisions of O.1, Rule 13 which I have already extracted, there is no necessity to invoke Sec.99 of the C.P.C.

8. In the result, the second appeal and cross objections are dismissed and in the circumstances without costs.

B.S. ---- Appeal and cross-objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Swamidurai, J.

C.R.P.Nos.42 of 1990, 610 of 1990 and 1038 of 1991
9th December, 1992.

Dharmaraja Vellalar ...Petitioner
v.

Ramachandra Vellalar and others ...Respondents.

(A) Stamp Act (II of 1899), Sec.2(15) and Sch.I, Art.45 - Final decree for partition passed by Civil Court not engrossed on proper non-judicial stamp paper - Effect.

(B) Stamp Act (II of 1899), Sch.I, Art.45 - Final decree for partition passed - First defendant, one of the sharers applying for copy of decree - Copy application returned for furnishing general stamp papers - Value of general stamp papers not mentioned - Stamp papers not furnished within time specified - Copy application if can be struck off.

The plaintiff filed a suit for partition and separate possession of the suit properties. Thereafter an application was filed by him for passing a final decree and accordingly a final decree was passed on 24.1.1979. The 1st defendant (petitioner) applied for a certified copy of decretal order (C.P.No.575 of 1979) for appeal to the High Court. He was called upon to submit general stamps within a week. As the stamps were not submitted the copy application was struck off on 7.3.1979. He filed an application for restoring the copy application. It was dismissed. Hence the revision. *Held:-* There can be no doubt that a final decree for partition passed by a Civil Court is an instrument of partition as defined in Clause (15) of Sec.2 of the Stamp Act. It follows that such a decree can only be engrossed on stamp papers of sufficient value. As held in *Satyanandam v. Namayya*, A.I.R. 1938 Mad. 307, a final decree for partition has no existence as a decree until it is engrossed on a proper non-judicial stamp paper and till that is done, the suit will be considered as pending.

[Para 19]

The plaintiff is liable to furnish non-judicial stamp papers for his share and the first defendant/petitioner herein also has to furnish non-judicial stamp papers for his share since the final decree is treated as a partition deed under Sec.2(15) of the Indian

Stamp Act. The first defendant is not liable to pay the entire non-judicial stamp papers. But the lower court has called for general stamps to be supplied for drafting the decree from the first defendant himself as per its order dated 28.2.1979 made in C.P.No.515 of 1979. This order itself appears to be wrong on the face of the records when the first defendant himself is not liable to pay the entire stamp duty. Further, the quantum of general stamps to be paid by the first defendant was also not mentioned in the return in C.P.No.515 of 1979. As already held till the decree is drafted on a stamp paper, the suit is deemed to be pending. In the circumstances, the order of the lower court made on 7.3.1979 in C.P.No.515 of 1979 appears to be wrong on the face of the records since the lower court should have called for general stamps even from the plaintiff for his share when the first defendant himself is not liable to pay the entire stamp duty. The plaintiff himself had supplied the entire stamp papers only in 1986. The first defendant/petitioner herein has not paid the court fee also as required under Sec.37(3) of the Tamil Nadu Court-Fees Act and as he is also not eligible for getting a decree in the partition suit. With all these irregularities the lower court need not have struck off the copy application on 7.3.1979, but it should have directed the first defendant/petitioner to pay court fees towards his share first. In the absence of the stamp papers being furnished by the plaintiff himself for his half share the lower court should not have called for general stamps from the first defendant himself and after collecting general stamp from the plaintiff also, it should have directed the first defendant to produce general stamps for his share. Admittedly, the plaintiff had not furnished the general stamps on 28.2.1979 or on 7.3.1979 when C.P.No.515 of 1979 was struck off. The first defendant should not have been directed to furnish general stamps for drafting the decree. This would unnecessarily saddle the first defendant/petitioner with liability of furnishing the entire stamp papers. The order of the lower court is wrong on the face of the records and the general maxim is that no party should suffer at the instance of the court and by applying this doctrine, the order of the lower court striking off the copy application is wrong. The copy application is deemed to be pending in law since the order striking off on 7.3.1979 does not exist at all as that order is *null and void*. [Para 20]

Cases referred to:

The Board of Revenue, Madras v. Moideen Rowther, (1955)2 M.L.J. 635: I.L.R. 1956 Mad 132: A.I.R. 1956 Mad.207: 1955 M.W.N. 990. [Para 15]
Kovantiv. Imbichi Koya, (1946)1 M.L.J. 454. [Para 15]
Jbtindra Mohan Tagore v. Bejoy Chand Mahata, (1904) I.L.R. 32 Cal. 483. [Para 15]
Laxmi Prasannam v. Narasayya, A.I.R. 1975 A.P. 91. [Paras 15, 19]
Satyanandam v. Namayya, A.I.R. 1938 Mad. 307. [Para 19]
Venkatappa v. Venkatappa, A.I.R. 1943 Mad. 650: I.L.R. 1944 Mad. 266. [Para 19]
 Petitions under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the I Subordinate Judge, Pattukottai, (1) dated 17.10.1989 and made in E.P.No.6 of 1988 in O.S.No.5 of 1960 (Subordinate Judge, Thanjavur) C.R.P.No.42 of 1990. (2) dated 7.2.1990 and made in E.P.No.14 of 1989 in O.S.No.5 of 1960 (Subordinate Judge, Thanjavur) and (C.R.P.No.610 of 1990) and II Subordinate Judge, Thanjavur, dated 8.3.1991 and made in I.A.No.136 of 1991 in I.A.No.303 of 1971 in O.S.No.5 of 1960 C.R.P.No.1038 of 1991), respectively.
K.T.Palpandian, Senior Counsel for *R.G.Rajan* and *S.Purushothamados*, for Petitioners in C.R.P.No.42 of 1990, and for *S.K.Sivapunniam*, *K.Baby* and *V.Narayanaswamy*, for Petitioner in C.R.P.No.610 of 1990 and for *S.Rajeswaran*, for Petitioner in C.R.P.No.1038 of 1991:
M.V.Venkataseshan, for Respondent in C.R.P.No.42 of 1990 and 1038 of 1991 and for Respondent No.1 in C.R.P.No.610 of 1990.

The Court made the following
ORDER:- Civil Revision Petition No.42 of 1990 arises against the order made in E.P.No.6 of 1988 in O.S.No.5 of 1960 on the file of the learned Subordinate Judge, Pattukottai. The first defendant/first judgment-debtor, is the petitioner in the civil revision petition and the plaintiff/decreed holder is the respondent. A preliminary decree against the first defendant/petitioner was passed on 8.2.1965 and the final decree was passed on 24.1.1979. In this E.P., the respondent has claimed a sum of Rs.1,16,315.55. The E.P. is filed under O.21, Rules 54, 66 and 72 and under Sec.151 C.P.C. for realisation of the said amount by order of attachment and sale of the property of the first defendant mentioned in the E.P. The execution is resisted by the

first defendant by filing a counter contending *inter alia* that the plaintiff/decreed holder is not entitled to claim his share in the execution petition. The preliminary decree is to the following effect:

"That the plaintiff be and hereby entitled to recover 1/2 share in the outstandings of Rs.52,000 in the E. Schedule. So, any claim contrary to that which is provided for in the preliminary decree cannot be countenanced."

Further, the petitioner herein has submitted that he has preferred an appeal to this Court against the final decree and that the matter is pending in this Court. The execution petition, according to him is therefore premature. The lower court negating the contention of the petitioner herein, allowed the execution petition to be proceeded with further. The lower court in its order has observed that even if the counsel fee has been exaggerated in the execution petition, it could be reduced later on after the properties were sold and the sale proceeds were collected. The lower court also has observed that there is no evidence to show that an appeal has been filed in this Court as against the final decree and that there is no stay also from this Court. With this observation, the lower court allowed the execution petition.

2. In this C.R.P.No.42 of 1990, the petitioner has contended that the decree-holder had admitted in the lower court that he has been in exclusive possession and enjoyment of 24 acres of land. The other contention raised by the petitioner herein, is that the parties are separately in possession and enjoyment of the properties and that they should be allowed to retain those properties.

3. C.R.P.No.610 of 1990 arises against the order made in E.P.No.14 of 1989 in O.S.No.5 of 1960 on the file of the learned Subordinate Judge, Pattukottai. The E.P. was filed by the plaintiff/decreed holder respondent herein under O.21, Rule 35, C.P.C. for delivery of possession of the properties mentioned in the execution petition. This E.P. was resisted by the first defendant/judgment debtor, the petitioner herein by filing a counter to the E.P. contending *inter alia* that the decree-holder/respondent herein is not entitled to delivery of possession of the properties on the ground that the execution is laid mainly basing on the commissioner's report for which the petitioner herein has filed his objections. The petitioner further contended that the decree-holder himself filed an application for amendment of decree and that

without getting any orders on the same, he has filed an execution petition for delivery of possession. The contentions are not relevant for the disposal of the civil revision petition.

4. The lower court has observed in the order that whatever objections the first defendant has got to say against this execution, he could make such objections before the Amin at the time of delivery. In this way, the lower court has repelled the contentions of the first defendant and allowed the execution application for delivery of possession.

5. C.R.P.No.1038 of 1991 arises against the order made in I.A.No.136 of 1991 in I.A.No.303 of 1971 in O.S.No.5 of 1960 in the file of the Subordinate Judge, Thanjavur. The first defendant in O.S.No.5 of 1960 is the petitioner herein and the plaintiff is the respondent. The first defendant filed an application I.A.No.136 of 1991 before the lower court for setting aside the order dated 7.3.1979 striking off the copy petition (C.P.No.515 of 1979) and to restore it and to pass further orders on the same. In the affidavit filed by him in support of I.A.No.136 of 1991, the petitioner contended as follows:- The suit O.S.No.51 of 1960 was filed by the first respondent for partition and separate possession of the suit properties, a preliminary decree was passed. Thereafter, an application I.A.No.303 of 1971 was filed by the respondent herein for passing a final decree and accordingly a final decree was passed on 24.1.1979 by the learned Principal Subordinate Judge, Thanjavur. After passing the final decree, the petitioner herein had applied for a certified copy of decretal order in I.A.No.303 of 1971 for appeal to this Court in the copy application C.P.No.515 of 1979, dated 24.1.1979. Even though final decree was passed on 24.1.1979, it was not drafted till February, 1987 by the office because general stamps were not submitted to the office. So, the copy application was struck off on 7.3.1979. The petitioner was under the *bona fide* impression that his counsel would have taken steps for complying with C.P.No.515 of 1979. Since the date of filing of the copy application, the petitioner had not received any communication from his counsel with regard to copy application. The petitioner was suffering from acute jaundice and he was bed-ridden at that time and so, he was unable to pursue the matter for further proceedings. The petitioner was mentally upset also at that time. Due to the abovesaid reasons, the petitioner could not meet his counsel personally and

instruct him. Everything happened due to the communication gap from his counsel also due to his ailment. Since the copy application was not represented in time, there was a delay in representation. The petitioner received a communication from his counsel at Madras that his appeal could not be numbered for want of decretal order passed in I.A.No.303 of 1971, dated 24.1.1979. After receiving the communication, the petitioner presented an application I.A.No.136 of 1991 for restoring the copy application which was struck off on 7.3.1979. The delay in representation is not wilful, but *bona fide*. The petitioner seeks for condoning the delay in setting aside the order dated 24.1.1979 made in C.P.No.515 of 1975.

6. The petition I.A.No.136 of 1991 was presented on 4.3.1991 in the lower court. It appears from the order that no notice was given to the plaintiff/respondent. The order dismissing I.A.No.136 of 1991 was passed on 8.3.1991. The order is in Tamil and the true translation is as follows:

"On 8.3.1991 arguments were heard. It is prayed to condone the delay for the reasons stated in the affidavit. The order striking off the copy application cannot be set aside by allowing this application. With the result, the application is dismissed."

As against this order made in I.A.No.136 of 1991, C.R.P.No.1038 of 1991 is filed.

7. In the civil revision petition, the petitioner has submitted that if the order striking off the copy application is not set aside and the petitioner is not permitted to comply with the copy application and obtain a certified copy of the decree in the final decree application, the petitioner would lose his right of appeal which would result in irreparable loss and injury to him. The next contention is that no prejudice would be caused to the respondent if the order striking off the copy application is set aside and copy application is restored to file. According to him, the lower court failed to consider the fact that there is sufficient reason for the delay and the dismissal of the petition on the ground that there is no sufficient reasons for the delay, is not correct.

8. Mr.K.T.Palpandian, learned counsel appearing for the petitioner in all the C.R.Ps. contended that the lower court ought not to have rejected the copy application on the ground that general stamps were not furnished within the time mentioned by it. I have called for the records from the lower

court and perused them.

9. The admitted facts are that the preliminary decree was passed on 8.2.1965 and that a first appeal in A.S.No.339 of 1965 was filed against the preliminary decree in this Court and this Court disposed of the first appeal by judgment dated 13.7.1972. As against the same S.C.O.P.No.107 of 1973 was filed before the Supreme Court of India and it was dismissed on 22.3.1974. Thereafter, the plaintiff filed I.A.No.303 of 1971 for passing a final decree and final decree was passed on 24.1.1979. In the meantime, the first defendant filed A.S.S.R.No.36045 of 1979 as against the attachment made in the final decree application I.A.No.303 of 1971 with C.M.P.No.13718 of 1988 for condoning the delay in representation of the appeal and the said C.M.P. for condoning the delay of 1365 days in representing the first appeal was dismissed on 25.10.1989 by a Division Bench of this Court. Another appeal A.S.S.R.No.39885 of 1989 was filed by the petitioner against the decree made in I.A.No.303 of 1971 with C.M.P.Nos.3850 and 3851 of 1990 for condoning the delay of 3854 days and the appeal is pending.

10. In C.R.P.No.1038 of 1991, the points for consideration are whether there is sufficient cause for condoning the delay in filing the application I.A.No.136 of 1991 seeking to set aside the order dated 7.3.1979 and to restore the said C.P.No.515 of 1979 and for passing further orders on the same. The reason given by the petitioner/first defendant in his affidavit is that he was under the *bona fide* impression that his counsel who appeared on behalf of him, would have taken steps to comply with C.P.No.515 of 1979, dated 24.1.1979. The other reason is that he was suffering from acute jaundice during the pendency of copy application and that he was bed-ridden. The third ground is that there is communication gap between himself and his counsel with regard to copy application filed on 24.1.1979. These are the main grounds stated in his application for condoning the delay in setting aside the order made in C.P.No.515 of 1979, dated 7.3.1979. The lower court has dismissed this application on the ground that the application already dismissed need not be set aside on the ground stated in the affidavit and therefore, the lower court did not accept the case of the petitioner.

11. Mr.Palpandian, learned counsel appearing for the petitioner pointed out the Rule 129 of Civil Rules of Practice. The copy application C.P.No.515

of 1979 was presented on 24.1.1979 for a decretal order made in I.A.No.303 of 1971, dated 24.1.1979. This was returned on 28.2.1979 by the court with an endorsement "general stamps to be given for drafting the decree". Time was granted by seven days for compliance. Then on 7.3.1979, the lower court passed an order "C.P. not taken back" and so the order striking off was made on that day.

12. Chapter VII of the Civil Rules of Practice deals with issuance of certified copies. Rule 127 of the rules reads as follows:

"Rule 127: *Application for certified copy:* (1) When a person is entitled to obtain a copy of a proceeding or document filed in, or in the custody of the court, he may present an application therefor to the Superintendent of Copyists or where there is no such officer, to the Chief Ministerial Officer in person or by his pleader or the latter's authorised gumasta between the hours of 11.30 a.m. and 3 p.m. If the proceeding or document has been sent to another court, the application may, at the option of the applicant, be forwarded to the said court for compliance or be returned to him, for presentation to the said court.

(2) Copies of proceedings of High Court: Application for copy of a plaint, written statement, memorandum of appeal, Judgment, decree or other proceeding of, or in the custody of the High Court, may be made by any party to such proceeding to the court of first instance, or the lower appellate court and shall be transmitted by the said court to the High Court for disposal. The copy, if granted shall be transmitted by the High Court to the former court, and on payment of the prescribed fees, shall be delivered to the applicant. No copy of any proceeding of the High Court shall be granted by a subordinate court. An application by a person not a party to the proceeding shall be made directly to the High Court."

Rule 128 of the Rules gives the Form of application and it reads as follows:

"Rule 128: *Form of application:* The application shall be in Form No.51 and shall set out the name of the applicant and his position in the suit or proceeding and a description of the document of which a copy is required, and an application which is to be in proper form shall be returned for amendment."

Rule 129 of the Rules is the relevant rule for the

purpose of this case and it reads as follows:

"Rule 129: *Notice as to stamp papers:* Everyday between the hours of 3 and 5 P.M. a list showing the applications in which the records have been received and number of stamp papers required shall be prepared and affixed to the court's notice board. Such list shall remain suspended for three days, or, if the last day is a holiday, till the next court day. If the required stamp papers have not been deposited by 3.00 P.M. on the fourth day counting from that on which the list was suspended or, if the fourth day is a holiday, then on the next court day, the application shall be struck off. Between hours 3 and 5 p.m. on each of the intermediate days, the applications upon which the requisite deposits have been made shall be struck off the list. The procedure above prescribed shall apply also to calls for additional stamp papers when the number first supplied has been found to be insufficient.

Provided that when the additional stamp papers called for are not deposited, but the stamp papers originally deposited are sufficient for the preparation of complete copies of one or more documents applied for the application shall be struck off only as regards the documents which cannot be prepared by reason of the insufficiency of the stamp papers supplied; but it shall be complied with by delivery of such of the completed copies as can be prepared on the stamp papers supplied, the decision of the superintendent as to the documents to be selected for copying being final:

Provided further that it shall be open to the parties, after obtaining the previous order of the Chief Ministerial Officer of the court or such other person as the court may appoint for the purpose, to furnish white fullscap paper of durable quality with the requisite court-fee stamps affixed on each sheet in the place of the stamp papers called for and the rules applicable to the preparation of copies stamp papers shall apply to the copies so prepared."

13. Mr.K.T.Palpandian, learned counsel for the petitioner submitted that the final decree was passed in I.A.No.303 of 1971 on 24.1.1979. It was returned on 28.2.1979 for supply of general stamp papers for providing the decree by granting seven days time for the said purpose. The copy application was not taken back and so it was struck off on

7.3.1979. Copy stamps for engrossing final decree was filed on eight occasions for the value of Rs.200, Rs.200, Rs.200, Rs.200, Rs.75, Rs.1,000, Rs.50 and Rs.200 and the first copy stamp given for the value of Rs.200 was dated 20.11.1984 and the last copy stamp furnished was dated 5.2.1986 for the value of Rs.200 totalling to Rs.2,125. The final decree was drawn on 24.2.1987 after the plaintiff had deposited the remaining stamp papers.

14. O.20, Rule 6-A runs, as follows:

"6-A Last paragraph of judgment to indicate in precise terms the relief granted:

(1) The last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment.

(2) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the court shall if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay, and there upon,

(a) an appeal may be preferred against the decree and in such a case the last paragraph of the judgment shall, for the purpose of Rule 1 of O.41, be treated as the decree; and

(b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and the party interested shall be entitled to apply for a copy of that paragraph only without being required to apply for a copy of the whole of the judgment; but as soon as a decree is drawn up, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose; Provided that, where an application is made for obtaining a copy of only the last paragraph of the judgment, such copy shall indicate the name and address of all the parties to the suit."

The plaintiff has submitted the remaining stamp papers only on 5.2.1986. Thereafter only, final decree was drafted on 24.3.1987.

15. Learned counsel for the petitioner submitted that unless non-judicial stamp paper is produced and duly engrossed on those papers, there is no decree at all and that the lower court should not

have struck off the copy application C.P.No.515 of 1979 on 7.3.1979. This is a partition suit and therefore, the final decree in the partition suit passed by the Civil Court is an instrument as defined in Clause (15) of Sec.2 of the Indian Stamp Act and as such the decree can only be engrossed on stamp papers of sufficient value. In support of his contention, he relied on the judgment reported in *The Board of Revenue, Madras v. Moideen Rowther*, (1955) 2 M.L.J. 635: I.L.R. 1956 Mad 132: A.I.R. 1956 Mad.207: 1955 M.W.N. 990 (F.B.). In the above judgment, the Full Bench of this Court observed as follows:

"A final decree for partition passed by a civil court is undoubtedly an instrument of partition as defined in Clause (15) of Sec.2 of the Indian Stamp Act (II of 1899). Such a decree can only be engrossed on stamp papers of sufficient value. If the parties fail to furnish the requisite stamps, the court has no power to draw up the decree for partition. The court also has no power to draw the decree on unstamped paper or on stamp paper of insufficient value, and cannot impound under Sec.33 of the Stamp Act the decree so drawn up. The court cannot itself draw up an invalid document and then take action consequent on its invalidity.

There is no provision in the Stamp Act which enables a court to adopt the procedure indicated in Rule 12(3) of Chapter 3 of Part II of the Civil Rules of Practice. Sec.122 of the Code of Civil Procedure will not cover such a rule. In the absence of an express statutory provision to that effect, a court cannot make a party liable to stamp duty and penalty for omission to furnish stamp papers to enable the courts to draw up a valid decree for partition. Rule 12, Sub-rule (3) of the Civil Rules of Practice is *ultra vires*."

Learned Judges in the above decision followed the judgment of this Court reported in *Kovanti v. Imbichi Koya*, (1946) 1 M.L.J. 454, wherein it is held as follows:

".....it may be open to the parties to approach the court which passed the decree and to request the court to pass a final decree after supplying the necessary stamp papers at any time, because as pointed out in *Jotindra Mohan Tagore v. Bejoy Chand Mahatap*, (1904) I.L.R. 32 Cal. 483, the suit must be deemed to be

pending. Be that as it may, the question which falls for our decision on this reference is whether the court itself can bring into existence an unstamped decree and then proceed to impound it. In our opinion, it is too much of a strain on the language of Sec.33(1) of the Act to say that the decree which the court draws up and signs is produced or comes before it in performance of its functions. It is equally inappropriate to speak of such an instrument as appearing to the Judge to be not duly stamped. The Judge knew even when he drew up the document that it was not duly stamped."

The Full Bench further held that on the failure of parties to furnish requisite stamps, learned Subordinate Judge in that case had no power to draw up the decree for partition. This judgment was also later on followed in *Y.Laxmi Prasannam v. Y.Narasayya*, A.I.R. 1975 A.P. 91. It is observed in the said judgment as follows:

"It is now well settled that a final decree for partition has no existence as a decree until it is engrossed on a proper non-judicial stamp paper, and till that it is done, the suit will be considered as pending."

16. In the present partition-suit, the plaintiff was given a decree and the petitioner/first defendant was also given some portion towards his share in the decree. In the plaint, the plaintiff claimed half share in plaint A, B, C, E and F and also one fourth share in plaint D schedule properties and other properties to be found as joint family properties on taking account. The plaintiff also wanted appointment of a Commissioner to take account of all the joint family outstanding and other incomes of the family properties and also to divide the plaintiff's share in the suit properties by metes and bounds and allow the plaintiff's share in his favour. The plaintiff paid court fee for his half share of Rs.1,37,639.50. The plaintiff paid court fee for the relief of partition under Sec.37(2)(ii) and also under Sec.35(1) of the Tamil Nadu Court Fees Act. The total court fee paid by him is Rs.207.50. The suit was decreed on 8.2.1965 and a preliminary decree was passed on that date. The relevant portion of the judgment of the trial court is as follows:

"Issue No. 7: To sum up, I find that the plaintiff will be entitled to partition and separate possession of his half share of the properties described in the A schedule and B schedule

except items 15 and 22 of B schedule and the house property mentioned as item 2 in the plaint B Schedule. In the rest of the items, he will be entitled to a partition and separate possession of his half share. The plaintiff will not be entitled to the property described in plaint C. schedule. So far as D schedule properties are concerned, there is no dispute. It will be divided in accordance with the shares as indicated in the plaint. The Commissioner will divide the properties having regard to the objections put forward by the 5th defendant as regards the correctness of the survey number and also the extent available. So far as the schedule properties are concerned, the plaintiff will be entitled to a half share in a total sum of Rs.52,700 and the 1st defendant who is in possession of the entire joint family assets and who has collected a portion of them will be liable to account for his share. So far as the jewels claimed in the E schedule is concerned, the plaintiff has failed to prove that they belonged to the joint family and they are available for partition. The plaintiff therefore is not entitled to any share in the jewels sovereigns and silvers. So far as the F schedule properties are concerned, the evidence on the side of the plaintiff is very meagre. The evidence shows that Alagappa and Chinnappa have been living separately having separate mess on account of disagreement among womenfolk. It is hardly possible to believe that they would be having any manure carts or plough bulls or granaries, etc. Further, the plaintiff has not established that any of the items mentioned in F. schedule are joint family moveables or when they were purchased or by whom and how they are enjoyed. So, I do not think that any of the items can be held to be items available for division. So far as G schedule properties are concerned, there is no dispute about the existence of the trees or the right of the plaintiff, the 1st defendant and other pangalis to divide the same. So, there will be a division of the trees as prayed for.

In the result, preliminary decree for partition and separate possession of the plaintiff's half share in the manner indicated above, is passed. The 1st defendant will be entitled to his share in the properties in the possession of defendants 4 and 15. A commissioner will be

appointed to divide the properties by metes and bounds. The 1st defendant will be liable to account for the outstandings as referred to in the judgment. The suit will stand adjourned *sine die*. The costs of this suit will come out of the estate."

17. The first defendant has filed a separate statement on 7.12.1959 in the suit and additional written statement also later on. Defendants 2 and 3 have also filled a written statement. The 4th defendant has filed a written statement and also an additional written statement. The 5th defendant filed a written statement and also an additional written statement. Defendants 6 to 8 and 9 and 10 have filed a written statement. The 11th defendant has filed a written statement. Defendants 12 and 13 have not filed any written statement. The 14th defendant has filed a written statement. The 15th defendant has also filed a written statement. The first defendant is the petitioner in the civil revision petition and he was granted a decree in a final decree application No.303 of 1991 for certain shares in some of the properties. The first defendant claimed shares also in his written statement. But it appears from the records that the first defendant has not paid any court-fee for his share. Sec.37 of the Tamil Nadu Court-Fee Act deals with the Court-fees payable in a suit for partition and it reads as follows:

"37. *Partition suits*: (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates:

When the plaint is presented to—

(i) A District Munsif's Court .. Rupees thirty
(ii) the City Civil Court, Rupees thirty if the value of Madras or a Sub-Court plaintiffs' share is Rs.5,000 District Court: or less;

Rupees one hundred if the value is above Rs.5,000 but below Rs.10,000 and Rupees two hundred if the value is Rs.10,000 and above.

(iii) the High Court: Rupees three hundred.

(3) Where, in a suit falling under Sub-sec.(1) or

Sub-sec.(2), a defendant claims partition and separate possession of his share of the property, fee shall be payable on his written statement computed on half the market value of his share or at half the rates specified in Sub-sec.(2), according as such defendant has been excluded from possession or is in joint possession."

The first defendant has not paid the court-fee for his share. If court fee is not paid, he is not entitled to a decree at all.

18. Mr.M.V.Venkateseshan, learned counsel for the respondent contended that the petitioner herein could have filed an appeal with a certified copy of the judgment and with a certificate of the trial court in the suit embodying the last paragraph of the judgment as provided under O.20, Rule 6-A, C.P.C. This O.20, Rule 6-A, C.P.C. is a newly inserted provision. The Select Committee felt that it should be made obligatory on the part of the court to draw up the decree within fifteen days from the date on which the judgment is pronounced. In case it is not possible to draw up the decree within the period so fixed, the court, on a request by a party desirous of appealing against the decree, should be required to certify that the decree has not been drawn up and also to indicate in the certificate the reasons for the delay. An appeal might be referred on filing a copy of the last paragraph of the judgment, but as soon as the decree is drawn up the last paragraph of the judgment should cease to have the effect of a decree.

19. Mr.Venkateseshan, learned counsel for the respondent contended that the petitioner could have filed an appeal with a certificate as required under O.20, Rule 6-A, C.P.C. and the petitioner now wants to restore C.P.No.515 of 1979 which was struck off earlier, to enable him to get a certified copy of the decree now, after a long lapse of time and to file it in the appeal now pending before this Court. I am afraid, that the Parliament when inserting Rule 6-A of O.20, C.P.C. was not apprised of the fact that a partition decree is different from a decree of ordinary nature since the partition decree can be drafted only on non-judicial stamp papers to the value of the largest share claimed by the parties under Art.45 of the Indian Stamp Act. There can be no doubt that a final decree for partition passed by a Civil Court is an instrument of partition as defined in Clause 15 of Sec.2 of the Stamp Act. It follows that such a

decree can only be engrossed on stamp papers of sufficient value. It was held in *Jotindra Mohan Tagore v. Bejoy Chand Mahatapa*, (1904) I.L.R. 32 Cal. 483, that a decree for partition to be operative must be engrossed on stamp paper, as required by the Stamp Act, and, until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated. In *Satyanandam v. Namayya*, A.I.R. 1938 Mad. 307. The above decision was followed by a Division Bench of this Court. The learned Judges in that case observed:

"It is well stated that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper; till that is done, the suit is pending."

I do not think that the Parliament while introducing Rule 6-A in O.20, C.P.C. has contemplated such a situation. Sec.2(15) of the Indian Stamps Act reads as follows:

"(15) *Instrument of Partition*: "Instrument of partition, means any instrument whereby co-owners of any property divide or agree to divide such property in severalty and includes also a final order for effecting a partition passed by any Revenue Authority or any Civil Court and an award by an arbitrator directing a partition."

Art.45 in Schedule I of the Indian Stamps Act deals with the duty payable for partition deed and instrument of partition includes final decree in a partition suit passed by a Civil Court as found under Sec.2(15) of the Indian Stamp Act. As held in the decision *Satyanandam v. Namayya*, A.I.R. 1938 Mad. 307, a final decree for partition has no existence as a decree until it is engrossed on a proper non-judicial stamp paper, and till that is done, the suit will be considered as pending. In the decision *Venkatappa v. Venkatappa*, A.I.R. 1943 Mad. 650; I.L.R. 1944 Mad. 266, it is held that before a decree for partition could be executed, the holder must pay the stamp duty required by Art.45 of the Act and have the decree drawn up on non-judicial stamp paper. In *The Chief Controlling Revenue Authority v. Moideen Rowther*, (1955) 2 M.L.J. 635; I.L.R. 1956 Mad 132; A.I.R. 1956 Mad.207; 1955 M.W.N. 990 (F.B.), it is held that if the parties choose to take the risk and do not furnish stamp papers, the court has no power to draw up a decree on unstamped paper and sign it. Therefore, till the final decree is engrossed on proper non-judicial stamp paper, the final decree

for partition has no existence at all and till that is done, the suit shall be considered pending. Therefore, in view of the decision in *Satyanandam v. Namayya*, A.I.R. 1938 Mad. 307, there is no final decree at all in existence. In this case, I do not find that the first defendant has paid court-fee at all as required under Sec.37(3) of the Court-Fees Act for his share.

20. Non-judicial Stamp papers were finally supplied on 5.2.1986 and the final decree was drafted on 24.2.1987. The copy application C.P.No.515 of 1979 was presented on 24.1.1979. It was returned on 28.2.1979 by granting seven days time for furnishing general stamp papers for drafting final decree. The C.P. was not taken back and so it was struck off on 7.3.1979. The lower court directed the first defendant to furnish general stamp papers for drafting the decree. The lower court has not mentioned the value of the general stamps to be supplied by him. The plaintiff is liable to furnish non-judicial stamp papers for his share and the first defendant/petitioner herein also has to furnish non-judicial stamp papers for his share since the final decree is treated as a partition deed under Sec.2(15) of the Indian Stamps Act. The first defendant is not liable to pay the entire non-judicial stamp papers. But the lower court has called for general stamps to be supplied for drafting the decree from the first defendant himself as per its order dated 28.2.1979 made in C.P.No.515 of 1979. This order itself appears to be wrong on the face of the records when the first defendant himself is not liable to pay the entire stamp duty. Further, the quantum of general stamps to be paid by the first defendant was also not mentioned in the return in C.P.No.515 of 1979. In view of the decisions referred to above, till the decree is drafted on a stamp paper, the suit is deemed to be pending. In the circumstances, the order of the lower court made on 7.3.1979 in C.P.No.515 of 1979 appears to be wrong on the face of the records since the lower court should have called for general stamps even from the plaintiff for his share when the first defendant himself is not liable to pay the entire stamp duty. The plaintiff himself had supplied the entire stamp papers only in 1986. The first defendant/petitioner herein has not paid the court fee also as required under Sec.37(3) of the Tamil Nadu Court-Fees Act and so he is also not eligible for getting a decree in the partition suit. With all these irregularities the lower court need not have

struck off the copy application on 7.3.1979; but it should have directed the first defendant/petitioner to pay court fees towards his share first. In the absence of the stamp papers being furnished by the plaintiff himself for his half share, the lower court should not have called for general stamps from the first defendant himself and after collecting general stamps from the plaintiff also, it should have directed the first defendant to produce general stamps for his share. Admittedly, the plaintiff had not furnished the general stamps on 28.2.1979 or on 7.3.1979 when C.P.No.515 of 1979 was struck off. The first defendant should not have been directed to furnish general stamps for drafting the decree. This would unnecessarily saddle the first defendant/petitioner with liability of furnishing the entire stamp papers. The order of the lower court is wrong on the face of the records and the general maxim is that no party should suffer at the instance of the court and by applying this doctrine, the order of the lower court striking off the copy application is wrong. Bearing the above facts in mind, I find that the copy application is deemed to be pending in law since the order striking off on 7.3.1979 does not exist at all as that order is *null and void*.

21. In addition to that, I find that by mistake of the court in striking off the copy application much injustice appears to have been done to the first defendant. The lower court need not have struck off the copy application C.P.No.515 of 1979 by granting seven days time only for compliance of furnishing general stamps and the lower court should have kept that application pending till the plaintiff also furnished general stamp for drafting the decree. Admittedly, the plaintiff has furnished the general stamps only on 5.2.1986 lastly.

22. In the result, I find that there is just and sufficient cause for condoning the delay in filing the application for restoring C.P.No.515 of 1979. In the circumstances, the order of the lower court is not correct and proper and accordingly, I set aside the order of the lower court refusing to restore C.P.No.515 of 1979 and I restore the copy application C.P.No.515 of 1979 to file. C.R.P.No.1038 of 1991 is allowed. The lower court is directed to furnish certified copy of the final decree after collecting the required non-judicial stamp papers from him or, if the plaintiff has already furnished the entire non-judicial stamp papers, then direct the first defendant to pay the

value of the non-judicial stamp papers for his share to the plaintiff, or if the plaintiff refuses to receive the value, then direct the first defendant to deposit the value of the non-judicial stamp papers to the share of the first defendant into the lower court and issue certified copy of the decree within a period of two months from now.

23. With regard to C.R.P.Nos.42 of 1990 and 610 of 1990, I do not interfere with the orders passed by the lower court and therefore, C.R.P.Nos.42 of 1990 and 610 of 1990 are dismissed. There is no order as to costs in all the three C.R.Ps.

These petitions having been posted this day for being mentioned in the presence of the aforesaid Advocates, the court made the following Order: This matter having been listed today for being mentioned and on hearing both sides, the following order is made:

24. Mr.K.T.Palpandian, learned senior counsel appearing for the petitioners in all the civil revision petitions submits that there may be stay of execution proceedings in the suit for a period of four months to enable the petitioner to obtain a certified copy of the decree in the suit and also to seek further remedies. He also submits that in order to show his *bona fide* his client will deposit a sum of Rs.25,000 towards the decree debt.

25. Learned counsel for the respondents in all the three civil revision petitions objects to the prayer of the petitioner. His contention is that the stay granted by this Court on earlier occasion was vacated and the civil revision petition itself was dismissed. That order was passed possibly in a civil revision petition filed against execution.

26. In this matter, since the copy application was restored in order to enable the party to seek his remedy open to him in law, it is just and necessary that there should be stay so that the party aggrieved with the judgment of the lower court will seek further remedy open to him in law. In the circumstances, there will be stay of execution of decree for a period of three months and in the meantime, the petitioner is directed to deposit a sum of Rs.25,000 before the expiry of three months from now.

27. Learned counsel for the respondents seeks for stay of the operation of the order made in C.R.P.No.1038 of 1991 so as to enable him to file an appeal. His prayer is refused.

28. The office will despatch copy of the orders made on 8.12.1992 and today (9.12.1992) to the

lower court along with the records received from the lower court within a period of two weeks from now.

B.S. — Petitions ordered accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Bellie, J.

A.S.No.699 of 1982 with Cross objections

16th December, 1992.

Rajammal and another ...Appellants

v.

Sellani Ammal ...Respondent.

(A) Civil Procedure Code (V of 1908), Sec.11 - Res judicata - Suit for declaration that will concerning suit properties and other properties invalid and for maintenance of plaintiff if will was found valid - Compromised and decree passed - No issue framed in suit regarding the nature of the suit properties - Decree if operates as res judicata in subsequent suit for declaration of title of plaintiff to suit property, recovery of the same and for mesne profits.

The suit properties originally belonged to one 'K' was endowed them by a deed dated 29.1.1984 for performance of Pooja, Neivedyam and other ubhayam to Lord Nataraja at Chidambaram. He nominated one 'V' to be the trustee of the properties to manage the same and do the pooja, etc., and also provided for management of the properties after 'V'. The trustee or his heirs would have no power to alienate the properties. V was in possession of the properties and managing them. After his death his brother's son 'K' took the management. He was alleged to have executed a Will Ex.A-3, dated 17.4.1950 giving the trusteeship to the first defendant; and died on 19.4.1950. The plaintiff, the widow of 'K' filed a suit for enhanced maintenance against the 1st defendant from out of her husband's estate. As the defendants 2 and 3 who are the legal representatives of the first defendant did not deliver possession of the properties the plaintiff filed a suit for a decree declaring plaintiff's entitlement to the suit properties and directing the defendants to put the plaintiff in possession of the suit properties and directing them to pay mesne profits and costs. The defendants contested the suit contending *inter alia* that there was a compromise entered into between the plaintiff and the 1st defendant in O.S.No.52 of 1953 and that the present suit was barred by the principles of *res judicata*.

Held: The suit O.S.No.52 of 1953 has been filed by the plaintiff to declare the entire Will Ex.A-3 as

invalid and if the Will is found to be valid, for maintenance of the plaintiff at the rate of Rs.17 per month. There is no issue framed in that suit as regards the nature of the present suit properties i.e., whether they are endowed to charity or belonged absolutely to the first defendant. In that suit ultimately the parties compromised and in terms of the compromise, a decree was passed. Therefore, the decree passed in that suit cannot operate as *res judicata* against the present suit.

[Para 7]

(B) Will - Construction - Nature of bequest made - Whether given absolutely or endowed to the deity for performance of Kattalai.

The document does not speak about any surplus income. From the reading of the document it would appear that the executant of the document intended that the income from the properties must be utilised for the purpose of the said poojas. Therefore the court is of the view that under the document the properties have been endowed to the deity for the purpose of performing the kattalais managing 'V' and his family members as trustees and giving possession of the properties to them.

[Para 5]

T.R.Rajagopalan, for Appellant.

R.Srinivasan, for Respondent.

The Court made the following

JUDGMENT:- The defendants 2 and 3 against whom the suit for declaring the plaintiff's entitlement to the suit property, for recovery of the same from them, and for mesne profits was decreed are the appellants. The plaintiff Sellani Ammal filed a suit alleging as follows:

The suit properties of wet lands of an extent of 6.61 acres described in the B Schedule of the plaint originally belonged to one Krishna Rao who by a deed dated 29.1.1984 endowed the properties for performance of pooja, neivedyam and other ubhayam to Lord Nataraja at Chidambaram. He also appointed Vrishabadwaja Dikshidhar to be the trustee of the properties to manage the same and do the said poojas etc., As per the deed, after the said trustee, his sons and grand-sons are to manage the properties and do the poojas etc. The trustee or his heirs will not have any power to alienate the properties. Accordingly, Vrishabadwaja Dikshidhar acting as trustee was in possession of the properties and he was doing poojas etc. After the death of Vrishabadwaja Dikshidhar, his brother's son Kalyanasubramania Dikshidhar took the management of the properties and he was also doing poojas etc. The plaintiff is the widow of the said Kalyanasubramania Dikshidhar. It appears

that he executed a Will on 17.4.1950 (Ex.A-3) giving the trusteeship right to the first defendant (who is now dead) and died on 19.4.1950. Kalyanasubramania Dikshidhar had no right to do so. He has no such power under the deed Ex.A-1 executed by Krishna Rao. The deed itself specifies as to who should be the successive trustee after Vrishabadwaja Dikshidhar. Therefore the Will is incompetent in so far as it relates to the trusteeship of the endowment. The plaintiff being the next of kin and only heir is entitled to the trusteeship. Therefore, the defendants 2 and 3 who are in possession of the properties have to surrender it to the plaintiff. She came to know about the existence of the trust regarding the suit properties only in 1973, and it was then she filed an amendment petition in a suit filed by her in O.S.No.596 of 1972 for enhanced maintenance against the first defendant from out of her husband's estate. In spite of several requests the defendants never tried to deliver possession to her and therefore the suit. The plaintiff has prayed for a decree declaring the plaintiff's entitlement to the suit properties as per the terms of the trust deed dated 29.1.1894 (Ex.A-1) and consequently directing the defendants to put the plaintiff in possession of the properties and further directing the defendants to pay mesne profits till date of delivery of possession and for costs.

2. The defendants 2 and 3 contested the suit contending, *inter alia*, that the plaintiff has no *locus standi* to file the suit, She has no right to be the trustee for the suit properties. Kalyanasubramania Dikshidhar was competent to execute the Will (Ex.A-3), dated 17.4.1950 in respect of the suit properties. Under the Will Natarajan *alias* Dhanarethina Dikshidhar, the first defendant got absolute right to the suit properties. There was a compromise entered into between the plaintiff and Natarajan in O.S.No.52 of 1953 and as per the compromise decree, the said Natarajan got absolute right to the suit properties and as provided in that decree Natarajan *alias* Dhanarethina Dikshidhar had been maintaining the plaintiff. The present suit is barred by the principles of *res judicata*. As provided in the Will executed by Kalyanasubramania Dikshidhar the first defendant has been doing the poojas, etc., in the temple and after his death, the defendants 2 and 3 doing poojas, etc., On these contentions, the defendants 2 and 3 prayed for dismissal of the suit.

3. The trial court on considering the oral and documentary evidence held that the deed Ex.A-1 executed by Krishna Rao on 29.1.1894 is an endowment deed under which Vrishabadwaja Dikshidhar was trustee only and the suit properties have not been given to him absolutely. It further held that the Kalyanasubramania Dikshidhar had no right to execute a will in respect of the suit properties and therefore the Will Ex.A-3, dated 17.4.1950 in so far as it relates to the suit properties is incompetent. It further held that the suit is not barred by the principles of *res judicata* in view of the decree in O.S.No.52 of 1953 as contended by the defendants. He then held that the suit is not barred by limitation. On these findings, the trial court decreed the suit declaring the plaintiff's entitlement to have separate possession of the suit properties. It further decreed that the plaintiff is entitled to future mesne profits, but it left it to be decided by a separate proceeding. The trial court decreed the suit in the above terms, but without costs. Aggrieved, the defendants 2 and 3 have come up with the present appeal. The plaintiff filed cross objections regarding disallowance of costs.

4. The points that arise for consideration in the second appeal are:

(1) Whether Ex.A-1, dated 29.1.1894 executed by Krishna Rao in favour of Vrishabadwaja Dikshidhar is an endowment, or under it the suit properties have been given to Vrishabadwaja Dikshidhar as his absolute properties?

(2) Whether the Will Ex.A-3, dated 17.4.1950 executed by Kalyanasubramania Dikshidhar is valid in so far as the suit properties are concerned?

(3) Whether the suit is barred by *res judicata* in view of the judgment and decree in O.S.No.52 of 1953?

(4) Whether the suit is barred by limitation?

5. In Ex.A-1 deed, dated 29.1.1894 it is clearly mentioned that for the purpose of doing poojas, neivedyam and other ubayams etc., to Lord Nataraja at Chidambaram, the land of an extent of 6.61 acres is given to Vrishabadwaja Dikshidhar. It is provided in the document that the said Vrishabadwaja Dikshidhar and his descendants must be performing the said pooja, neivedyam and other ubayams and they have no right whatsoever the mortgage, lease or sell the properties. The document does not speak about any surplus income.

From the reading of the document it would appear that the executant of the document intended that the income from the properties must be utilised for the purpose of the said poojas etc., (Kattalais). It does not say that Vrishabadwaja Dikshidhar or his descendants can take any surplus income for their use. The plaintiff had filed the suit O.S.No.52 of 1953 for declaration that a will executed by Kalyanasubramania Dikshidhar is invalid and in the written statement filed by the present first defendant in that suit it has been clearly stated to the effect that the entire income from the suit properties must be spent for performances of the Kattalais. From these it is manifest that the predominant purpose of the document is to endow the properties for performing Kattalais. Of course, it is mentioned in the document that the properties are gifted to the family of Vrishabadwaja Dikshidhar, but considering all the recitals in the document it appears what the executant meant was to give possession of the properties to the family. This is apparent from the subsequent recitals that Vrishabadwaja Dikshidhar will not have any power to in any way mortgage or dispose of the property. It is therefore clear that under the document Vrishabadwaja Dikshidhar will have the right to possess and manage the properties and utilise the income for the performance of Kattalais. This is more apparent from the subsequent document Ex.A-2, dated 20.10.1894 (9 months after Ex.A-1) executed by Vrishabadwaja Dikshidhar and his brother in favour of Krishna Rao, as security. They have made it clear that they would perform the kattalai properly and permanently and they would not in any way mortgage or dispose of the properties and if they commit and default in the performance of the kattalai, Krishna Rao can take back the properties. This document appears to have been executed at the instance of Krishna Rao to make it more clear that Vrishabadwaja Dikshidhar and his descendants will not have absolute right to the property and they are only trustees for the performance of Kattalai. Ex.A-2 shows the conduct of the Vrishabadwaja Dikshidhar and his brothers which makes it beyond doubt that they took possession of the properties as trustees and not as absolute owners. Therefore, in my view under Ex.A-1 the properties have been endowed to the deity for the purpose of performing the kattalais naming Vrishabadwaja Dikshidhar and his family members as trustees and giving possession of the

properties to them.

6. From the abovesaid findings on point No.1, it follows that Kalyanasubramania Dikshidhar has no right to execute a Will in respect of the suit properties. The Will of course is valid as regards the other properties. Therefore, the defendants 2 and 3 cannot claim any right to the suit properties contending that they are the legatees under the Will Ex.A-3, dated 17.4.1950 executed in favour of the first defendant.

7. O.S.No.52 of 1953 has been filed by the plaintiff herein against the first defendant herein for declaration that the will Ex.A-3 executed by Kalyanasubramania Dikshidhar in favour of the first defendant is not valid and binding on her and if it is found to be valid, then to grant maintenance to her from and out of the estate of her husband deceased Kalyanasubramania Dikshidhar. In that suit, a compromise was entered into as per the compromise the plaintiff would enjoy for her life time item No.2 of the suit properties in that suit, and she will get maintenance at the rate of Rs.17 per month from the first defendant as his heir. It is now argued that this compromise would show that the plaintiff had accepted that the first defendant was entitled to the properties mentioned in Ex.A-3 and therefore utilise the income for the performance of Kattalais. This is more apparent from the subsequent document Ex.A-2, dated 20.10.1894 (9 months after Ex.A-1) executed by Vrishabadwaja Dikshidhar and his brothers in favour of Krishna Rao, as security. She cannot now in this suit say that Kalyanasubramania Dikshidhar had no right to bequeath the suit properties to the first defendant and therefore the present suit is barred by the principles of *res judicata*. That suit O.S.No.52 of 1953 has been filed by the plaintiff to declare the entire Will Ex.A-3 as invalid and if the Will is found to be valid, for maintenance of the plaintiff at the rate of Rs.17 per month. There is no issue framed in that suit as regards the nature of the present suit properties, i.e., whether they are endowed to charity or it belonged absolutely to the first defendant. In that suit, ultimately the parties compromised and in terms of the compromise, a decree was passed. Therefore, the decree passed in that suit cannot operate as *res judicata* against the present suit.

8. Coming to the question of limitation, the finding of the trial court that the suit is not barred by limitation appears to be quite correct. According

to the plaintiff only in 1973 she came to know about the suit properties and then she filed a petition for including these properties in O.S.No.596 of 1972 for enhancement of maintenance. There is nothing to indicate that the plaintiff knew about the suit properties earlier. As the learned trial Judge has rightly stated the plaintiff was married to Kalyanasubramania Dikshidhar while she was about 15 to 16 years old and she lived with him just for 6 or 7 years. Therefore quite possibly she would not have known about the suit properties. As the trial judge has further stated if she has known it, she would have included it in O.S.No.52 of 1953. The case of the first defendant is that in the written statement (Ex.B-6) filed by the first defendant in O.S.No.52 of 1953 it is mentioned about the suit properties and therefore the plaintiff cannot say that she did not know about the suit properties earlier. But the perusal of the said written statement shows that no description of the properties has been given, and what is more, by Krishna Rao in 1894 and rather misleadingly it is just stated that for the performance of kattalai in the temple five khannies of land has been given by a worshipper. Therefore there is no merit in the contention that the plaintiff had knowledge about the suit properties from the said written statement filed in O.S.No.52 of 1953.

9. For the abovesaid reasons, I find no merit in the appeal.

10. In the cross objections filed by the plaintiff, it is argued that no reason has been given for not allowing the costs. While decreeing the suit, the trial judge has stated in the peculiar circumstances of the case, the parties are directed to bear their own costs". Therefore it cannot be said that no reason has been given. The question of awarding costs is a matter of discretion of the court. I do not think there is any compelling circumstances that warrants interference with the judgment of the trial court in disallowing costs. Hence, the cross objection also has no merit.

11. In the result, the appeal is dismissed with costs. The cross objections is dismissed. No costs.

B.S. ---- Appeal and cross objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

S.A.Nos.685 and 686 of 1982 *24th November, 1992.*

Avudaithangammal ...*Appellant*
v.
Petchimuthupandia Thevar (died) and others ...*Respondents.*

Civil Procedure Code (V of 1908), Sec.2(12) - Mesne Profits - Suit for partition, separate possession and mesne profits decreed - Decree confirmed on appeals - Plaintiff filing interlocutory applications - Claiming mesne profits - Ordered in part - Appeals against such orders - Maintainable.

Held, that the appeals against orders granting mesne profits in interlocutory application in suit for partition is maintainable. [Para 3]

Appeals against the decrees of the courts of the Subordinate Judge, Tenkasi, dated 30.6.1981 in Appeal Suit Nos.78 and 79 of 1980 preferred against the decree of the Court of the District Munsif, Tenkasi, I.A.Nos.264 of 1979 and 1443 of 1973 in O.S.No.4 of 1969 respectively.

The Court delivered the following

JUDGMENT:- These two second appeals are by the plaintiff in O.S.No.4 of 1969 on the file of the District Munsif, Tenkasi. In the said suit, the plaintiff got the decree for partition and separate possession of her half share and for 'mesne profits' thereof. The said decree was confirmed in the first appeal A.S.No.177 of 1970 on the file of the Sub Court, Tirunelveli and also by this Court in S.A.No.14 of 1973. Subsequently, the plaintiff filed the present interlocutory applications out of which these second appeals have arisen. In I.A.No.1443 of 1973 the plaintiff claimed mesne profits of Rs.7,037.50 with reference to nine crops, i.e. from Pishanam 1969 to Pishanam 1973. The next I.A.No.264 of 1979 was filed claiming mesne profits of Rs.40,517.30 for 10 crops during the subsequent period, i.e. from Kar 1973 to Kar 1978. The trial court in the former interlocutory application granted a decree only for Rs.4,000. In the latter interlocutory application, the decree by the trial court was only for Rs.2,800. Aggrieved by the said two decrees the plaintiff preferred two appeals A.S.No.78 of 1980 against I.A.No.264 of

1979 and A.S.No.79 of 1980 against I.A.No.1443 of 1973.

2. The lower appellate court heard both the appeals together and held that 'mesne profits' as such cannot be claimed in a suit for partition and on that ground it held that the appeals were not maintainable. However, on the ground that there was no cross-objection by the defendants, the lower appellate court simply dismissed the appeals. Hence, the present two second appeals. S.A.No.685 of 1982 is against A.S.No.78 of 1980 and S.A.No.686 of 1982 is against A.S.No.79 of 1980.

3. The learned counsel for the appellant argues that the dismissal of the first appeals by the lower appellate court is totally erroneous. First of all, he submits that there is a decree for grant of 'mesne profits' confirmed by both the appellate courts. Further, according to him the defendants have not taken any plea that the above said appeals A.S.Nos.78 and 79 of 1980 are not maintainable. He submits that in such a situation, the lower appellate court in dealing with the said appeals against the afore-said interlocutory applications could not have held that no mesne profits could be claimed and the appeals were hence not maintainable. In this respect, the learned counsel for the respondents could not argue anything contra. No doubt, the learned counsel for the appellant even maintains that on the peculiar facts of the present case the profits claimed are only 'mesne profits' and that even assuming the same are not really 'mesne profits', but only loosely worded so, the lower appellate court cannot on that ground reject the said appeals, but, at least treating the said interlocutory applications as one for accounting regarding the profits, should have accordingly decided the said appeals therefrom on merits. He also cited authorities on the said aspect. This submission of the learned counsel for the appellant is correct. I, therefore, hold that the said appeals are maintainable.

4. Therefore, I set aside the judgment and decree of the lower appellate court in A.S.Nos.78 and 79 of 1980 and direct the lower appellate court to rehear the respective appeals, preferably within a short time of three months. The second appeals are allowed. No costs.

B.S.

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- Mishra, J.

W.P.No.11408 of 1983

5th November, 1992.

Saroja Sethu

...Petitioner

v.

State of Tamil Nadu represented by its Secretary to Government, Revenue, Irrigation Department, and others

...Respondents.

(A) Land Acquisition Act (I of 1894), Sec.4(1) - Land already being used for a public purpose - If can be acquired for another public purpose.

The court has no hesitation in holding that there cannot be any acquisition for a public purpose when the land is being used for another public purpose. Once it is found that the co-operative society could be regarded as constituted for the benefit of the public and that in general building schemes were to be considered advantageous to the public and that even though the direct and immediate beneficiaries under the scheme might be individuals, it was public purpose or in benefit of the public generally, any interference in the scheme of housing society by another acquisition will constitute interference in a public purpose there can be no public purpose which shall interfere with another public purpose and if there are two public purposes in conflict, one which has proceeded ahead must be allowed to proceed further.

[Para 5]

(B) Pleadings - Material facts available - Consequence has to follow if law is applied to such facts - Party not raising the pleadings, whether can be allowed to avail of the ground.

When pleadings are inadequate and material facts are absent, it is proper for any Court not to permit a point either of fact or law to be raised in any proceedings when, however, the material facts are available and on such facts that are not in dispute when law is applied, a consequence has to follow. It will be, in the opinion of the court, unjust in denying to a party availability of such a ground.

[Para 3]

Cases referred to:

Radha Raman v. State of U.P., A.I.R. 1954 All. 700.
[Para 2]

Somavanti v. State of Punjab, A.I.R. 1963 S.C. 151: (1963) 2 M.L.J. (S.C.) 18; (1963) 2 An.W.R. (S.C.) 18; (1963) 2 S.C.J. 35; (1963) 2 S.C.R. 774. [Para 2] *Bai Malimabu v. State of Gujarat*, (1978) 1 S.C.J. 430: A.I.R. 1978 S.C. 515. [Para 2] *Padayachi v. State of Madras*, (1952) 2 M.L.J. 298: I.L.R. 1952 Mad. 982; 1952 M.W.N. 677: A.I.R. 1952 Mad. 756. [Para 2]

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* of calling for the records of the third respondent herein namely the Special Tahsildar, Land Acquisition, Kodaikanal, Madurai District relating to the notice under Sec.4(1) of the Land Acquisition Act, 1894, Central Act 1 of 1984, dated 29.7.1980 under reference G.O.Ms.No.1345, P.W.Irrigation, dated 29th July, 1980 and published in the Tamil Nadu Government Gazette dated 27th August, 1980, Gazette Supplement to Part II, Sec.2 at pages 10 and 11 and quash the same.

Mrs.Nalini Chidambaram, Senior Counsel, for *M/s.K.Kuppasamy* and *V.Jeevagan*, for Petitioners.

M.Liakat.Ali, Government Advocate, for Respondent.

The Court made the following

ORDER:- Petitioner herein is a member of the Kodaikanal House Building Co-operative Society Limited No.A.1583. She has been given a house site-vide sale document No.505/69 of the Sub Registration Office, Kodaikanal for the purpose of constructing a house therein to spend the last days of her life, by the society, stating *inter alia* as follows:

"Whereas the 'Member' has applied to the society for a A class house in Kodaikanal House Building Co-operative Society Limited, colony in survey No.1, Kodaikanal urban herein-after referred to as the colony at Kodaikanal and taken one share of the value of Rs.5 (Rupees five only) in the society and deposited the said sum of Rs.5 (Rupees five only) with the society and,

whereas the Government has assigned the site necessary for the construction of houses in the said colony in favour of the society and, whereas the society has, after deducting the extent allotted for common purposes such as

road, parks, market, shops, school playground and other public amenities common to all the members of the society, divided the land remaining in the total extent assigned by the Government to the society, into plots and allotted them to members and whereas the member has been allotted the plot bearing No.A-30 in the said colony measuring about 25 cents in extent, and

whereas, after taking into account the cost of the land set apart for communal purposes as mentioned above and the cost of all other works which have to be carried out for the benefit of all the members, the cost of site in the said plot No.A-30 has been fixed at Rs.25 per cent and whereas the cost of the plot No. A-30 which comes to Rs.625 has been recovered by the society in cash from the member. The society hereby conveys the said plot No.A-30 by virtue of this sale deed to the member to be enjoyed by him, his legal representatives, and assignees with absolute rights from generation to subject to the conditions mentioned hereunder."

Following the transfer of the land to her, the petitioner entrusted the house construction work to a contractor. In the meanwhile, however, a notification under Sec.4(1) of the Land Acquisition Act, 1894 (Central Act 1 of 1894) was issued-vide publication in the Tamil Nadu Government Gazette, dated 27th August, 1980, expressing intention to acquire this land for the purpose of establishing a Repeater Station of the Public Works Department, Hydrology Division. This, however, was modified-vide Gazette Notification dated 5.7.1982, saying that the land was needed for the purpose of Staff Quarters of the Employees of the Repeater Station of the Public Works Department, Hydrology Division. Alleging that having come to know of the notification, the petitioner sent her objections to the Tahsildar/Land Acquisition Officer on several dates and that no enquiry of any kind was held under Sec.5-A of the Act by the competent authority, the petitioner moved this court for a writ in the nature of *certiorari* and for such other or other further orders as the court deemed fit. Petitioner stated in the petition as follows:

"I state that to my best knowledge, there has been no declaration under Sec.6(1) of the Act. Nor is there any publication of the declaration

in the Tamil Nadu Government Gazette which is mandatory under Sec.6(2) of the said Act. It is only after such declaration the Government can direct the Land Acquisition Officer to take orders for acquisition of my site under Sec.7 and after this issue of Notice under Sec.8(1) and calling for making statement under Sec.10 arises. But, even without declaration under Sec.6, the notices under Secs.9(1) and 10 had been issued to me in the Roc.No.66 of 1980/A, dated 12.9.1983. These notices were objected to by me. In spite of this I have been served with a letter under Sec.12(2) of the said Act in Tahsildar Memo Roc.No.66 of 1980/A, dated 10.11.1983 intimating the amount about Rs.2,200 as compensation awarded for the site and directing to take it in person or by an authorised agent, such fixing of very low compensation for my site is without proper enquiry and is arbitrary and I reserve my right to agitate it in the proper jurisdiction. This apart, such an award is going to be passed under Sec.11 and the possession of the site will be taken under Sec.16 without reference to my civil rights in an arbitrary manner as has been done at every stage."

Mention of the notice under Sec.12 of the Act in the above show that some sort of declaration had already been made followed by proceedings leading to the award under Sec.11 of the Act. Respondents have, in their counter, stated so in these words:

"It is submitted that at the instance of the Executive Engineer (Public Works Department), Hydrology Division, Madurai, acquisition proceedings were initiated for acquisition of an extent of 0.25 acres of land in S.No.1/6-2A1 of Kodaikanal village for construction of quarters for the staff of Repeater station. The Notification under Sec.4(1) of the Land Acquisition Act in respect of the Land measuring 0.25 acre in S.No.1/6-2A1 of Kodaikanal village, Kodaikanal taluk for the construction of staff quarters of Repeater Station was approved in G.O.Ms.No.1345 (Public Works Department) dated 20.7.1980 and published at page No.10 of Tamil Nadu Government Gazette Supplement to part II Sec.2, dated 27th August, 1980. At the time of submission of Notification under Sec.2, dated 27th August, 1980. At the time of submission of

Notification under Sec.4(1), the name of the interested person (owner) was noted as President, Kodaikanal House Building Co-operative Society Limited as per Revenue accounts instead of Tmt.Saroja Sethu in the schedule (Form 2A) of 4(1) of the Act. The same was published in the Gazette also. The Government in their letter No.36456 of 1972-81-8, Public Works Department, dated 7.4.1982 ordered to submit an amendment, indicating the name of Tmt.M.S.Saroja Sethu to notification under Sec.4(1) of the Land Acquisition Act. The amendment was published at page 29 of the part II, Sec.1 of Tamil Nadu Government Gazette, dated 23.6.1982. Enquiry under Sec.5-A of the Land Acquisition Act was conducted on 30.8.1982 after observing the usual formalities as laid down under rules. The draft declaration and directions were approved in G.O.Ms.No.1767, Public works Department, dated 19.8.1983 and they were published as extraordinary in Part II, Sec.2 of Tamil Nadu Government Gazette, dated 22.8.1983. The award enquiry was conducted on 3.10.1983 and award passed acquiring 0.25 acre of land in S.No.1/6-2A1 of Kodaikanal village for construction of Staff quarters of Repeater station awarding a compensation of Rs.2,199.40 to the landlady in Award No.1/83, dated 3.10.1983. The land was taken possession on 8.10.1983. The awardee did not attend the award enquiry on 3.10.1983 posted at taluk office, Kodaikanal either personally or through a representative but had sent a letter on 29.9.1983 requesting adjournment for six weeks as the Tamil month Puratasi was inauspicious. The award enquiry was conducted on 3.10.1983 as already fixed. The notice under Sec.12(2) of Land Acquisition Act dated 10.11.1983 was sent to the landlady and it was served on her on 22.11.1983. The possession of the land was handed over to the requisitioning body on 8.10.1983. The awardee did not attend the award enquiry and receive the compensation. Now, the awardee has obtained an interim stay confirmed to taking possession of the land. But, the possession of the land was taken on 8.10.1983 and was handed over to the requisitioning body on 8.12.1983 even before the receipt of the stay order from this Honourable Court."

There has been serious contentions whether any valid enquiry under Sec.5-A had been held, whether procedures prescribed by law have been followed by the respondents in acquiring the land in question and whether on account of the irregularities in the procedure petitioner has suffered any legal injury. But one fact has emerged out of all the controversies between the parties, which relates to the character and purpose of the house site allotted to the petitioner by the society and the nature and character of the society in the eye of the law, which is known as the Land Acquisition Act. 2. Secs.4 and 6 of the Act, which apply to all types of land acquisitions under the Act, make no distinction in the procedure of the acquisition of the land for a public purpose or for a company. Sec.3(0) has defined the expression 'company' to include, 'a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society, which falls within the definition of a Corporation owned or controlled by the State, being a society established or administered by Government or being a co-operative society in which not less than fifty one per centum of the paid up share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments. The definition of 'Public purpose' has undergone quite a few amendments and as it stands today, it includes the provisions of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a local authority or a society registered under the Societies Registration Act, 1860, or under any corresponding law for the time being in force in a State, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State. As on today, therefore, there cannot be any difficulty in accepting the scheme sponsored by the Kodaikanal House Building Co-operative Society Limited for construction of houses for those who intended to spend their life in Kodaikanal as a public purpose. On the day the notification was issued, however, the 'public purpose' had the following definition,

"the expression 'public purpose' includes the

provision of village-sites, in districts in which the appropriate Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision."

Even so, when a question arose before a learned single Judge of the Allahabad High Court in *Radha Raman v. State of U.P.*, A.I.R. 1954 All. 700, as to whether acquisition for co-operative housing society will satisfy the definition of a public purpose, the learned Judge stated in his judgment as follows:

"The preamble to the Co-operative Societies Act, 1912, says that the object of the Act is to promote self help among poorer people and according to Sec.4 importance is attached to the promotion of interests of the members of the society. Reference was also made to the bye-laws of the society amongst the objects of which are mentioned requirements of the members of the society and the construction of residential houses or other buildings for the convenience of the members and development of a co-operative colony for the convenience and benefit of the members. On the strength of the preamble to the Co-operative Societies Act and the contents of Sec.4 as well as the contents of bye-law No.3 it is argued that the object of the society is to benefit the members only and not any section of the public at large. Reference was also made to Nicholas on Eminent Domain, Volume 2, pages 517, 518, 520 and 537.

I have considered the argument with care, but I do not think any of these provisions necessarily lead to the conclusion that the acquisition of land for purposes of this Co-operative Society cannot be 'useful to the public'.

The general dearth of residential accommodation in the towns and cities of Uttar Pradesh is very well known, and if a society is found to construct a number of houses and the houses are actually constructed, the construction is likely to ease the situation, as there will be an increase in the total residential accommodation in the town and rents may also possibly go down. This will benefit not only the members of the society but also the resident public of the town. It is true, that the bye-laws of the society as well as the Co-operative Societies Act itself are mainly concerned with the interests of the members of the society. But, if in carrying out

those objects a situation is brought out which may also help the other members of the public, the acquisition may, in my opinion be said to be one useful to the public.

Sec.4 of the bye-laws of the society shows that the membership is open to all persons of good character and sound mind, who may be residing or carrying on any trade, business or profession in Pillibhit. Anybody in Pillibhit can, therefore, become a member of the society and have the advantages of being a member. In America Housing Societies constituted for the purpose of clearing slumps have been held to be doing work which is of 'public use'. Slump clearance has been held to be a valid reason for the acquisition of land. The present case cannot be said to be a case of clearance of slumps, but in the conditions prevailing in the towns of this State at present, the construction of more residential houses is, in my opinion, an object which is useful to the resident public of the place."

The Allahabad Judge has only carried what has been more specifically stated by a Bench of this Court in the case of *Padayachi v. State of Madras*, (1952)2 M.L.J. 298: I.L.R. 1952 Mad. 982: 1952 M.W.N.677: A.I.R. 1952 Mad. 756. That was a case of a society formed and registered under the Madras Co-operative Societies Act, 1932 with the object of enabling its members to construct houses. This society considered that certain block of lands within the municipal limits of the city would serve as suitable building sites and moved the Government for its acquisition. The Government gave its consent to the scheme and issued a notification declaring that the lands were needed for public purpose, to wit, construction of houses and in pursuance of this notification proceeded to acquire lands. That was challenged in the court on the ground that the public as such had no interest in the land or buildings, that neither the public nor even a considerable portion thereof would be benefited by the scheme and in effect the acquisition would amount to taking property of one individual and transferring it to another. The court answered the same by saying that the society could be regarded as constituted for the benefit of the public, that in general building schemes were to be considered as advantageous to the public and that even though the direct and immediate beneficiaries under the scheme might be individuals it was a

public purpose as it benefited the public generally. One can have support to the above view from the judgment of the Supreme Court in the case of *Somavanti v. State of Punjab*, A.I.R. 1963 S.C. 151: (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774 and another judgment of the Supreme Court in the case of *Bai Malimabu v. State of Gujarat*, (1978)1 S.C.J. 430: A.I.R. 1978 S.C. 515, wherein it is said that construction of staff quarters for the employees of dispensary and other employees working under State Insurance Scheme was a public purpose. The definition, as it has stood before the amendment in the year 1984, after which amendment there can be no doubt that any housing scheme of a co-operative society will be a public purpose was obviously not existed and when courts in India, including this court in the case of *Padayachi v. State of Madras*, (1952)2 M.L.J. 298: I.L.R. 1952 Mad. 982: 1952 M.W.N.677: A.I.R. 1952 Mad. 756, extended its meaning to include house sites of co-operative societies, it will be only reiterating the consensus, when it is said that the Kodaikanal House Building Co-operative Society Limited's acquisition of land by whatever method, whether by negotiations and purchase from the owners or through the process of the law of acquisition of land was/is a public purpose and the society's allotting a piece of land and thereafter transferring the same to her has been an act in furtherance of the public purpose for which the society existed/exists. In the document of sale, the mention of the fact that the Government has assigned the site necessary for the construction of houses in the said colony in favour of the society and further the words 'the society has, after deducting the extent allotted for common purposes such as roads, parks, market, shops, school, playground and other public amenities common to all the members of the society, divided the land remaining in the total extent assigned by the Government to the society, into plots and allotted them to members' are quite significant. The Government has known the purpose for which it assigned necessary site for the construction of houses to the Kodaikanal House Building Co-operative Society Limited and the society in fulfilment of the purpose created roads, parks, market, shops, schools, playground and other public amenities common to all the members of the society and divided the land remaining in the total extent assigned by the Government to

the society into plots and allotted them to members, one such member being the petitioner.

3. A question has thus arisen in the instant case, can any land, allotted, assigned or marked for a public purpose and utilised for such a public purpose, be subjected to acquisition proceedings in the name of any of the public purposes that could/ and be spelled out from the definition or the explanation of the 'public purpose'. A serious objection to the consideration of this aspect of the case, however, has been raised on behalf of the respondents, Learned counsel appearing for them has submitted that no specific plea in this behalf has been raised in the writ petition. Petitioner should not in such a situation be permitted to raise any such ground. When pleadings are inadequate and material facts are absent, it is proper for any Court not to permit a point either of fact or law to be raised in any proceedings. When, however, the material facts are available and on such facts that are not in dispute when law is applied, a consequence has to follow. It will be, in my opinion, unjust to deny to a party availability of such a ground. Learned counsel for the respondents has also urged that the objections, which the petitioner was in a position to raise under Sec.5-A of the Act and failed to raise at that stage, she cannot raise (such objections to the acquisition) for the first time in a writ proceedings. As I have said earlier, if, on admitted facts when law is applied and the consequence has to follow, it will be unjust to deny to a party the benefit of such a legal consequence. It will indeed be extending the same unfair rule of procedure if on the ground that some objection could have been raised under Sec.5-A of the Act but was not raised, a plea of this kind is rejected. In the instant case, however, it is not possible to say that no such objection had been raised by the petitioner at the stage of the enquiry under Sec.5-A of the Act. The petitioner, in one of the representations to the Tahsildar (Land Acquisition Officer concerned), has said,

"Kindly read these objections besides the objections I had sent to you periodically..... It should be noted that the house site is allotted by the Kodaikanal Co-operative Limited, to me as a part of the purpose for which the said house construction society was formed, and hence the said P.W.D. Executive Engineer stated that the above construction is purely public interest and beyond the jurisdiction of the

P.W.D.

It should be noted that the site is for me under the scheme of public purpose could not be acquired for another public purpose as per the decision of the High Court and the Supreme Court."

4. Learned counsel for the respondents has raised yet another objection saying that the acquisition proceedings have been completed and possession of the land has already been taken under Sec.16 of the Act by the concerned department of the Government. There may be some truth in it as it seems award was made in the year 1983 itself and there is no reason to think that after making the award the Collector would not have proceeded to take possession. Petitioner, however, has stoutly denied this statement of taking of possession by the respondents and asserted that if respondents had taken possession as they allege they would have exercised possession. They have never exercised possession according to the petitioner and petitioner is still in possession: Dispute as to who is in possession however, I need not determine for it is conceded at the Bar on behalf of the respondents that no act in fulfilment of the purpose for which the impugned notifications have been issued beyond the alleged taking of possession has been done by the respondents and the site is still awaiting any construction.

5. I have given my anxious considerations and I have no hesitation in holding that there cannot be any acquisition of a public purpose when the land is being used for another public purpose. Once it is found that the co-operative society could be regarded as constituted for the benefit of the public and that in general building schemes were to be considered advantageous to the public and that even though the direct and immediate beneficiaries under the schemes might be individuals, it was public purpose as it benefited of the public generally, any interference in the scheme of housing society by another acquisition will constitute interference in a public purpose. There can be no public purpose, which shall interfere with another public purpose and if there are two public purposes in conflict, one which has proceeded ahead must be allowed to proceed further. For the reason, as above, I am satisfied that in the instant acquisition of land for the purpose of Staff Quarters of the Employees of the Repeater Station of the Public Works Department, Hydrology

Division has been made without taking notice of the public purpose of the Kodaikanal House Building Co-operative Society Limited, and has accordingly been done without due care and regard to the scheme of the law in the Land Acquisition Act. The acquisition being in the teeth of the law, as I have noticed above, the same has to be annulled.

6. In the result, the writ petition is allowed; the notification in G.O.Ms.No.1345, P.W.Irrigation, dated 19.7.1980 and all consequent proceedings are quashed. The petitioner shall be deemed to be the owner of the land and shall be entitled to utilise the same for the purpose of constructing a house as envisaged in the scheme of The Kodaikanal House Building Co-operative Society Limited. On the facts of this case, there shall be, however, no order as to costs.

B.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Mishra and Padmini Jesudurai, J.

O.S.A.No.208 of 1992 9th September, 1992.

Corporation Bank ...Appellant
v.

M/s.E.W.Stevensors, No.22, Jawaharlal Nehru Road, Calcutta and others ...Respondents.

Civil Procedure Code (V of 1908), O.9, Rule 13, Proviso 1 - Ex parte decree passed against more than one defendant - First defendant, principal debtor - Defendants 2 and 3 sureties - First defendant alone applying for setting aside ex parte decree - Decree, if to be set aside against the other defendants also.

It has to depend upon the facts of each case whether to set aside the decree only in so far as the case of the defendant who applied for setting aside the decree is concerned or even in case of other defendants as well and in that the court shall mainly be guided by the principles of equity and good conscience. In the present case, the money decree revealed that the first defendant is the principal

debtor and the second and third defendants are the sureties. The effect of setting aside the decree against the first defendant alone will mean that a decree made effective against all the defendants jointly will stand annulled in so far as the principal debtor is concerned but shall bind the sureties and the creditor-decree holder thus shall satisfy the decree. On the facts as above even if the decree has to be set aside at the instance of only one of the defendants, it must be set aside against all of them.

[Paras 3, 4 & 6]

Cases referred to:

Meenakshi Sundaram Pillai v. Chandrakasa Naicker, A.I.R. 1927 Mad. 550: 101 I.C. 98: 1927 M.W.N. 294. [Paras 4, 5, 7]

Panji Achan v. Marutha Veera Kavundan, (22 M.L.J. 543. [Para 4]

Hiralal v. Sitaram, A.I.R. 1952 Bom. 446. [Paras 4, 7]

Vasant v. Tukaram, A.I.R. 1960 Bom. 485. [Para 4]

Khagesh Chandra v. Chandra Kanta, A.I.R. 1954 Assam 183 (F.B.). [Para 5]

Gopala Chetty v. Subbier, I.L.R. 26 Mad. 604. [Para 5]

Bhura Mal v. Har Kishan Das, I.L.R. 24 All. 383 (F.B.). [Para 5]

Mohamed Hamidulla v. Tehurenissa Bibi, I.L.R. 25 Cal. 155. [Para 5]

Munshi Ram v. Malava Ram, A.I.R. 1917 Lah. 194. [Para 5]

Appeal under Clause 15 of the Letters Patent against the Order of Pratap Singh, J. dated 13.8.1992 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.3669 of 1992, in C.S.No.432 of 1981.

S.Sethuraman, for Appellant.

The Judgment of the Court was delivered by *Mishra, J.*:- A learned single Judge of this Court has set aside an *ex parte* decree against the defendants/respondents in C.S.No.432 of 1981. He has noted the fact that the decree was passed pursuant to an order made *ex parte* in the case for the reason that the counsel for the defendants fell ill and hence he was not able to attend the hearing on the date fixed in the case. The learned Judge has said; "To substantiate the claim that Mr.N.V. Balasubramanian was ill on 29.6.1992, a certificate given by Dr.Gopal Ramanathan, M.D., FCCP has also been filed. In view of the above, I am clear that sufficient reason is given for setting aside the *ex parte* decree."

2. O.9, Rule 13, Code of Civil Procedure, stated that in any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court would make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit.

3. On facts, as found by the learned single Judge the defendants have not appeared through counsel on account of the sudden illness of the counsel and thus for that reason the defendants were prevented by a sufficient cause from appearing when the suit was called on for hearing. Learned counsel for the appellant, however, has referred to the proviso under O.9, Rule 13, C.P.C., and drawn our attention to the order of the learned single Judge in this behalf wherein it is said that even if a good cause is shown for setting aside the *ex parte* decree, such order can enure only to the benefit of that defendant who applied for setting aside the *ex parte* decree. According to the learned counsel, the first defendant alone was represented in the proceeding for setting aside the *ex parte* decree in the sense that although the application was purported to have been filed on behalf of all defendants only a representative of the first defendant filed the affidavit as to the cause for setting aside the *ex parte* decree. Learned single Judge has, however, said as follows:

"The learned counsel for the plaintiff would submit that even if it is taken that good cause is shown for setting aside the *ex parte* decree it can enure only to the benefit of first defendant alone. The learned counsel for the petitioner points out that Mr. N.V. Balasubramaniam was appearing for all the defendants and the prayer in the application is for setting aside the *ex parte* decree in its entirety passed on 29.6.1992 and acceptable reason has been given for the absence of the defendants' advocate on that date. In view of the above, I am unable to accept the submission made by the learned counsel for the plaintiff/respondent."

The fact being that Mr. Balasubramaniam represented all the respondents (defendants in the suit) and his absence affected the common cause of the respondents and the application for setting aside

was filed on behalf of all the respondents, it is not possible merely on the basis of the affidavit having been filed by a representative of the first defendant that the application for setting aside the *ex parte* decree was only on behalf of the first defendant. Apart from the above, we have seen with the assistance of the learned counsel for the appellant the facts of the case leading to the money decree which revealed that the first defendant is alleged to be the principal debtor and the second and third defendants are the sureties. The effect of setting aside the decree against the first defendant alone will mean that a decree made effective against all the defendants jointly will stand annulled in so far as the principal debtor is concerned but shall bind the sureties and the creditor-decree holder thus shall satisfy the decree.

4. The first proviso to O.9, Rule 13 reads as follows:

"Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

On the facts as above, in our opinion, it has been indeed a case in which even if the decree has to be set aside at the instance of only one of the defendants, it must be set aside against all of them. The law in this behalf has been stated in one of the earliest judgments of this Court in *Meenakshi Sundaram Pillai v. Chandrakasa Naicker, A.I.R. 1927 Mad. 550: 101 I.C. 98: 1927 M.W.N. 294*, in these words:

"Under the proviso to Rule 13, O.9, where a decree is of such a nature that it cannot be set aside as against the applying defendant only, it may be set aside as against all or any of the defendants also. It appears to me that the decree in this case is of this indivisible character, because it is for the possession of a house, which itself is indivisible; so that if the share of one of defendants is excluded, delivery will, in effect, be impossible."

This view is expressed in a case under the Code of Civil Procedure, Act VIII of 1859 by this Court in *Panji Achan v. Marutha Veera Kavundan, 22 M.L.J. 543*, in these words:

"The extent to which the decree must be set aside will depend upon the circumstances of each particular case. On what principle then is the court to act in deciding how far any particular decree is to be set aside? There can I think,

be no doubt that the object of the section is that a more successful applicant should be put in exactly the same position as if no decree had been passed in the suit, and the decree, therefore, must be set aside so far as is necessary, to achieve this object, and no further.

As I read Sec.108, C.P.C., it *prima facie* means that the decree, so far as it gives any relief to the plaintiff against the defendant who is able to establish that he was prevented from sufficient cause from appearing at the time of hearing, is to be set aside, and not against those defendants in the suit who have no good cause to make for non-appearance or have not chosen to take any action. But it may happen that the decree, from its nature, must, if set aside, necessarily exempt all the defendants from liability as is the case here with respect to so much of the decree as directs the amount in question to be paid out of the Dewaswom property. In such case the scope of Sec.108, C.P.C., as I understand it, is no doubt enlarged, but that is because it cannot be helped; but if one were to go further and to hold that in all cases where there is one cause of action against all the defendants, or where there is a common defence, the court acting under this section has the power to set aside the decree so far as it affects the defendants other than the applicant, it would, in my opinion, be putting too great a strain on the language of the Legislature."

5. Learned counsel for the appellant, however, has placed reliance upon the judgments of a Division of the Bombay High Court in *Hiralal v. Sitaram*, A.I.R. 1952 Bom. 446, and of a learned single Judge of the same court in *Vasant v. Tukaram*, A.I.R. 1960 Bom. 485. In the former it is said:

"It may be pointed out that under the old Code, when an application for setting aside an *ex parte* decree was made by any defendant, the provision was that the Court shall make an order setting aside the decree. The Code was amended and in the amended Code the language used in O.9, Rule 13, is "the court shall make an order setting aside the decree as against him." Therefore, the principle accepted by the Legislature in O.9, Rule 13, is that the *ex parte* decree shall ordinarily be set aside only against the party who applies to set aside the *ex parte* decree. I use the word "ordinarily", because

there is a proviso to O.9, Rule 13 and the proviso provides that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendant also. It is clear that the proviso emphasises the nature of the decree. What the court has got to consider is whether the decree which it is setting aside at the instance of one defendant is of such a nature that it cannot be set aside as against that defendant only. Therefore, the infirmity must be in the decree itself.

The obvious illustration would be a partition decree. If one of the defendants applied to set aside a partition decree, the Court could not set aside such decree against that defendant only because it would be impossible to work out a partition decree in the absence of any of the parties. Now, can it be said that in the decree which was passed in this suit, there is anything which makes it impossible for the court or makes it difficult for the court to set it aside as against defendant No.1 only. The decree is only a money decree passed against both defendants Nos.1 and 2. The decree can be worked out and can be executed even though the decree against defendant No.2 stands and is set aside only against defendant No.1. There is nothing in the nature of this money decree which the court has passed which renders it difficult for the court to set aside only *guae* one of the defendants who are parties to the suit. Mr.Bhabba asked us to consider what would happen after the decree is set aside and the Court dismisses the suit against defendant No.1. In our opinion, that is not a consideration that can weigh with the Court when it considers the proviso to O.9, Rule 13. The right to set aside the *ex parte* decree is conferred expressly only upon the party who applies to set aside the *ex parte* decree. As against the parties who have not applied, the plaintiff has obtained a valuable right, he has obtained a decree against those defendants, and that valuable right can only be defeated provided the Court itself finds a difficulty in setting aside the *ex parte* decree only against the defendant who has applied to do so. But there is no right whatever in the party who has not applied to set aside the *ex parte* decree to have that decree set aside. Mr.Bhabba's client had the right to apply to set

aside *ex parte* decree. He did not choose to exercise that right; he submitted to the decree. It is not therefore for him to appeal against any injustice that might be caused by reason of the fact that a suit against defendant No.1 may be dismissed on the same cause of action. He himself has no right conferred upon him by the Code. It is only the difficulty that the court might experience which has led the Legislature to enact the proviso.

We are not very much impressed by the argument of inconsistent decrees being on the record of this Court. Take the instance of a decree being passed on an admission. One defendant may admit the claim, the other defendant may not, and it would be open to the court to pass a decree against defendant No.1 on an admission and the court may proceed to try the suit as against defendant No.2. This may happen although the plaint is based on the same cause of action and in respect of the same transaction. If the plaintiff's suit fails against defendant No.2, it may be said that there are inconsistent decrees on the record of the court, because there is a decree against defendant No.1 on an admission and a dismissal of the suit as against defendant No.2, although the transaction was the same and the cause of action was the same. In the illustration I have given, it is a case of a decree being passed against one defendant on an admission. In the present case there is a decree against defendant No.2 by reason of the fact that he did not appear and defend the suit. It may be that a inconsistent decree may be passed in respect of defendant No.1 because he has been given the right by the Code to defend his suit on merits. Such a right has not been given to defendant No.2."

In the latter it is said:

"It is contended by the learned counsel for the applicant that although the lower court held that the order passed by its predecessor was illegal it did not set aside the order because it thought that it had no power to review the order, and that if this Court holds that the order could have been reviewed the original order passed should be set aside. But this Court cannot set aside the order passed unless it agrees with the view taken by the lower court that the original order was contrary to the

proviso to O.9, Rule 13, C.P.C.

The lower court thought that the order passed by its predecessor was contrary to law because (i) the decree in question is one and indivisible, (ii) the decree is likely to result in two inconsistent decrees if the decree is not set aside against defendants 2 and 3, and (iii) the decree proceeds on the grounds common to defendants 2 and 3. In addition to these grounds it is also urged by the learned counsel for the applicants that in the interests of justice the whole decree should be reopened and the decree should be set aside against both defendants 2 and 3 and not merely against one of them, namely, defendant No.3 who had applied under O.9, rule 13, to have the *ex parte* decree set aside. Learned counsel for the applicant has relied on *Khagesh Chandra v. Chandra Kanta*, A.I.R. 1954 Assam 183 (F.B.), *Gopala Chetty v. Subbier*, I.L.R. 26 Mad. 604, *Bhura Mal v. Har Kishan Das*, I.L.R. 24 All. 383, (F.B.), *Mohamed Hamidulla v. Tehurenissa Bibi*, I.L.R. 25 Cal. 155, *Munshi Ram v. Malava Ram*, A.I.R. 1917 Lal 194 and *Meenakshi Sundaram Pillai v. Chandrakasa Naicker*, A.I.R. 1927 Mad. 550: 101 I.C. 98: 1927 M.W.N. 294.

6. It is unnecessary to consider the Calcutta case at any great length because that was a decision under the old C.P.C. and the view taken by the Chief Justice of the Calcutta High Court was that under Sec.108 of the old Code if a decree was to be set aside the whole decree should be set aside against all the defendants and not against some only of the defendants.

7. The Assam case deals with a different set of circumstances, because in that case the suit had been decreed *ex parte* against one defendant and dismissed, after contest, against another defendant. It was held by the majority of the Full Bench of the Assam High Court that O.9, Rule 13 and the provisos to it do not confer any jurisdiction upon the Court to reverse a decree dismissing the suit of the plaintiff as against some of the defendants. In the instant case the *ex parte* decree had been passed against both the defendants 2 and 3 and not in favour of one of them. The case of the Assam High Court has therefore no application to the instant case. But the view has been expressed that if the decree is joint and indivisible or if there is a possibility of conflicting

decrees, then the whole decree should be set aside under the proviso to O.9, Rule 13 in *Meenakshi Sundaram Pillai v. Chandrakasa Naicker*, A.I.R. 1927 Mad. 550: 101 I.C. 98: 1927 M.W.N. 294, in a suit filed for delivery of a house and mesne profits against defendants 2 and 3 and defendant No.1 who had purchased the house in execution of a decree against the undivided brother of defendants 2 and 3 these two defendants were *ex parte* and the plaintiff compromised with the first defendant, with the result that the decree was passed against all the defendants for possession and for mesne profits. The second defendant who had been *ex parte*, got the decree set aside under O.9, Rule 13. Plaintiff filed petition saying that if the *ex parte* decree is set aside against the second defendant, it should also be set aside against all the defendants. It was held that the decree was of an indivisible character because it was for the possession of the house which itself was indivisible, and if the share of one of the defendants is excluded, delivery in effect was impossible. The Madras High Court therefore set aside the *ex parte* decree against all the defendants although the petition to do so had been filed by the plaintiff. This case is an authority for the proposition that the decree was joint and indivisible and if the setting aside of the decree against one of the defendants only would result in an impossibility of execution, then the whole decree should be set aside. In *Munshi Ram v. Malava Ram*, A.I.R. 1917 Lah. 194, a decree had been passed *ex parte* against the principal debtor and his surety-after the *ex parte* decree against the principal debtor was set aside under O.9, Rule 13, it was held that the Judge was in error in setting aside the decree against the principal debtor without setting it aside against the surety.

8. If we look at the wording of the proviso to O.9, Rule 13, it provides that where the decree is of such a nature that it cannot be set aside as against such defendant only, the decree may be set aside against all or any of the other defendants also. The proviso contemplates cases where the decree is of such a nature that it cannot be set aside against one defendant only. Such cases are, for instance, a decree for possession of a house in the joint possession of persons, a partition decree, and a decree for

joint possession of property in the joint possession of two or more persons. It is the nature of the decree that is the determining factor and not the reasons behind the decree. Even if the defends of two defendants is common and even if the decree proceeds on a ground common to all the defendants, the ultimate decree should not be set aside against all the defendants unless it is of such a nature that it cannot be set aside as against one defendant only. Two decrees may be inconsistent in the sense that the grounds given are inconsistent. A decree against two or more defendants may be a decree for a certain amount of money as damages for breach of a contract, and if the decree against one of the defendants is set aside under O.9, Rule 13, and ultimately the suit is dismissed against such a defendant on the ground that he did not commit a breach of contract, then though the grounds may be inconsistent, the original decree is not of such a nature that it cannot be set aside as against one defendant only. Generally in the case of a money decree the application of the proviso to O.9, Rule 13, C.P.C. is not attracted. In *Hiralal v. Sitaram*, A.I.R. 1952 Bom. 446, which was a case of money lent to two defendants carrying on business under a partnership name and in which an *ex parte* decree passed against defendant. Nos.1 and 2 and in favour of the plaintiff, was set aside against defendant No.1 under O.9, Rule 13, it was held that the application of defendant No.2 for setting aside the *ex parte* decree against him also under the proviso to O.9, Rule 13, should be rejected because the money decree was not an indivisible decree and the argument of inconsistent decree being possible was rejected. For the application of the proviso to O.9, Rule 13, it is not sufficient that there was possibility of inconsistent decrees, but what is necessary is that the Original decree, which is being set aside at the instance of only one defendant is of such a nature that it cannot be set aside as against that defendant only, if there is such an infirmity in the original decree, then only action would be taken under the proviso."

6. We do not propose, however, to say whether any of the two Bombay cases go in support of the contention of the learned counsel for the appellant, because we do not notice any departure in the

statement of the principles of law by the learned Judges of the Bombay High Court, as found in the two earlier judgments of this Court. It has to depend upon the facts of each case whether to set aside the decree only in so far as the case of the defendant who applied for setting aside the decree is concerned or even in case of other defendants as well and in that the court shall mainly be guided by the principles of equity and good conscience. On the facts of the present case as we have found the learned single Judge has committed no error, there is no merit in the appeal. The appeal is accordingly dismissed.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

C.R.P.No.2135 of 1992 20th August, 1992.

V.Subramani ...*Petitioner*
v.
Arumugham ...*Respondent.*

(A) Civil Procedure Code (V of 1908), Sec.115 and O.14(2)(a) - Petitioner raising question of pecuniary jurisdiction of court and praying for that issue to be decided first - Petition dismissed - Revision against order, if lies.

It shall be noted that the disposal of the said application did not involve adjudication of any right or obligation of the parties in controversy and that hence the order cannot be treated as 'Case decided' within the meaning of that term in Sec.115, C.P.C. Therefore, the civil revision petition is not maintainable. [Para 3]

(B) Civil Procedure Code (V of 1908), Sec.115 (as amended by Act CIV of 1976) - Interim order not causing irreparable injury or failure of justice - Revision against, if maintainable.

As per Sec.115, C.P.C., as amended in 1976, if a revision is filed against an interim order, unless

irreparable injury or failure of justice is shown, the revision is not maintainable. [Para 5]

(C) Civil Procedure Code (V of 1908), Sec.115 and O.14, Rule 2 - Petitioner raising question of pecuniary jurisdiction of court on ground that suit is not properly valued - Praying that that issue be decided as a preliminary issue - Application, if maintainable. As per O.14, Rule 2, C.P.C., only when 'the case or any part thereof may be disposed of on an issue of law, the court may try that issue first. But what is contained in the affidavit in support of I.A.No.1263 of 1992 is only that the court has no pecuniary jurisdiction and that hence that question should be decided first. As per the written statement, the said contention is based on the fact that the suit is not properly valued. If that is so, when a proper valuation is made and it is found that the court below has no jurisdiction, but some other court alone has jurisdiction, then the plaint may have only to be returned for presentation to the proper court. In such a situation, the said return, of the plaint cannot be considered as 'disposal' of the case or part spoken to in O.14, Rule 2, C.P.C.

[Para 6]

(D) Civil Procedure Code (V of 1908), O.14, Rule 2 - Preliminary issue - Mixed question of law and fact - If can be taken as a preliminary issue.

As per O.14, Rule 2, C.P.C., only a question of law, if at all, can be taken up as a preliminary issue. Issue No.5 in the present case relating to jurisdiction involve question of law and fact since, the question raised is that the suit has not been properly valued. The Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. [Para 7]

Cases referred to:

Baldevdas Shivilal v. Filmistan Distributors (India) (P) Ltd., (1970)1 S.C.R. 485: (1970)1 S.C.J. 342: A.I.R. 1970 S.C. 406. [Para 3]

Mitsubishi France v. Neyveli Lignite Corporation Limited, (1984)2 M.L.J. 369: A.I.R. 1985 Mad. 300. [Para 7]

S.S.Khanna v. F.J.Dhillon, A.I.R. 1964 S.C. 497. [Para 7]

Petition under Sec.115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Harur, dated 9.7.1992 and made in I.A.No.1263 of 1992 in O.S.No.406 of 1987.

V.Natarajan, for Petitioner.

The Court made the following

ORDER: The defendant whose I.A.No.1263 of 1992 praying for trying issue No.5 first as preliminary issue in the suit O.S.No.406 of 1987 was dismissed, is the petitioner herein. The said issue no doubt raises the question of pecuniary jurisdiction of the Court below to try the suit on the ground that the suit has been properly valued.

2. The learned counsel for the petitioner argues that the court below has not given reasons for passing the abovesaid order of dismissal and that when the jurisdiction question is involved, O.14, Rule 2(a) is attracted and the court below should have agreed to take up the abovesaid issue as a preliminary issue to be tried before the other issues are tried.

3. But, first of all, it should be noted that the disposal of the said application did not involve any adjudication of any right or obligation of the parties in controversy and that hence the order cannot be treated as "case decided" within the meaning of that term in Sec.115, C.P.C. (*Vide: Baldevdas Shivilal and another v. Filmistan Distributors (India) (P) Ltd.*, (1970)1 S.C.R. 485; (1970)1 S.C.J. 342; *A.I.R. 1970 S.C. 406*, regarding the meaning of the term "case decided"). Therefore, this civil revision petition is not maintainable at all.

4. That apart, it cannot be said that the court below has not given any reason for passing the abovesaid order. The court below has pointed out that even though the suit was filed in 1987 itself, the present application has been filed only about five years later in 1992. The written statement of the petitioner which was filed in 1988 itself no doubt states in paragraph 13 as follows:

"The suit is not properly valued and the court-fee paid by the plaintiff also not correct. This Court also has no pecuniary jurisdiction to deal with this matter."

If really, the defendant wanted to have the trial of this issue first, he would have come forward with an application to that effect long back as soon as the issues were framed in about 1988. Only after the suit has been listed for trial, the present I.A. has been filed. So, it is clear, only to protract the trial of the suit, the said I.A. has been filed. For this reason, the court below has rightly dismissed the application and it cannot be said that in coming to the abovesaid conclusion on the abovesaid

reasoning, the court below has erred in exercise of the jurisdiction. So, since there is no error of jurisdiction as stated above, this civil revision cannot be sustained.

5. Further, as per Sec.115, C.P.C., as amended in 1976, if a revision is filed against an interim order, unless irreparable injury or failure of justice is shown the revision is not maintainable. In the present case, there is no irreparable injury or failure of justice. No such allegation even has been made in the supporting affidavit to the application. Therefore, also this civil revision petition has no merit.

6. Further, as per O.14, Rule 2, C.P.C., only when "the case or any part thereof may be disposed of" on an issue of law, the court may try that issue first. But, what is contained in the affidavit in support of I.A.No.1263 of 1992 is only that the court has no pecuniary jurisdiction and that hence that question should be decided first. As per the written statement, the said contention is based on the fact that the suit is not properly valued. If that is so, when a proper valuation is made and it is found that the court below has no jurisdiction, but some other court alone has jurisdiction, then the plaintiff may have only to be returned for presentation to the said proper court. In such a situation, the said return of the plaint cannot be considered as "disposal" of the case or part of it, spoken to in O.14, Rule 2, C.P.C. Therefore also, on the very allegation in the supporting affidavit, the abovesaid I.A. is not maintainable.

7. Further, as per O.14, Rule 2, C.P.C., only a question of law, if at all can be taken up as a preliminary issue. Issue No.5 in the present case, relating to jurisdiction, involves question of law and fact, since the question raised is that the suit has been not properly valued. In this connection, no doubt the learned counsel for the petitioner relied on the decision in *Mitsubishi France v. Neyveli Lignite Corporation Limited*, (1984)2 M.L.J. 369; *A.I.R. 1985 Mad. 300*, contending that the said decision has held that even where mixed questions of law and fact are relatable to an issue raising jurisdiction question, that issue could be tried as preliminary issue. But, I find that the Supreme Court has observed in *S.S.Khanna v. F.J.Dhillon*, *A.I.R. 1964 S.C. 497*, while interpreting O.14, Rule 2, C.P.C., as follows:

"The jurisdiction to try issues of law apart from the issues of fact, may be exercised, only where

in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally, all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

So, I am bound by the Supreme Court decision. I am, therefore, quite convinced that this civil revision petition has to be dismissed.

8. In the result, the civil revision petition is not admitted, but dismissed.

B.S. ---- Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Janarthanam, J.

S.A.No.381 of 1992

3rd July, 1992.

M.Sundaram Servai ...Appellant
v.

Muslim Jamath (Public Wakf), Karaikudi represented by its President, Janab Syed Mohammed and another ...Respondents.

(A) Civil Procedure Code (V of 1908) (as amended by Act CIV of 1976), Sec.99 - Suit by President and Secretary of a Wakf - Objection as to frame of suit in second appeal stage - Maintainability.

The technical objection as to the frame of the suit had not been raised by way of a specific pleading in the written statement filed by the defendant. From the factum of such a plea not having been raised, it is rather obvious that such a plea, if raised, would meet with dismissal failure and, therefore, the same is not raised. The non-raising of such a plea denied the opportunity to the plaintiffs to make it appear that the present plaintiffs were the persons in charge of the trust as Muttawalli's by making necessary application for suitable amendment. On the face of Sec.99, C.P.C., such a technical

objection as raised by the appellant is of no avail.

[Paras 10 & 12]

(B) Mohammedan Law - Wakf - Concept of - Rights of Mutawalli or Sajjadanishin.

Muslim public wakf is not to be confused with the conception of trust in the ordinary sense of the term. The Privy Council has in *Vidya Varuthi v. Balusami Ayyar*, A.I.R. 1922 P.C. 123, explained that the idea conveyed by the word 'trust' is foreign to the religious conception involved in the word wakf. It has held that the Wakfnama does not transfer property to trustees, that under the Mohammedan Law the moment a Wakf is created, all rights of property pass out of the wakf and vest in God Almighty and that the curator whether called mutawalli or sajjadanishin or by any other name is merely a manager.

[Para 13]

Case referred to:

Vidya Varuthi v. Balusami Ayyar, A.I.R. 1922 P.C. 123. [Para 13]

T.L.Ram Mohan for K.Jayaraman, for Petitioner. Ms.V.Sumathi, for Respondents.

The Court delivered the following

JUDGMENT: The appellant herein was the defendant while the respondents were the plaintiffs in the suit.

2. The plaintiffs filed the suit in O.S.No.332 of 1985 on the file of the District Munsif, Devakottai, praying for the relief of possession with mesne profits, past and future and for costs, contending that the suit property is a public wakf, utilised as a burial ground for Muslims from time immemorial; that Kalanivasal in which the suit property was situate was an inam estate, taken over by the Government, that in the settlement proceedings, this property had been recognised as "mayanam poramboke" resulting in the making of necessary entries therefor in the relevant records; that thereafter, patta had been granted to Muslim Jamath, Karaikudi, that the defendant, having no manner of right whatever encroached over the suit property and put up a shed thereon and had been running a cycle shop, besides a sound service, and that therefore, he is liable to pay mesne profits by way of damages calculated at the rate of Rs.120 per mensem for the three years proceeding suit with future mesne profits at such rate, as may be determined in separate proceedings.

3. The defendant contested the suit *inter alia* contending that at no point of time, the suit property was used as a burial ground for Muslims; that

it was not recognised at any point of time as Muslim *mayanam poramboke*; that since in the settlement proceedings he was not a party, any decision taken thereon was not binding on him; that the suit property is a *poramboke* property and as such, the suit is bad for non-joinder of the Government as a necessary party; that in any event, he had prescribed title by adverse possession and that therefore, the suit is liable to be dismissed.

4. Learned District Munsif, on consideration of the materials placed on record, upholding the claims of the plaintiffs, decreed the suit as prayed for with costs, giving two months' time to the defendant for delivery of vacant possession of the suit property to the plaintiffs.

5. The aggrieved defendant filed A.S.No.88 of 1988, on the file of the Subordinate Judge, Devakottai, who in turn, on considering the materials available on record and after hearing learned counsel for the respective parties, dismissed the appeal confirming the judgment and decree of the trial court, making no order as to costs in the appeal.

6. When the matter came up for admission, notice of motion had been issued by this Court on 31.3.1992 returnable by two weeks and the plaintiffs entered appearance through a counsel of their choice.

7. The arguments of learned counsel for the appellant-defendant as well as the respondents-plaintiffs were heard.

8. Learned counsel for the appellant, fully realising the predicament situation in which he had been placed, in the sense of there being no chance of his making any submission as to the concurrent findings recorded by the courts below that the suit property is a '*mayanam poramboke*' intended for Muslims and that patta has been issued to Muslim Jamath, Karaikudi, subsequent to the take-over by the Government of the inam estate in Kalanivasal village under the Tamil Nadu Act XXVI of 1963 and there being no perverse appreciation of the materials for reaching such a conclusion, resorted to make a technical objection revolving on the question of the frame of the suit, by stating that the plaintiffs-trust should be represented by all its trustees and the suit filed by the plaintiffs, namely, the President and the Secretary of the Muslim Jamath alone, is not maintainable and though such a plea is raised for the first time, he would submit such a plea is purely a question of

law and therefore it is but legitimate for him even to raise such a question during the course of the second appeal.

9. Learned counsel appearing for the respondents-plaintiffs would however repel such a submission by stating that the so-called error or defect in the frame of the suit, even assuming to be correct, but without admitting the same, will not, in the eye of law, have the effect of reversal of the decree passed by the trial court and latterly confirmed by the lower appellate court, so long as the same is not affecting the merits of the case or the jurisdiction of the court.

10. Admittedly, the technical objection as to the frame of the suit had not been raised by way of a specific pleading in the written statement filed by the defendant. From the factum of such a plea not having been raised, it is rather obvious that such a plea, if raised, would meet with dismal failure and therefore, the same is not raised. The non-raising of such a plea, denied the opportunity to the plaintiffs to make it appear that the present plaintiffs were the persons in charge of the trust as Muttawallis, by making necessary application for suitable amendment. Even otherwise, on the merits of the matter, a concurrent finding had been recorded by both the courts below in favour of the plaintiffs and the action had been initiated before the competent forum having jurisdiction.

11. At this juncture, reference may profitably be made to the sanguine provisions adumbrated under Sec.99 of the Code of Civil Procedure, 1908 (as amended by Act 104 of 1976) and it prescribes:

"99. *No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction:* No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.

Provided that nothing in the section shall apply to non-joinder of a necessary party."

12. Thus, on the face of the aforequoted provisions, such a technical objection, as raised by the appellant, is of no avail, as rightly contended by learned counsel for the respondent.

13. It is also to be borne in mind that Muslim public wakf is not to be confused with the conception of trust in the ordinary sense of the term and

that perhaps appear to be the reason for raising such a technical plea in the second appeal. In the epoch-making decision in *Vidya Varuthi v. Bahusami Ayyan*, A.I.R. 1922 P.C. 123, the Privy Council explained that the idea conveyed by the word 'trust' is foreign to the religious conception involved in the word 'Wakf':

"When once it is declared that a particular property is wakf or any such expression is used as implies wakf the right of the wakf is extinguished and the ownership is transferred in the Almighty" says Mr. Ameer Ali in delivering judgment. "The manager of the wakf is the mutawalli, the governor, superintendent or curator. In the case of khankhas the head is called a sajjadanishin. 'But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf, the property is not vested in him, and he is not a trustee in the technical sense. The wakfnama does not transfer property to trustees. Under the Mohammedan Law the moment a wakf is created all rights of property pass out of the wakf and vest in God Almighty. 'The curator, whether called mutawalli or sajjadanishin, or by any other name, is merely a manager.'"

14. In view of what has been stated above, it goes without saying that the second appeal deserves dismissal even at the admission stage and is accordingly dismissed.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *D.Raju, J.*

W.P.Nos.1421 to 1428 of 1993 *5th February, 1993.*

Raja D.V.Appa Rao Bahadur and others

...Petitioners

v.

The Government of Tamil Nadu by Secretary, Municipal Administration and Water Supply Department, Madras and another ... Respondents.

(A) *Madras City Municipal Corporation Act (IV of 1919), Sch.IV as amended by the Rules, Municipal Administration and Water Supply G.O.Ms.No.1178, dated 10.12.1987 - Levy of property tax - In respect of property situate in the City of Madras on and from 1.4.1993 - Whether illegal - Ultra vires of the rule making powers.*

(B) *Madras City Municipal Corporation Act (IV of 1919), Sec.100 - Schedule IV, Rules found thereunder - Revision of property tax - With effect from 1.4.1993 - Of the property tax in the Madras City - Based on the returns furnished by the owners/occupiers - Calling upon them to file the proforma return - Whether i'legal.*

(C) *Constitution of India (1950), Arts.14 and 265 - G.O.Ms.No.1178, dated 10.12.1987 relating to levy of property tax - In respect of property situate in the City of Madras - On and from 1.4.1993 - Whether illegal - Ultra vires of the rule making powers - Whether violative of rights guaranteed under the Constitution.*

After a careful consideration of the respective submissions of the learned counsel appearing on either side, the court of the view that the apprehension of the petitioners that the proposed revision of the property tax is sought to be made on the basis of the plinth area and not really on the annual value has no basis in law or otherwise. Apart from the candid admissions made by the second respondent in the counter affidavit filed it is by now well settled by catena of decisions of this Court and that of the Apex Court that the rateable value of a building whether tenanted or self occupied is limited by the measure of standard rent arrived at by the Assessing Authority by applying the principles laid down in the Rent Act and cannot exceed the figure of the standard rent so arrived at

though in a given case. It may be lower than such standard rent. It has been held and the law as beyond controversy that within the upper limit of the rateable value of the premises so fixed the Assessing Authority would have to determine the reasonable rent by evaluating factors such as site, situation, locality and condition of the premises and the amenities thereon provided. It has been held that annual value cannot exceed the standard rent and even landlord actually receiving higher rent in an individual case matters very little for determination of the annual value for levying and collecting property tax. [Para 15]

There is no dispute that the proforma return, as such has not been prescribed by the State Government or that any specific authorisation of the second respondent is so made to formulate any such form. But the question would be as to whether the absence of such enabling power undermines the efficiency of the form published. The rules contained 1C(1) prescribes the particulars that should be furnished by the owner/occupier and the period within which such form should be filed by those liable. In the light of such prescription made, the fact that a format has been devised by the second respondent for the convenience of an owner/occupier does not militate against its efficiency merely because the format of the return itself has not been so prescribed under rules. The plea on behalf of the petitioners that no time limit or period of limitation as such could have been prescribed under the rules in the absence of specific conferment of power in this regard and the reliance placed upon two decisions of the Apex Court are incorrect and inappropriate. Unlike the ordinary rule making power that was the subject matter of consideration in the decisions of the Apex Court relied upon for the petitioners, the rules in question though made by the State Government are made after two drafts of the same is moved and placed before the Legislature and specifically approved by the State Legislature as required under Sec.347(5) of the Act. That apart, it is a well accepted principle of statutory construction that the rules in the Schedule to the Act are as much part and parcel of the statute itself and the infirmity alleged cannot be said to exist in such cases so as to affect the legality and validity of the notification prescribing the time limit within which the return visualised has to be filed and the relevant particulars are furnished to facilitate a time

bound finalisation of the assessment proceedings to ensure the effective collection of the tax due to the second respondent. [Para 16]

The notification also states that if no return was filed within the notified time, the Corporation will *suo motu* revise the assessment of the property and the owner of the property shall not be entitled to file an appeal against such assessment, as per the act. The legality or otherwise of the provision disabling an assessee who has not filed his return from filing an appeal will be separately dealt with and need not concern the consideration of this stage. A reading of the rule 1-C(1) of Part 1-A would go to show that the return envisaged thereunder is not of the conventional nature as prescribed in the other taxation laws. Apart from the non-prescription of the form as such the rules contemplate a return containing certain details and information which have been stipulated by the rules themselves. Rule 2 provides also that in case of default in the filing of the return within the notified time the preparation of the return by a person authorised by the Commissioner by entering upon and making an inspection of the assessable item. As a matter of fact, the explanatory note appended to the motion of the draft rules submitted before the Legislature under Sec.347(3) of the Act. [Para 17]

Therefore, it could be seen that the object of the rules itself is to allow participation of the owner/occupier in the very process of assessment/revision by enabling him to disclose certain relevant details relating to the assessable item, in his own interest and even in cases of default cause such details to be ascertained by the inspection assessable item by a person authorised to facilitate assessment/revision. Even under the old rates for assessment/revision the ultimate burden to make the assessment/revision was that of the authorities and the introduction of the system of filing of a return, does not make any change in this regard, except that it extends an extent of participation in the process by the owner/occupier himself of the property concerned. Consequently, the second respondent cannot also be said to be exonerated or relieved of his duties and obligations to cause a due verification of the relevant details relating to the assessable item before proceeding to assess/revise the tax liability of an assessee, in accordance with the well-settled principles relating to the levy and collection of property tax under the Act. Merely

because the owner/occupier fails to file a return as envisaged, the second respondent cannot arbitrarily or whimsically assess/revise the liability in any manner he thinks. It is a well accepted principle of law that the phraseology "Having regard to" do not mean having regard to only those mentioned and that the authority could not take into other relevant, vital or necessary materials or particulars or that such materials not specified are excluded from consideration. Likewise the absence of guidelines issued by the council or even the existence of guidelines do not affect the exercise of power of assessment/revision objectively taking into account only the provisions in the Act, Rules and the law declared by courts. The guidelines if any, could only fill up any gaps or at any rate, serve as guidelines and cannot either override the law or have any binding effect so as to fetter or freeze the exercise of discretion and discharge powers and duties objectively and independently. I find nothing wrong in the Commissioner being enjoined to have regard to the annual value of the assessable item as on 1st October, 1978, since that was the last of the general revisions made, for purpose of further revision now contemplated. The relevance of the existing assessment for further revision cannot totally be ruled out and no basic or legal infirmity can be said to affect the exercise made by the Commissioner, which as referred to supra, has to be only in accordance with Sec.100 of the Act and the law already declared by the decisions of this Court, keeping in view to the extent possible and permissible the rules in question. [Para 18]

The right of appeal, no doubt, is a creature of the law and the absence of any provision for an appeal or revision against a decision, in the context of modern development of law is viewed as a serious infirmity, particularly in view of the fundamental principle of rule of law enshrined under Art.14 of the Constitution of India. So far as the case on hand, there is no controversy that a right of appeal to the taxation appeal tribunal and a further appeal to the Principal Judge, City Civil Court. The question is whether the said right of appeal could be denied to an owner/occupier merely because he failed to file the return envisaged under Rule 1-C(1) of Part 1-A of the IV Schedule. The failure on the part of the owner/occupier to file the return disclosing the details sought, as held already by me does not absolve the second respondent of his

obligation and duty to verify those details relating to the assessable item or the obligation cast upon him to act objectively and reasonably while exercising his powers of assessment/revision. Consequently, no immunity from challenge could be afforded to an assessment revision made by the second respondent even in such cases and there is no rhyme or reason in Rule 13. In a taxing law, normally orders passed *ex parte* or to the best of judgment due to the non-co-operation of the assessee in completing the assessment process, are also made subject to a right of appeal and or revision and the stipulation contained in Rule 13 not only sounds illogical, arbitrary and unreasonable, but smacks of draconian devilry and cannot be said to be justifiable for any good reason or on sound principle of law or logic. An owner/occupier, who has failed to file a return, called for, is as much entitled to file an appeal as one who has filed a return. Consequently, Rule 13 of the Part V of the IV Schedule to the Act is struck down as arbitrary, unreasonable and violative of Art.14 of the Constitution of India and declared *null and void*. [Para 19]

Even under the old and substituted rules when the assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Commissioner had to give a public notice specifying the time whom and the place where the books may be inspected and stating that revision petitions will be considered if preferred within 15 days from the date of such notice and the rules also provided that in cases of enhancement in the assessment, a special notice shall issue to the owner/occupier and only after hearing the said person shall amend the assessment books. This Court in the decision reported in *Dalavai v. Government of Tamil Nadu*, 91 L.W. 110, has held that such notice of enhancement should disclose the reasons or basis for such enhancement to enable the assessee to put forward any effective objections to the same. But, the new rules, apparently for the reason that the assessment invariably would be made on the return filed provides for an assessment/revision without any such opportunity. Rule 6 provides for such an opportunity only in cases where the Commissioner, on verification made of the particulars in the return after a general revision and before the next general revision seeks to modify the assessment already made from the date on which

the assessment was made and not otherwise. No doubt, there is an appeal to the Taxation Appeal Tribunal and a further appeal to the Principal Judge, City Civil Court. A careful analysis of the rules under challenge disclose the following:

- (a) After the stage of filing the return or ascertaining particulars in the absence of any such return, the Commissioner assess the property tax or revise the existing assessment of the property to tax;
- (b) There is no provision for pre-decisional hearing or making representation as against the proposals of the Commissioner for revision and enhancement;
- (c) No provisions exist for communicating the order passed or disclosing the reasons or basis for the enhancement of the levy or for assessment/revision;
- (d) Only the supply of a property tax card, with details mentioned therein, and that too to only those who filed the return is contemplated;
- (e) Provision has been made for filing an appeal to the Taxation Appeal Committee and a further appeal to the Principal Judge, City Civil Court. The appeal to the Tribunal cannot be entertained unless the appellant deposits in the Corporation the existing tax and also fifty per cent of the difference between the existing tax and the tax as assessed by the Commissioner, in the revision. [Para 20]

It is by now well-settled that rules of natural justice or the principle of *audi alteram partem* are not rigid rules but they are not only flexible, but their application depends upon the setting and background of a statutory provisions, nature of the right which may be affected and the consequences which may entail its application or non-application. It is also well-settled that the application of the uncodified rules can be excluded by express provisions or by implication of course subject to the rights of this and the other competent authorities to adjudicate on the constitutionality of doing so. Wherever the law contemplates by making a suitable provision for a post decisional hearing amounting to a full review of the original order on merits, it can be construed as an exclusion of the *audi alteram partem* principle and if the law is silent with regard to the giving of a pre-decisional hearing to the person affected and the decision taken by the authority involves civil consequences and no full review or appeal on merits

against the decision is provided. Courts would hesitate to construe an exclusion of the duty to afford a hearing. Unless viewed pragmatically it would paralyse the administrative process or frustrate the need for utmost promptitude. The courts of law have been enjoined to always make every effort to salvage the cardinal rule of *audi alteram partem* to the maximum extent possible with situation modifications and ensure as far as possible that the person affected has a reasonable opportunity of hearing or showing cause against the proposed section against him. [Para 21]

So far as the cases on hand are concerned, there can be no two views on the claim of the Corporation that a revision of the property tax is long overdue and imminent, having regard to the fact that the last general revision was only in 1978 and the further facts that not only there had been steep rise in the annual value, but substantial increase in the commitments of the Corporation to provide basic amenities and that the increase in the cost of providing such amenities to the residents warrant and justify such a revision. The justification of the end alone cannot justify the adoption of any means or procedure, ignoring completely the prejudice that may be caused to the citizen. Rule 3 obliging the Commissioner to assess the property tax and forming part of Part 1-A relating to assessment of property tax does not exclude the principles of natural justice. Unlike the earlier set of rules there was no opportunity given to make representations by means of a revision to the Commissioner before actually amending or revising or enhancing the assessment and enforcing the same. The rules are silent about giving of any reasons or disclosing the basis of enhancement either before or immediately thereafter by serving any order or proceeding except supplying a property tax card, apparently containing the details relating to property, annual value fixed and the property tax assessed to be paid. In the absence of any of those details or disclosure of the basis or reasons for enhancement, it would not hold the assessee to effectively even vindicate his rights in the appeal provided for and formulate the grounds on which the enhancement can be challenged. As a matter of fact, prior to the impugned amendments and even under the earlier rules when an occasion like this arose, this Court in the decision in *Dalavai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93: 91 L.W. 110, pointed out all these and emphasised the need for

disclosing the basis and reasons for enhancement. The Legislature has not and could not be said to have nullified or altered the said position of law by the impugned amendments, particularly in the absence of specific rule or provision to the contra. The insertion of Rule 21-A to the extent that notwithstanding anything contained in any rule "in this part" it shall not be necessary for the Commissioner to serve any notice for the levy and collection of property tax under Sec.98 cannot have the effect of dispensary with the requirements of principles of natural justice at the stage of assessment/revision and enhancement of the levy by the Commissioner. This is obvious from the fact that Rule 21-A has been inserted in Part VI relating to collection of taxes and the rule is also meant to be a *non obstante* clause in respect of anything contained to the contra or in any rule in Part VI and not the other parts of the IV Schedule particular Part I-A. [Para 22]

There can be no serious controversy over the position that the assessment, levy and collection of tax involve civil consequences. The rules relating to assessment are also silent on the exclusion of the principles of natural justice at the stage of assessment or revision as the case may be. While so, merely from the fact that after an assessment or revision, there is a provision for appeal particularly when the rules do not cast an obligation on the Commissioner to write an order with reasons and communicate them to the assessee, for enabling the assessee to effectively challenge the assessment or enhancement of the tax made. The long lapse of time between the present revision proposed and the earlier general revision in 1978 or the justification or imminent need for a general revision is no ground to jettison the application of rules of fair play. Instead suitable directions may and have to be issued to adjust and harmonise the need for speed and also the obligation to set fairly and modify the measure of its application in reasonable proportion to the exigencies of the situation. The assessment and communication of the demand either in the form of a notice or the property tax card or both need not necessarily be in the beginning or the first day of the commencement of the half year and it may be either in the course of the first half year or by the close of the succeeding half year concerned (*Vide* Rule 20(3)). This would be in conformity with the mandate of Sec.100(2) of the Act that the annual value of

lands and buildings shall be deemed to be the gross annual rent at which they may 'at the time of assessment' reasonably be expected and inevitably the assessment is an event to follow the date of commencement of the half year concerned. In view of the above the second respondent would not suffer any damage or injury by being directed to adhere to the principle of natural justice to the required possible extent. Consequently, though there is no justification to stall the assessment process set in motion by the issue of the impugned notification under the rules under challenge, it is necessary, for the second respondent to serve a provisional notice containing the proposed revision and the reasons or basis for the enhancement before passing final orders under Rule 3 and give the assessment atleast a period of 15 days time to submit the objections of the assessee and consider them before passing final orders of assessment/revision under rules, though not a personal hearing at that stage. This procedure shall be adopted in respect of all irrespective of the fact whether they filed a return or not as called for under the impugned notification. The adoption of the said course would be in the best interests of both parties before this Court. [Para 23]

For all these reasons stated above, the court summarises its conclusions and directions in the matter as hereunder:

(1) The assessment/revision of the property tax shall be only in accordance with Sec.100 of the Act on the annual value to be ascertained and determined on the principle laid down in *Devan Daulet Rai Kapur v. New Delhi Municipality*, A.I.R. 1980 S.C. 541, *Dr. Balbir Singh v. Municipal Corporation of Delhi*, A.I.R. 1985 S.C. 339 and *Dalavai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93; 91 L.W. 110, as also conceded by the second respondent.

(2) The owners/occupiers liable to submit their returns shall have further time to do so till 28th February, 1993 and the returns may be either in the same format or any other form but must contain all the relevant details and information stipulated in the format and rules or such further or other details relevant for the purpose.

(3) On receipt of the said returns and even where there are no returns filed, the Commissioner shall be at liberty to proceed with the assessment process by serving a provisional

notice of enhancement wherever there is any reason for the enhancement giving atleast 15 days time to enable the assessee to file their representations against the proposal, consider the said objections and pass final order, amending the books of assessment.

(4) The assessment so made shall be effective from the first half year of 1993-94 (with effect from 1-4-1993) as notified subject to the provisions governing revision and appeals.

(5) The provisions of Rule 13 is struck down as arbitrary unreasonable and violative of Art.14 of the Constitution of India and consequently *null and void*. The assessee shall be entitled to file an appeal or submit their representations irrespective of the fact whether they have actually filed the returns or not.

(6) Subject to the above declaration and directions, the respondent shall be entitled to and be at liberty to proceed further with the assessment process initiated by the notification issued on 3.1.1993, and

(7) The impugned rules issued in G.O.Ms.No.1178, Municipal Administration and Water Supply, dated 10.12.1987, published in the Tamil Nadu Government Gazette (Extraordinary) dated 10.12.1987 are held valid, but their enforcement shall be subject to the declaration of law and directions given above in this order. [Para 26]

These writ petitions shall stand ordered in the manner and to the extent indicated above. In all other respects the relief claimed shall stand rejected. [Para 27]

Cases referred to:

State of Andhra Pradesh v. Raja Reddy, (1968)1 M.L.J. (S.C.) 6: (1968)2 S.C.J. 857: (1967)2 I.T.J. 777: A.I.R. 1967 S.C. 1458. [Para 12]

Dalavai v. Government of Tamil Nadu, (1978)1 M.L.J. 93: 91 L.W. 110. [Paras 12, 15, 21, 25]

Commissioner of Income-tax v. Balakrishna Malhotra, 81 I.T.R. 759. [Para 12]

Sales Tax Officer v. Abraham, (1967)20 S.T.C. 367. [Para 12]

Bharat Barrel Company v. Employees' State Insurance Corporation, A.I.R. 1972 S.C. 1935: 41 F.J.R. 481: (1972)1 Lab.L.J. 854: 1972 Lab.I.C. 1074. [Para 13]

Murugesan v. Collector of North Arcot, (1966)2 M.L.J. 290. [Para 14]

R.Valliammal v. Commissioner, H.R. & C.E., Madras,

(1975)2 M.L.J. (NRC.) 7. [Para 14]

Devan Daulet Rai Kapur v. New Delhi Municipality, A.I.R. 1980 S.C. 541. [Paras 15, 25]

Dr.Balbir Singh v. Municipal Corporation of Delhi, A.I.R. 1985 S.C. 339. [Para 15]

K.C.Rajappa, for Petitioner.

P.Sathasivam, Government Pleader, for Respondent No.1.

N.R.Chandran, Senior Counsel assisted by *N.Kannadasan*, for Respondent No.2.

The Court made the following.

ORDER: The petitioners in the above writ petitions have filed petitions, W.M.P.Nos.2213 to 2216 of 1993 for stay of all further proceedings for the levy and assessment of property tax under the provisions of Schedule IV of the Madras City Municipal Corporation Act, 1919, hereinafter referred to as the Act, as amended by the Rules in Schedule IV of the Act, hereinafter referred to as the Rules, in G.O.Ms.No.1178, Municipal Administration and Water Supply, dated 10.12.1987 on and from 1.4.1993 relating to the respective petitioner's property mentioned therein. Having regard to the nature of the issues raised and by consent of parties the main writ petitions themselves were heard at considerable length. Since the issues are also identical and common, they are disposed of together by this judgment.

2. Though different writ petitioners in respect of different items of property have filed the above writ petitions, the respective contentions are identical and similar and it would suffice to refer to the pleadings from one such writ petition. W.P.No.1421 of 1993 has been filed for a writ of declaration, declaring the provisions of the Amendment to Schedule IV of the Madras City Municipal Corporation Act IV of 1919 undo by the issuance of G.O.Ms.No.1178, dated 10.12.1987 relating to the levy and assessment of property tax in respect of property in the City of Madras on and from 1.4.1993 illegal, *ultra vires* the Rule making powers and violative of Arts.14 and 265 of the Constitution of India, in so far as it relates to the petitioner's property The petitioners have given the half-yearly property tax and cess hitherto paid on the annual value, which admittedly has been devoid under Sec.100 of the Act and the rules found in Schedule IV of the Act. Thereafter reference is also made to Secs.99 and 100 of the Act and Taxation rules contained in Schedule IV, with particular reference to Part I-A, which existed

prior to the impugned amendment. While referring to the Notification issued by the second respondent and published in the daily newspapers *The Hindu* and *The Indian Express* under the caption 'revision of property tax' proposing revision with effect from 1.4.1993 of the property tax in Madras City based on returns to be furnished by the owners/occupiers, calling upon them to file the pro forma return to reach the office of the second respondent on or before 1.2.1993. Reference next has been made to G.O.Ms.No.1178, MAWS, dated 10.12.1987. The amended rules substitute Part I-A and Part V with a fresh set of rules for assessment of property tax and revision of assessment respectively as originally contained in the Act.

3. Rule 1-C in Part I-A enables the Commissioner to give publicity in local newspapers and otherwise require the owner or the occupier of any land or building, or a portion thereof to file a return within a period not exceeding one month from the date notified by the Commissioner in this behalf, containing the following particulars with regard to each assessable item, namely:

- (i) the name of the division and the street in which it is situated and the door number;
- (ii) description of the assessable item like number of storeys. plinth are in each storey and the extent of vacant land;
- (iii) the name of the owner;
- (iv) the name of the occupier;
- (v) the year in which the assessable item was last assessed and the amount of annual value fixed by the Commissioner;
- (vi) the amount of tax now being paid per half-year;
- (vii) whether the assessable item is used for residential or non-residential purpose;
- (viii) whether the assessable item is wholly rented or partly occupied by the owner and partly rented; and
- (ix) the amount received as rent or lease amount per year.

The rules also provide that if any person fails to file a return within the notified time, the Commissioner may authorise any person not below the rank of a Bill Collector to enter upon and make an inspection of the assessable item and prepare the return.

4. The Rules also empower the Commissioner to assess the property tax having regard to:

- (a) the annual value of the assessable item as on the 1st October, 1978;
- (b) the property tax payable by the owner or the occupier on the basis of the particulars filed in the return; and
- (c) the property tax payable by the owner or the occupier with reference to the guidelines, if any, issued by the Council.

Thereafter a property tax card, which shall contain all details relating to the assessable item and the amount of property tax payable shall be supplied to every owner or occupier, who has filed the return and that the Commissioner shall receive the property tax specified in the said property tax card and make necessary entry in the said card as well as in the assessment book maintained by the Corporation. Provisions have also been made for correction if any to be made in the property tax card either in pursuance of any revision in the property tax or an order passed in appeal against the order of the Commissioner and authenticated by the Commissioner or any officer authorised by him both in the property tax card as well as in the assessment book. The rules declare that the property tax card shall be valid until the assessment is revised during a general revision or earlier as the Government may direct in this behalf. The Commissioner is also empowered to make arrangements for the verification of the particulars furnished in the return filed by the owner or occupier of every assessable item immediately after a general revision and before the next general revision and if any discrepancy is noticed in the particulars furnished in the return filed by the owner or occupier, the Commissioner is empowered after giving a reasonable opportunity of being heard of the person concerned and after considering the objections, if any, to modify the assessment from the date on which the assessment was made and collect the arrears of tax.

5. The provisions contained in Part V relating to revision of assessment, as substituted under the impugned amendment, proclaims the existence of one or more Taxation Appeal Tribunal for hearing and disposing of appeal preferred by any person, who is not satisfied with the assessment order made by the Commissioner and that the Tribunal shall consist of a judicial officer not below the rank of a Sub Judge. Rule 13 as contained in the said Part V requires to be set out in detail since a substantial grievance has been made out against

the provisions contained therein. It reads thus:

"No person who fails to file the return within the notified time under rule 1-C in Part I-A shall be entitled to appeal against any assessment order made by Commissioner."

Rule 14 provides that no appeal shall be entertained by the Tribunal unless the appellant deposits in the Corporation the existing tax and also fifty per cent of the difference between the existing tax and the tax as assessed by the Commissioner in the revision, and enables further that an appeal against the said decision of the Tribunal may also be filed within thirty days from the date of the order to the Principal Judge, City Civil Court. The procedure to be followed by the Tribunal is also set out in the other rules. So far as Part VI of the Schedule is concerned relating to the collection of taxes a new Rule 21-A has been inserted after Rule 21, which reads as hereunder:

"Notwithstanding anything contained in any rule in this part, it shall not be necessary for the Commissioner to serve any notice for the levy and collection of property tax under Sec.98."

6. The rules and the consequent Notification published by the second respondent are challenged as *ex facie* illegal and *ultra vires* the jurisdiction as well as the mandate contained in Arts.14 and 265 of the Constitution of India on the following grounds:

- (a) The rules and the notification which compels the owner or occupier to file returns on or before 1.2.1993 even before the date of commencement of the revision with effect from 1.4.1993 and the insufficiency of the time granted renders them arbitrary, unreasonable and opposed to the spirit of Sec.100(2) of the Act.
- (b) Under the provisions contained in Secs.99 and 100 of the Act, the levy of property tax could be on the annual value of the land and building as one unit and that judicial pronouncements of this Court as well as the Apex Court have firmly settled the principles relating to the determination of the annual value with reference to the reasonable or standard rate which a building may fetch under the Rent Control law and an open market rate than the standard or fair rent envisaged under the Rent Control law cannot be assumed as the basis. In substance, the plea is that the hypothetical rent cannot exceed the standard rent as per the Rent Control laws. Provisions of Rule 3 in Part I-A is said to be inconsistent with Sec.100(2) of

the Act.

(c) The absence of any provision in the Amended Rules neither to make known to the assessee or providing for the assessee to object and to consider such objections is also said to be violative of Sec.100(2) of the Act and the principles of natural justice. In substance, the absence of a pre-decisional hearing of the assessee is said to confer an arbitrary and unguided power to assess in any manner or method without disclosing the same to the assessee.

(d) The absence of guidelines as contemplated under Rule 3(iii) as also the provision for issuing such guidelines is said to be bad in law for the reason that the rent reasonably expected is a matter for adjudication independently and cannot be fettered by any guidelines whatsoever.

(e) The provisions contained in Rule 13 depriving an assessee who failed to file a return, to file an appeal against the assessment made by the Commissioner is challenged as an arbitrary one and the absence or denial of appeal in such cases would constitute conferment of arbitrary and uncanalized power to make assessment on the Authority concerned. Rule 13 is also challenged as in excess of the rule making power and violative of Art.14 of the Constitution of India.

(f) The pro forma framed by the Commissioner and published in the notifications in the Press is not one framed under the Rules, and as a matter of fact, is without reference to and opposed to the rules themselves.

It is contended that in not providing for giving all relevant details and seeking for irrelevant details, the procedure including the form envisaged to be filed and observed for assessment is said to be arbitrary and whimsical.

7. The modality of assessing the appurtenant land as disclosed is also challenged and it is pleaded that an opportunity should be given to enable the assessee to give a computation of his own for determining the annual value of his building. The move of the second respondent to compel disclosure of materials, which are already available with the second respondent himself is challenged to be arbitrary, besides expressing an apprehension with reference to the details sought for in the pro forma as leading to a reasonable presumption that the

assessment is going to be on the plinth area in derogation of the Scheme of taxation underlying Sec.100, which should be only on the annual value.

8. The second respondent has filed a detailed counter-affidavit. It is contended therein that the writ petitions are premature as well as misconceived. It is contended that the rules have come into force as early as on 1.4.1988 and the challenge at this stage is belated. While pleading that the population of the Madras city is 40 lakhs as per the latest census and comparatively the per capita property tax collection is the lowest among Bombay, Delhi, Bangalore and Hyderabad City Corporations. It is contended that there is every need to augment the revenue from this source of property tax to keep pace and also meet the alarming increase in the demand for provision of basic amenities to cope up with the increase in population and it is said to be causing considerable financial strain to the Corporation. It is also stated that the last revision of the property tax was during the years 1978-79 and there is every justification and need for revision as visualised and the challenge now made is unjust and unsustainable. While denying the assumption of the petitioners that the revision of the tax is not going to be on the annual value principle, it is declared that the second respondent is going to determine the annual value only as per Sec.100 of the Act and bearing in mind the principles laid down by the various decision of this Court and that of the Apex Court and the details called for in the pro forma are relevant for the purpose of ascertaining the reasonably expected rent and that the apprehension to the contrary has no basis either on facts or in law.

9. The second respondent also states that the time granted is sufficient in law and that the demand to file returns before 1.2.1993 does not offend either Sec.100(2) or Sec.104 of the Act, and that as a matter of fact the liability to pay tax arises in terms of Sec.104 within 15 days after the commencement of the half year and there is nothing wrong in the Corporation in trying to get the relevant details in advance to make the assessment on the commencement of the half year on 1.4.1993. It is contended that the rules made do not provide for a pre-decisional hearing before assessing the annual value and the grievance in this regard has no legal basis. It is stated that even before the amendment effected by the impugned rules, there was no scope for any such hearing and at any rate the Act does

not provide for any pre-decisional hearing. While denying that the rules confer any arbitrary or uncanalized or unguided power, it is stated that there is sufficient safeguard in the form of an appeal and also by a further appeal to the Principal Judge, City Civil Court.

10. The second respondent also states that guidelines contemplated under Rule 3(iii) is not a must and that as it is there are no such guidelines issued by the Council and that the tax will be assessed on the basis of the principles enshrined in Sec.100 of the Act. The plea that the assessment procedure is a *quasi judicial* one is denied. The second respondent also seeks to justify the denial of a right of appeal to a person, who has not submitted a return in time on the ground that no one has an inherent or a fundamental right of appeal and that no exception could be taken to the said provision. It is also contended that the particulars called for in the pro forma are relevant and necessary for properly assessing the annual rental value as laid down in Sec.100 of the Act and that the assessment is going to be really on the basis of reasonable letting value as visualised under Secs.99 and 100 of the Act by limiting the same to the standard fair rent. While stating that the second respondent will be guided by the particulars furnished in assessing the property tax in terms of Secs.99 and 100 of the Act, it is pleaded that there is an opportunity to be heard by the Commissioner or his representative though it is not clearly spelt out in what form and what stage and it is also open to the assessee to file an appeal to the Tribunal and thereafter to the court as envisaged and that the calling for the particulars under the impugned notification in the pro forma cannot be said to be either unreasonable or arbitrary. While contending that the main source of revenue of the Corporation is the property tax, it is pleaded that any stay of assessment or recovery would dislocate the execution of several works of public importance, besides creating a stalemate in the administration of the affairs of the Local Body. It is also assured that the statement of the assessee given in the pro forma would be got verified with the available records maintained by the Corporation and that no exception could be taken to the notification calling upon the filing of the pro forma return.

11. The learned Special Government Pleader appearing for the first respondent while adopting the submissions of the learned counsel for the

second respondent, contended that the impugned rules have been made by the state in exercise of the powers conferred under Sec.347(3) of the Act, that the draft of the amended rules has been approved by the Tamil Nadu Legislative Assembly as required by Sub-sec.(5) of Sec.347 and consequently the plea of arbitrariness or unreasonableness or want of jurisdiction is only misconceived and without basis. Argued the learned Special Government Pleader further that the amendments have been devised to keep in conformity with the current requirements and that the Scheme underlying the rules would, on an overall consideration, would prove to be not only just and reasonable but help effectively to ensure a proper implementation of the provisions contained in the chapter relating to the assessment and recovery of property tax under the Act. It has also been contended that the notification issued by the second respondent is quite in conformity with the procedure envisaged by the amended rules and that no exception whatsoever could be taken to the legality or the propriety of the amendments made.

12. Mr.K.C.Rajappa, learned counsel appearing for the petitioners, while Mr.N.R.Chandran, Senior Counsel assisted by Mr.N.Kannadasan appeared for the second respondent and Mr.P.Sathasivam, learned Special Government Pleader appeared for the State (1st respondent). The learned counsel reiterated their respective submissions made in the pleadings as referred to supra. Reference to some of the decisions of courts, both of this Court and the Apex Court, relied upon by the learned counsel, may be made at this stage, before considering their respective tenability of their respective submissions.

13. The decision in *State of Andhra Pradesh v. Raja Reddy*, (1968)1 M.L.J. (S.C.) 6: (1968)2 S.C.J. 857: (1967)21 T.J. 777: A.I.R. 1967 S.C. 1458, has been relied upon to contend that absolute discretion cannot be arbitrarily left to the officers and the absence of proper machinery, opportunity and right of appeal renders the very levy unconstitutional. That was a case involving the constitutional validity of Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act as amended by the Amending Act 23 of 1962. The Apex Court was of the view, on the provisions contained therein that the whole imposition of assessment was left to the arbitrary discretion of the officers not even named in the Act and that too

without giving any remedy whatsoever to the assessee for questioning the correctness of any of the important stages in the matter of assessment, and that therefore the levy was held to be violative of Art.14 of the Constitution of India. In coming to such a conclusion, the Apex Court applied their earlier decisions, holding that taxation law is not an exception to the doctrine of equality enshrined in Art.14 of the Constitution of India, though in the application of the principles underlying the same the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature so that it can adjust its system of taxation in all proper and reasonable ways. The learned counsel next relied upon a decision of this Court in *Dalavai v. Government of Tamil Nadu*, (1978)1 M.L.J. 93: 91 L.W. 110. The said decision directly concerned the determination of valuation of property, the principles governing such determination and the procedural safeguards to be secured to an assessee to make the assessment and levy in conformity with law. The learned Judge (Ramanujam, J.), while declaring after noticing the decisions of the Apex Court that the property tax cannot be levied under Sec.100 of the Act on the plinth area basis, but has got to be determined on the annual valuation of property, with particular reference to the rent the premises can lawfully fetch if the premises is let out to hypothetical tenant for a fair rent that may be payable under the Rent Control Act in force during the year of assessment, categorically held that the Assessing Authority is not free to assess the tax on any arbitrary annual value. It has been reiterated that even in cases where the rent actually collected by the landlords are higher than the standard/fair rent permissible under the Rent Control Act, the assessment could not be made on the basis of the actual rent received by the landlord, but on the other hand, has to be only by the fair rent, which alone the landlord is entitled to collect legally from the tenants. While analysing the Scheme underlying the assessment and revision rules, which have been substituted by the impugned amendment, it has been held in the said decision as hereunder:

“This leads us to the fourth contention set out above. It has been pointed out that before finalising the assessment list an opportunity must be given to the assessment to object to the enhanced valuation. The petitioner’s

complaint is that in all the special notices issued before finalising the assessment list, how the annual value has been ascertained has not been stated and that, therefore the assessee is handicapped in putting forward their objections to the basis and the mode of fixing the annual value. I am inclined to agree with the contention of the petitioner that the mere mention of the annual value, as determined by the assessor in the special notice, is not sufficient and that the details as to how that valuation was arrived at are necessary to put the assessee on notice of the basis, and the mode of fixing the annual value so as to enable him to file objections to the proposed increase. Sec.100 of the Madras City Municipal Corporation Act, 1919, enables the property tax being levied on the gross annual rent at which they may reasonably be expected to let at the time of assessment less a deduction, in the case of buildings, of ten per cent of such annual rent which is attributable to the buildings alone, in lieu of all allowance for repairs, etc. Schedule IV of the Act sets out the rules governing the levy and assessment of property tax. Rule 1-C directs the Commissioner to enter the annual value of all lands and buildings and the tax payable thereon in the assessment books. Rule 1-D enables a general revision of the assessment books by the Commissioner once in every five years. Rule 1-E says that an assessment once made shall continue in force until it is revised and until the revised assessment takes effect. Rule 2 says that when assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Commissioner shall give public notice specifying the time when and the place where the books may be inspected and stating that revision petitions will be considered if they are preferred within 15 days from the date of such notice. The proviso to rule 2 specifically says that in every case where there is an enhancement in the assessment the Commissioner shall also cause intimation thereof to be given by a special notice to be served on the owner or occupier of the property concerned. Rule 3 says that the Commissioner may after giving notice to the parties concerned and after hearing their objections, if any, amend the property tax assessment books

at any time between one general revision and another, by altering the valuation of any property or the amount of tax. The proviso to Rule 2 clearly indicates that wherever there is an enhancement in the assessment, a special notice is to be served on the owner or occupier of the property concerned. The special notice contemplated by the proviso is intended to give an opportunity to the owner or occupier of the property to put forward his objections to the enhancement in the assessment. The owner or occupier can put forward his objections only if he knows why there has been enhancement in the assessment. Therefore, the special notice should necessarily contain the basis for enhancement of the assessment so that the assessee may be able to object to the enhancement of the assessment. Thus, there is considerable force in the contention of the petitioner that the special notices issued by the second respondent should contain the reasons for the enhancement of the assessment and unless the reasons are given, the assessee may not be able to put forward any effective objections to the said enhancement.

The petitioner has produced a bundle of photostat copies of the special notices served on some of the assessment in some of the Corporation Divisions. In all these special notices, the old annual value before the revision and the new annual value after the revisions have alone been mentioned and the reason for enhancement has not been given. The assessee on receipt of such special notices cannot be expected to know as to whether the enhancement may be due to (1) rental difference noticed during the course of inspection of the property by the assessing officers, (2) additions of alterations in the existing building, or (3) construction of a new building. Unless the assessee is told as to what is the reason for the enhancement in the assessment, he may not know on what ground the enhancement has been made. In such cases, he may not be able to put forward his objections specifically and effectively. It is, therefore, clear that the special notices should give reasons for enhancement."

While referring to the decision in *Commissioner of Income-tax v. Balakrishna Malhotra*, 81 I.T.R. 759, the learned counsel submitted that the word

'assessment' takes within it not only the mere computation of the income, but also the determination of the tax and consequently there should be a pre-decisional hearing. While relying upon *Sales Tax Officer v. Abraham*, (1967) 20 S.T.C. 367, a case arising under the Central Sales Tax, the learned counsel for the petitioners submitted that the expression 'in the prescribed manner' cannot confer on the rule making authority the power to prescribe a rule of limitation. The decision in *Bharat Barrel Company v. Employees' State Insurance Corporation*, A.I.R. 1972 S.C. 1935: 41 F.J.R. 481: (1972) 1 Lab.L.J. 854: 1972 Lab.I.C. 1074, was also relied upon for the same purpose. While adverting to the phraseology employed in Rule 1(C)(1) and comparing the same with Sec.22(1) of the Income Tax Act, 1922, the learned counsel submitted that individual notices also are necessary in addition to the public notification.

14. Mr.N.R.Chandran, learned Senior Counsel, relied upon the decision in *Murugesan v. Collector of North Arcot*, (1966) 2 M.L.J. 290 and contended that the assessment would not be without jurisdiction merely because no guidelines have been prescribed by the Council. The decision relied upon was one rendered under the Tamil Nadu Panchayats Act, challenging the division of wards for the conduct of elections to the Panchayats in the State. The Division Bench held that the division of the Panchayat into wards by the Inspector under Sec.16 of the Act would not be without jurisdiction merely because no rules prescribing the scales in accordance with which the division to be effected or formulated by the Government as provided by the later part of Sec.16 of the Panchayats Act. The decision in *R.Valliammal v. Commissioner, H.R. & C.E., Madras*, (1975) 2 M.L.J. (NRC.) 7, was rendered under the Tamil Nadu Hindu Religion and Charitable Endowments Act, 1959. While construing the expression 'subject to such conditions as may be prescribed in Sec.45 of the Act, the Division Bench held that is only meant that if and when any conditions are prescribed, the power of appointment of an Executive Officer can be exercised only subject to those conditions, and the provisions cannot be construed to mean that the power is not available if no conditions have been prescribed.

15. After a careful consideration of the respective submissions of the learned counsel appearing on either side, I am of the view that the apprehension

of the petitioners that the proposed revision of the property tax is sought to be made on the basis of the plinth area and not really on the annual value has no basis in law or otherwise. Apart from the candid admissions made by the second respondent in the counter affidavit filed it is by now well settled by catena of decisions of this Court and that of the Apex Court that the rateable value of a building whether tenanted or self-occupied is limited by the measure of standard rent arrived at by the Assessing Authority by applying the principles laid down in the Rent Act and cannot exceed the figure of the standard rent so arrived at though in a given case, it may be lower than such standard rent. It has been held and the law as beyond controversy that within the upper limit of the rateable value of the premises so fixed the Assessing Authority would have to determine the reasonable rent by evaluating factors such as size, situation, locality and condition of the premises and the amenities thereon provided. *Devan Dauler Rai Kapur v. New Delhi Municipality*, A.I.R. 1980 S.C. 541, *Dr.Balbir Singh v. Municipal Corporation of Delhi*, A.I.R. 1985 S.C. 339, *Dalavai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93: 91 L.W. 110. Thus it has been held that annual value cannot exceed the standard rent and even landlord actually receiving higher rent in an individual case matters very little for determination of the annual value for levying and collecting property tax.

16. The next aspect that requires to be considered is the legality of the pro forma prescribed by the second respondent and the propriety of the demand made by filing the return within the stipulated time on threat of sufferance of certain disabilities. There is no dispute that the proforma return, as such has not been prescribed by the State Government or that any specific authorisation of the second respondent is so made to formulate any such form. But the question would be as to whether the absence of such enabling power undermines the efficacy of the form published. The rules contained 1-C(1) prescribes the particulars that should be furnished by the owner/occupier and the period within which such form should be filed by those liable. In the light of such prescription made, the fact that a format has been devised by the second respondent for the convenience of an owner/occupier or does not militate against its efficiency merely because the format of the return itself has not been so prescribed under rules. The

plea on behalf of the petitioners that no time limit or period of limitation as such could have been prescribed under the rules in the absence of specific conferment of power in this regard and the reliance placed upon two decisions of the Apex Court are incorrect and inappropriate. Unlike the ordinary rule making power that was the subject matter of consideration in the decisions of the Apex Court relied upon for the petitioners, the rules in question though made by the State Government are made after two drafts of the same is moved and placed before the Legislature and specifically approved by the State Legislature as required under Sec.347(5) of the Act. That apart, it is a well accepted principle of statutory construction that the rules in the Schedule to the Act are as much part and parcel of the statutes itself and the infirmity alleged cannot be said to exist in such cases so as to affect the legality and validity of the notification prescribing the time limit within which the return visualised has to be filed and the relevant particulars are furnished to facilitate a time bound finalisation of the assessment proceedings to ensure the effective collection of the tax due to the second respondent to carry out their duties and obligation under the statute.

17. The learned counsel for the petitioners made a grievance of the notification of the second respondent and the procedure for assessment, by drawing inspiration from the meaning or purport of the 'return' and 'assessment' from the other taxation laws and contending that the provisions of the impugned rules do not conform to those well accepted concepts of definite import and object in a law of taxation. The learned Senior Counsel appearing for the second respondent contended that there can be no analogy or comparison as is sought to be made by the learned counsel for the petitioners and that the object of calling upon the owners/occupiers to file the returns is to make the details sought in the proforma conveniently available for verification, processing and ultimate assessment only in terms of the statutory formula, standard and principles underlying Sec.100 of the Act and already declared by this Court and the Apex Court. The notification also states that if no return was filed within the notified time, the Corporation will *suo motu* revise the assessment of the property and the owner of the property shall not be entitled to file an appeal against such assessment, as per the act.

The legality or otherwise of the provision disabling on assessee who has not filed his return from filing an appeal will be separately dealt with and need not concern the consideration of this stage. A reading of the Rule 1-C(1) of Part 1-A would go to show that the return envisaged thereunder is not of the conventional nature as prescribed in the other taxation laws. Apart from the non-prescription of the form as such the rules contemplate a return containing certain details and information which have been stipulated by the rules themselves. Rule 2 provides also that in case of default in the filing of the return within the notified time the preparation of the return by a person authorised by the Commissioner by entering upon and making an inspection of the assessable item. As a matter of fact, the explanatory note appended to the motion of the draft rules submitted before the Legislature under Sec.47(3) of the Act, also refers to the object and purpose of the return in the following terms: "The assessment of property tax is now made by inspecting the buildings and with reference to the oral information furnished by the occupants of the buildings or lands without reference to any written records. Therefore, the present method of assessment of property tax has led to public criticism. In Bombay and Calcutta Corporations, the assessment is based on the returns filed by the owners or occupiers of the buildings or lands. It has, therefore, been considered that the assessment of property tax may be made based on the returns filed by the owners or occupiers of the buildings or lands."

18. Therefore, it could be seen that the object of the rules itself is to allow participation of the owner/occupier in the very process of assessment/revision by enabling him to disclose certain relevant details relating to the assessable item, in his own interest and even in cases of default cause such details to be ascertained by the inspection assessable item by a person authorised to facilitate assessment/revision. Even under the old rates for assessment/revision the ultimate burden to make the assessment/revision was that of the authorities and the introduction of the system of filing of a return, does not in my view make any change in this regard, except that it extends an extent of participation in the process by the owner/occupier himself of the property concerned. Consequently, the second respondent cannot also be said to be exonerated or relieved of his duties and

obligations to cause a due verification of the relevant details relating to the assessable item before proceeding to assess/revise the tax liability of an assessee, in accordance with the well-settled principles relating to the levy and collection of property tax under the Act. Merely because the owner/occupier fails to file a return as envisaged, the second respondent cannot arbitrarily or whimsically assess/revise the liability in any manner he thinks. The process of assessment/revision of the liability continues to be objective and not rendered subjective merely on account of any default in filing the return, by an owner/occupier. So far as the assessment to be made is concerned, the learned counsel for the petitioners also expressed the grievance about the provisions contained in Rule 3 of the Rules. It is a well accepted principle of law that the phraseology "having regard to" do not mean having regard to only those mentioned and that the authority could not take into account other relevant, vital or necessary materials or particulars or that such materials not specified are excluded from consideration. Likewise, the absence of guidelines issued by the council or even the existence of guidelines do not affect the exercise of power of assessment/revision objectively taking into account only the provisions in the Act, rules and the law declared by courts. The guidelines, if any, could only fill up any gaps or at any rate, serve as guidelines and cannot either override the law or have any binding effect so as to fetter or freeze the exercise of discretion and discharge of powers and duties objectively and independently. I find nothing wrong in the Commissioner being enjoined to have regard to the annual value of the assessable item as on 1st October, 1978, since that was the last of the general revisions made, for purpose of further revision now contemplated. The relevance of the existing assessment for further revision cannot totally be ruled out and no basic or legal infirmity can be said to affect the exercise made by the Commissioner, which as referred to supra, has to be only in accordance with Sec.100 of the Act and the law already declared by the decisions of this Court, keeping in view to the extent possible and permissible, the rules in question.

19. The learned counsel for the petitioners further challenges the provisions contained in Rule 13 in Part V of the IV Schedule that no person, who fails to file the return within the notified time under

Rule 1-C in Part I-A shall be entitled to appeal against any assessment order made by the Commissioner. The learned counsel for the respondents tried to justify the provision as containing a sanction for compelling the owners/occupiers to file a return and that at any rate, there was nothing wrong in a defaulter being denied of a further right of appeal. I am unable to countenance the stand taken for the respondents in this regard. The right of appeal, no doubt, is a creature of the law and the absence of any provision for an appeal or revision against a decision, in the context of modern development of law is viewed as a serious infirmity, particularly in view of the fundamental principle of rule of law enshrined under Art.14 of the Constitution of India. So far as the case on hand, there is no controversy that a right of appeal to the Taxation Appeal Tribunal and a further appeal to the Principal Judge, City Civil Court have been provided for. The question is whether the said right of appeal could be denied to an owner/occupier merely because he failed to file the return envisaged under Rule 1-C(1) of Part I-A of the IV Schedule. The failure on the part of the owner/occupier to file the return disclosing the details sought, as held already by me, does not absolve the second respondent of his obligation and duty to verify about those details relating to the assessable item or the obligation cast upon him to act objectively and reasonably while exercising his powers of assessment/revision. Consequently, no immunity from challenge could be afforded to an assessment/revision made by the second respondent even in such cases and there is no rhyme or reason in Rule 13. In a taxing law, normally orders passed *ex parte* or to the best of judgment due to the non-cooperation of the assessee in completing the assessment process, are also made subject to a right of appeal and or revision and the stipulation contained in Rule 13 not only sounds illogical, arbitrary and unreasonable, but smacks of draconian devilry and cannot be said to be justifiable for any good reason or on sound principle of law or logic. An owner/occupier, who has failed to file a return, called for, is as much entitled to file an appeal as one who has filed a return. Consequently, Rule 13 of the Part V of the IV Schedule to the Act is struck down as arbitrary, unreasonable and violative of Art.14 of the Constitution of India and declared *null and void*.

20. The further serious challenge made by the learned

counsel for the petitioners is about the absence or denial of any pre-decisional opportunity or hearing before completing the process of assessment/revision. Even under the old and substituted rules when the assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Commissioner had to give a public notice specifying the time when and the place where the books may be inspected and stating that revision petitions will be considered if preferred within 15 days from the date of such notice and the rules also provided that in cases of enhancement in the assessment, a special notice shall issue to the owner/occupier and only after hearing the said person shall amend the assessment books. This Court in the decision reported in *Dalvai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93: 91 L.W. 110, has held that such notice of enhancement should disclose the reasons or basis for such enhancement to enable the assessee to put forward any effective objections to the same. But, the new rules, apparently for the reason that the assessment invariably would be made on the return filed provides for an assessment/revision without any such opportunity. Rule 6 provides for such an opportunity only in cases where the Commissioner, on verification made of the particulars in the return after a general revision and before the next general revision seeks to modify the assessment already made from the date on which the assessment was made, and not otherwise. No doubt, there is an appeal to the Taxation Appeal Tribunal and a further appeal to the Principal Judge, City Civil Court. A careful analysis of the rules under challenge disclose the following:

- (a) After the stage of filing the return or ascertaining particulars in the absence of any such return, the Commissioner assess the property tax or revise the existing assessment of the property to tax;
- (b) There is no provision for pre-decisional hearing or making representation as against the proposal of the Commissioner for revision and enhancement;
- (c) No provisions exist for communicating the order passed or disclosing the reasons or basis for the enhancement of the levy or for assessment/revision;
- (d) Only the supply of a property tax card, with details mentioned therein, and that too to only those who filed the return, is contemplated;

(e) Provision has been made for filing an appeal to the Taxation Appeal Committee and a further appeal to the Principal Judge, City Civil Court. The appeal to the Tribunal cannot be entertained unless the appellant deposits in the Corporation the existing tax and also fifty per cent of the difference between the existing tax and the tax as assessed by the Commissioner, in the revision.

21. The above grievances expressed by the petitioners have got to be considered in the light of those inevitable consequences flowing from the rules under challenge. It is by now well-settled that rules of natural justice or the principle of *audi alteram partem* are not rigid rules, but they are not only flexible, but their application depends upon the setting and background of statutory provisions, nature of the right which may be affected and the consequences which may entail its application or non-application. It is also well-settled that the application of those uncodified rules can be excluded by express provision or by implication, of course subject to the rights of this Court and the other competent authorities to adjudicate on the constitutionality of doing so. Wherever the law contemplates by making a suitable provision for a post decisional hearing amounting to a full review of the original order on merits, it can be construed as an exclusion of the *audi alteram partem* principle and if the law is silent with regard to the giving of a pre-decisional hearing to the person affected and the decision taken by the authority involves civil consequences and no full review or appeal on merits against the decision is provided. Courts would hesitate to construe an exclusion of the duty to afford a hearing or opportunity unless viewed pragmatically it would paralyse the administrative process or frustrate the need for utmost promptitude. The courts of law have been enjoined to always make every effort to salvage the cardinal rule of *audi alteram partem* to the maximum extent possible with situation modifications and ensure as far as possible that the person affected has a reasonable opportunity of hearing or showing cause against the proposed action against him. (*Vide: Swadeshi Cotton Mills v. Union of India*, A.I.R. 1981 S.C. 818: (1981) 1 S.C.C. 664: 51 C.C. 210: 58 F.J.R. 190: (1981) 2 S.C.R. 533).

22. So far as the cases on hand are concerned, there can be no two views on the claim of the

Corporation that a revision of the property tax is long overdue and imminent, having regard to the fact that the last general revision was only in 1978 and the further facts that not only there had been a steep rise in the annual value, but substantial increase in the commitments of the Corporation to provide basic amenities and that the increase in the cost of providing such amenities to the residents also warrant and justify such a revision. The justification of the end alone cannot justify the adoption of any means or procedure, ignoring completely the prejudice that may be caused to the citizen. Rule 3 obliging the Commissioner to assess the property tax and forming part of Part 1-A relating to assessment of property tax does not exclude the principles of natural justice. Unlike the earlier set of rules there was no opportunity given to make representations by means of a revision to the Commissioner before actually amending or revising or enhancing the assessment and enforcing the same. The rules are silent about giving of any reasons or disclosing the basis of enhancement either before or immediately thereafter by serving any order or proceeding except supplying a property tax card, apparently containing the details relating to property, annual value fixed and the property tax assessed to be paid. In the absence of any of those details or disclosure of the basis or reasons for enhancement, it would not hold the assessee to effectively even vindicate his rights in the appeal provided for and formulate the grounds on which the enhancement can be challenged. As a matter of fact, prior to the impugned amendments and even under the earlier rules when an occasion like this arose, this Court in the decision in *Dalavai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93: 91 L.W. 110, pointed out all these and emphasised the need for disclosing the basis and reasons for enhancement. The Legislature has not and could not be said to have nullified or altered the said position of law by the impugned amendments, particularly in the absence of specific rule or provision to the contra. The insertion of Rule 21-A to the extent that notwithstanding anything contained in any rule "in this part", it shall not be necessary for the Commissioner to serve any notice for the levy and collection of property tax under Sec.98 cannot have the effect of dispensing with the requirements of principles of natural justice at the stage of assessment/revision and

enhancement of the levy by the Commissioner. This is obvious from the fact that Rule 21-A has been inserted in Part VI relating to collection of taxes and the rule is also meant to be a non obstante clause in respect of anything contained to the contra or in any rule in Part VI and not the other parts of the IV Schedule particularly Part I-A.

23. In the light of the above principles and context of the rules under consideration and their purport and object, it has to be considered whether there is any justification for excluding the principles of natural justice at the earlier stage. There can be no serious controversy over the position that the assessment, levy and collection of tax involve civil consequences. The rules relating to assessment are also silent on the exclusion of the principles of natural justice at the stage of assessment or revision as the case may be. While so, merely from the fact that after an assessment or revision, there is a provision for appeal, particularly when the rules do not cast an obligation on the Commissioner to write an order with reasons and communicate them to the assessee, for enabling the assessee to effectively challenge the assessment or enhancement of the tax made. The long lapse of time between the present revision proposed and the earlier general revision in 1978 or the justification or imminent need for a general revision is no ground to jettison the application of rules of fair play. Instead suitable directions may and have to be issued to adjust and harmonise the need for speed and also the obligation to set fairly and modify the measure of its application in reasonable proportion to the exigencies of the situation. The assessment and communication of the demand either in the form of a notice or the property tax card or both need not necessarily be in the beginning or the first day of the commencement of the half year and it may be either in the course of the first half year or by the close of the succeeding half year concerned (Vide Rule 20(3)). This would be in conformity with the mandate of Sec.100(2) of the Act that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may 'at the time of assessment' reasonably be expected and inevitably the assessment is an event to follow the date of commencement of the half year concerned. In view of the above the second respondent, in my view, would not suffer any damage or injury by

being directed to adhere to the principles of natural justice to the required possible extent. Consequently, though there is no justification to stall the assessment process set in motion by the issue of the impugned notification under the rules under challenge, it is necessary, in my view, for the second respondent to serve a provisional notice containing the proposed revision and the reasons or basis for the enhancement before passing final orders under Rule 3 and give the assessee at least a period of 15 days time to submit the objections of the assessee and consider them before passing final orders of assessment/revision under the Rules, though not a personal hearing at that stage. This procedure shall be adopted in respect of all assessees irrespective of the fact whether they filed a return or not, as called for under the impugned notification. The adoption of the said course would be in the best interests of both parties before this Court.

24. Many of the other grievances expressed at the time of hearing appear to be hypothetical and premature and in anticipation of some untoward action being taken. In the light of the safeguard now provided by me, there would be no scope for such apprehensions and if in any case any injustice is meted out, there is sufficient safeguard in the form of an appeal to the Tribunal initially and thereafter to the Principal Judge, City Civil Court. The conclusions of mine and directions shall enure to the benefit of all assessees, irrespective of whether any one has filed any writ petition or not in this Court or filed any return within the time stipulated or not, so far.

25. The plea raised by the respondents on the ground of laches has no merit, since the petitioners have come immediately when the rules were sought to be enforced against them. The plea that the writ petitions are premature also does not merit acceptance since the very constitutional validity of the rules themselves are being challenged.

26. For all these reasons stated above, I would summarise my conclusions and directions in the matter, as hereunder:

(i) The assessment/revision of the property tax shall be only in accordance with Sec.100 of the Act on the annual value to be ascertained and determined on the principles laid down in *Devan Daulet Rai Kapur v. New Delhi Municipality*, A.I.R. 1980 S.C. 541, *Dr. Balbir*

Singh v. Municipal Corporation of Delhi, A.I.R. 1985 S.C. 339 and *Dalavai v. Government of Tamil Nadu*, (1978) 1 M.L.J. 93: 91 L.W. 110, as also conceded by the second respondent.

(ii) The owners/occupiers liable to submit their returns shall have further time to do so till 28th February, 1993, and the returns may be either in the same format or any other form, but must contain all the relevant details and information stipulated in the format and rules or such further or other details relevant for the purpose.

(iii) On receipt of the said returns and even where there are no returns filed, the Commissioner shall be at liberty to proceed further with the assessment process by serving a provisional notice of enhancement whenever there is any with the reasons for the enhancement, giving at least 15 days time to enable the assessee to file their representations against the proposal, consider the said objections and pass final orders, amending the books of assessment.

(iv) The assessment so made shall be effective from the first half year of 1993-94 (with effect from 1-4-1993) as notified, subject to the provisions governing revision and appeals.

(v) The provisions of Rule 13 is struck down as arbitrary unreasonable and violative of Art.14 of the Constitution of India and consequently null and void. The assessees shall be entitled to file an appeal or submit their representations irrespective of the fact whether they have actually filed their returns or not.

(vi) Subject to the above declaration and directions, the respondents shall be entitled to and be at liberty to proceed further with the assessment process initiated by the notification issued on 3.1.1993, and

(vii) The impugned rules issued in G.O.Ms.No.1178, Municipal Administration and Water Supply, dated 10.12.1987, published in the Tamil Nadu Government Gazette (Extraordinary), dated 10.12.1987 are held valid, but their enforcement shall be subject to the declaration of law and directions given above in this order.

27. These writ petitions shall stand ordered in the manner and to the extent indicated above. In all other respects, the relief claimed shall stand rejected. But, in the circumstances of the case,

there shall be no order as to costs.

R.S. ----- Petitions ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- Abdul Hadi, J.

S.A.No.735 of 1982 27th November, 1992.

A.Sankaralingam ...Appellant
v.

Arunachala Reddiar and others ...Respondents.

(A) *Evidence Act (I of 1872), Sec.67 - Mode of proof of document - Objection as to - When should be taken.*

It has been held that the objection regarding the mode of proof of a document has to be taken at the time when it is being exhibited and not at a later stage. [Para 5]

(B) *Evidence Act (I of 1872), Sec.67 - Piece of evidence not proved in proper manner admitted without objection - If can be challenged at a later stage.*

Where a piece of evidence even assuming not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of litigation. [Para 5]

(C) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), Sec.3(b) - All natham properties whether Government or Panchayat properties.*

There is no law saying that all natham properties are Government or Panchayat properties. The decision in *Rengaraja Iyengar v. Achukannu Ammal*, (1959) 2 M.L.J. 513, is that Gramanatham does not stand vested in the Government under Sec.3(b) of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). Thus, at any rate, it cannot be said automatically that all natham properties are Government properties. [Para 7]

(D) *Pleadings - Plea not put forward - Evidence on, if can be looked into.*

The fundamental principle is that no amount of

evidence can be looked into on a plea which was never put forward. [Para 9]

Cases referred to:

Ghansilal v. Bhuridevi, A.I.R. 1964 Raj. 39.

[Para 3A]

Surendra Bahadur v. Bahari Singh, (1939) 2 M.L.J. 762: 181 I.C. 216: 1939 M.W.N. 867: A.I.R. 1939 P.C. 117. [Para 3A]

Dhiren Ballung v. Bhutuki, A.I.R. 1972 Gluhau. 44. [Para 4]

Bhagawan Dass v. Khem Chand, A.I.R. 1973 P.& H. 477: (D.B.). [Para 4]

Gopal Das v. Sri Thakurji, (1943) 2 M.L.J. 51: 207 I.C. 553: A.I.R. 1943 P.C. 83: 1943 M.W.N. 334. [Para 4]

Harnam Singh v. Dalip Singh, (1963) 65 Pun.L.R. 1133. [Para 4]

Karupanna v. Kolandaswami, (1953) 2 M.L.J. 717: 1953 M.W.N. 799: A.I.R. 1954 Mad. 486. [Para 6]

Chinnathambi Goundan v. Venkatasubramani, 49 L.W. 326. [Para 7]

Jai Narain v. Kishan Chand, A.I.R. 1968 S.C. 1165. [Para 8]

Rengaraja Iyengar v. Achukannu Ammal, (1959) 2 M.L.J. 513. [Para 7]

S.V.Jayaraman, for Appellant.

N.V.Balasubramaniam, for Respondent.

The Court delivered the following
JUDGMENT: The plaintiff is the appellant in this second Appeal. The suit is for declaration of his title to the suit property and for consequential injunction or in the alternative for possession. The suit property is a vacant site measuring east to west 10 yards and south to north 23 yards and comprised in S.No.183/1 (part) in Vellur village natham. The plaintiff claimed it under Ex.A-6 sale deed dated 27.3.1978 and according to him, his vendor Gopalakrishnan got the said property under a registered settlement deed dated 22.1.1947, the registration copy of which is Ex.A-3, from one Thirumalaiammal. The plaintiff also sought title by adverse possession alternatively. On the other hand, the claim of the defendant/respondents is that the property being a natham property, vested with the Government and defendants were alone in possession of the property. Further, according to the defendants, the alleged settlement by Thirumalai Ammal could not be true and neither Thirumalaiammal, nor Gopalakrishnan was in possession of the suit property and that the alleged sale in favour of the plaintiff was also

invalid.

2. The trial court decreed the suit for declaration on the basis of the abovesaid title deeds Ex.A-3 and A-6 and holding that the defendants were in possession of the suit property on the date of suit, granted decree for possession. But, on appeal, the first appellate court has dismissed the suit and allowed the appeal on the ground that the plaintiff has not proved the abovesaid Ex.A-3 document, he having not examined any attesor to the said document. The lower appellate court also held that since Ex.A-3 is only a registration copy of the original deed, Sec.90 of the Evidence Act would not come to the rescue of the plaintiff, on the footing that the document in question was more than 30 years old. Further, while the trial court has held that item No.19 in Ex.A-3 is the suit property, the lower appellate court has reversed that finding by saying that in item 19 in Ex.A-3, the western boundary is described as Perumal Iyengar's vacant site and the eastern boundary is described as Yoganandasami madam, but that "the abovesaid boundary is not in existence now". On that reasoning, the lower appellate court has held that the property described as item No.19 of Ex.A-3, does not relate to the suit property.

3. Aggrieved by the said decision of the first appellate court, the plaintiff has preferred this second appeal. The learned counsel for the appellant argues that the lower appellate court erred in holding that Ex.A-3 has not been proved since no attesor therein has been examined. According to him, there is no specific denial by the defendants regarding the execution of Ex.A-3. All that has been pleaded in the written statement regarding Ex.A-3 is only as follows:

"The further contention that Thirumalai Ammal executed a registered settlement deed in favour of one Gopalakrishna Iyer on 22.1.1947 cannot be true. The plaintiff should prove the truth and validity of the alleged Settlement Deed dated 22.1.1947. The Settlement deed even if true cannot convey any title in favour of the Donee as the donor herself had no title, right, or interest in the suit property."

According to the said counsel, in view of this pleading, there is no scope for the application of Sec.68 of the Evidence Act. Sec.68 of the Evidence Act runs as follows:

"68. Proof of Execution of Document Required by Law to be attested. If a document

is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

According to the learned counsel, since there is no specific denial of the execution of Ex.A-3, it is not necessary to call an attesting witness in proof of the execution of Ex.A-3 registered settlement deed. On the other hand, the learned counsel for the respondents argues that there is a specific denial of the execution of Ex.A-3 and hence one attesor at least has to be necessarily examined.

3A. I shall first consider the rival submissions on the abovesaid point. The learned counsel for the appellant has not cited any authority regarding the term "Specifically denied" used in the proviso to Sec.68. However, since it has been pleaded that the execution of the abovesaid settlement deed cannot be true, it has to be taken that the execution of the said document has been specifically denied. In fact, I find that in *Ghansilal v. Bhuridevi*, A.I.R. 1964 Raj. 39, relying on *Surendra Bahadur v. Behari Singh*, (1939) 2 M.L.J. 762: 181 I.C. 216: 1939 M.W.N. 867: A.I.R. 1939 P.C. 117, it has been held that where the defendant pleads that a certain paragraph of the plaint is denied the plaintiff is put to strict proof of the facts stated therein and the plaintiff must prove that a legal and valid gift has been made to her, there is specific denial of the execution of the document within the meaning of the said proviso. In the abovesaid *Surendra Bahadur v. Bahari Singh*, (1939) 2 M.L.J. 762: 181 I.C. 216: 1939 M.W.N. 867: A.I.R. 1939 P.C. 117, the plea raised by the defendant ran thus:

"The contesting defendant does not admit the execution and completion of the document sued on, nor is receipt of the consideration of the same admitted."

This plea was regarded by the Privy Council as specific denial of the execution of the document within the meaning of the term "Specifically

denied" in the abovesaid proviso.

4. In the present case, the defendants have also stated in the above extracted portion of the written statement that the plaintiff should prove the "truth" of the alleged settlement deed. They have specifically referred to the said settlement deed and made the abovesaid allegations. It has also been held in *Dhiren Ballung v. Bhutuki*, A.I.R. 1972 Ghuhati. 44, that the term "Specifically denied" is used in the abovesaid proviso in contra distinction to the word "generally" and that in order to understand the meaning of the word "specifically" used in the abovesaid proviso to Sec.68 of the Evidence Act, considerable help could be drawn from the meaning given to that word in O.8 Rule 3 C.P.C., whose object is that the defendant should not exhibit casualness in the matter of his pleadings and that he should exhibit sense of responsibility by making his stand known to the court by dealing with the individual facts set out in the plaint. In the present case, the abovesaid denial cannot be merely termed as general denial, but it can as well be taken only as specific denial with reference to the document, relating to the truth of it and not merely to its validity.

5. However, on a different reasoning, I have to hold that the lower appellate court erred in dismissing the suit on the ground that Ex.A-3 has not been proved. It has been held that the objection regarding the mode of proof of a document has to be taken at the time when it is being exhibited and not at a later stage. To illustrate, in *Bhagwan Dass v. Khem Chand*, A.I.R. 1973 P.& H. 477 (D.B.), it has been held thus:

"The lower appellate court came to the conclusion that Ex.P-12 was not properly proved and, therefore, it had not been established that Kidar Nath was a statutory tenant. In the regular second appeal filed by the plaintiffs, basing his decision on *Gopal Das v. Sri Thakurji*, (1943)2 M.L.J. 51: 207 I.C. 553: A.I.R. 1943 P.C. 83: 1943 M.W.N. 334, and on a decision of this Court in *Harnam Singh v. Dalip Singh*, (1963)65 Pun.L.R. 1133, the learned single Judge came to the conclusion that the document being admissible and no objection having been taken by the defendants to the mode of its proof at the relevant time, they cannot now be heard to object that the document has not been properly proved. The observations of the Privy Council in *Gopal Das v. Sri Thakurji*, (1943)2

M.L.J. 51: 207 I.C. 553: A.I.R. 1943 P.C. 83: 1943 M.W.N. 334, which were relied upon by the learned single Judge, were to the following effect:

"Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof."

In the present case, I find that there was no objection to the proof of Ex.A-3 through the abovesaid Gopalakrishnan, P.W.1, the settlee under Ex.A-3. The following is his deposition, in seeking to prove Ex.A-3 and also the earlier othi document Ex.A-4 dated 16.3.1941, executed by the abovesaid Thirumalai Ammal in favour of some third party:

"அசல் செட்டில்மென்ட் என்னிடத்தில் இருந்தது அது தொலைந்துவிட்டது. எக்ஸிபிட் எ-3 ரிஜிஸ்ட்ரேஷன் நகல் திருமலையம்மாள் தாயா நிலத்தையும் மற்றும் வேறு சொத்துக்களை கோட்டை ஸ்ரீ அழகப்ப செட்டியாருக்கு ஒத்தி வைத்திருந்தான். எக்ஸிபிட் எ-4 அந்த ஒத்திபத்திரம் இந்த ஒத்தி நீர்ந்துவிட்டது"

In fact, even in the cross-examination, there appears to be no specific suggestion that Ex.A-3 was not executed by Thirumalaiammal in favour of Gopalakrishnan. On the other hand, I am able to see only the suggestion regarding the validity of the settlement as borne out by the following answer given by P.W.1 in the cross-examination:

"செட்டில்மென்ட் சட்டப்படி செல்லக் கூடியது என்பது சரியல்ல."

So where a piece of evidence even assuming not proved in the proper manner, has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of litigation. Therefore, the lower appellate court erred in holding that Ex.A-3 has not been proved.

6. That apart, the other reasoning of the lower appellate court that Sec.90 of the Evidence Act would not help the plaintiff, because Ex.A-3 is only a registration copy, is also misleading. It is well known that Sec.90 of the Evidence Act deals with presumption as to documents of 30 years old.

Though this particular Section may not strictly apply to the registration copy of Ex.A-3 that has been filed in the present case, I think Sec.57(5) of the Registration Act would come to the help of the plaintiff in proving the contents of originals of Ex.A-3. Sec.57(5) of the Registration Act runs as follows:

“All copies given under this section shall be signed and sealed by the registering Officer, and shall be admissible for the purpose of proving the contents of the original documents.”

In *Karupanna v. Kolandaswami*, (1953)2 M.L.J. 717: 1953 M.W.N. 799: A.I.R. 1954 Mad. 486, also it has been held thus:

“As stated ‘already under Sec.57(5) of the Indian Registration Act, a certified copy obtained from a Registrar’s office shall be admissible for the purpose of proving the contents of the original documents. That means that the mere production of a certified copy without any further oral evidence to support it would be enough to show that the original document contained. That a registration copy is the copy of a public document contemplated under Sec.74, Sub-sec.(2) of the Indian Evidence Act is indisputable and the copy of such a document is a certified copy of a public document under Sec.76 of the Indian Evidence Act.”

Therefore, it cannot be said that Ex.A-3 has not been proved. The lower appellate court’s observation as if Ex.A-3 is not admissible is also not correct.

7. Next, the learned counsel for the respondents contends that the suit property being a natham property, vested with the Government and that the plaintiff cannot have the declaration as prayed for. No doubt, the plaintiff also admits that the suit property is a natham. But according to the learned counsel for the plaintiff, that fact does not mean that the said property is a Government property. While considering this point, first of all, I find that even though the defendants plead in the written statement, “as the suit is for declaration of plaintiff’s title to a site in Natham which belongs to the Government and vest with the Panchayat should be decided only making the Government and the Panchayat as parties”, the 2nd defendant, who alone went into the box among the three defendants, did not even depose that the suit property is the property of the Government or the

Panchayat. All that he deposed was only that the property was natham. Natham, according to K.G.Iyer’s Judicial Dictionary, 8th edition, page 654, means that part of the village land, on which the houses of the Mirasdars are built as distinct from the lands attached to the village. Shortly putting it, they are house sites in the villages. There is no law saying that all natham properties are Government or Panchayat properties. The learned counsel for the appellant cited *Chinnathambi Goundan v. Venkatasubramani*, 49 L.W. 326. It says that in a shrotriem village not falling under the Estates Land Act, the control of unoccupied gramathanam vests in the shrotriemdar. So according to the said counsel, natham does not vest with the Government or Panchayat. But, there is neither plea nor proof that the village in question here is one such shrotriem village, not falling under the Estates Land Act. Anyway, the learned counsel for the respondents also could not point out any decision that natham properties automatically vests with the Government or Panchayat. He no doubt cites *Rengaraja Iyengar v. Achikanu Annal*, (1959)2 M.L.J. 513. But even there, the decision is that gramathanam does not stand vested in the Government under Sec.3(b) of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). Thus, at any rate, it cannot be said automatically that all natham properties are Government properties. Therefore, I am unable to hold that the suit property is a Government property.

8. Thirdly, the learned counsel for the respondents also relies on *Jai Narain v. Kishan Chand*, A.I.R. 1968 S.C. 1165. There, no doubt, it has been held that a suit on mere prior possession within 12 years is not barred and in such a suit, title need not be proved unless the defendant can prove one. But, in the present case, the defendants have not proved title. They only set up title in the Government and, even with reference to it, there is no proof. On the other hand, the plaintiff has come forward to prove his title by virtue of Exs.A-3 and A-6; the plaintiff has to be given a decree for declaration of his title and since the plaintiff is held to be not in possession on the date of suit, he should be given the possessory relief also.

9. No doubt, the learned counsel for the respondents also seek, to argue that the defendants have prescribed title by their adverse possession. But, there is absolutely no plea regarding adverse

possession, by the defendants. On the other hand, it is only the plaintiff who has alternatively pleaded title by adverse possession. Therefore, even assuming there is some evidence of possession by the defendants, it cannot be looked into, the fundamental principle being no amount of evidence can be looked into on a plea which was never put forward. Further, even the learned counsel for the respondents could not point out evidence showing open, continuous and peaceful possession as of right by the defendants as against the true owner. Further, as already mentioned, even according to them, the true owner is the Government and not the plaintiff. Therefore, there is absolutely no scope for defendants prescribing title by adverse possession against the plaintiff.

10. Lastly, I may take up the argument of the learned counsel for the respondents that the suit property is not a property covered under Ex.A-3. As against this argument, the learned counsel for the appellant contends that as against the finding of the trial court that item No.19 of the properties given in Ex.A-3 is the suit property, the defendants, while preferring the first appeal, have not taken a specific ground that the abovesaid factual finding of the trial court was wrong. Therefore, according to the learned counsel for the appellant, the lower appellate court has erred in holding that item 19 of Ex.A-3 does not relate to the suit property. The fact that the abovesaid specific ground was not taken in the first appeal, is not disputed by the learned counsel for the respondents. That apart, there was not even a specific suggestion to F.W.1, the donee under Ex.A-3, that the abovesaid item 19 of Ex.A-3 is not the suit property. That apart, I find that D.W.3, the 2nd defendant himself, who is none other than the first cousin of the 1st defendant and the brother of the 3rd defendant, has deposed that on the northern and southern side of the suit property, there are streets. This deposition tallies with the description given in the plaint schedule. Further, P.W.1 has stated that Perumal Iyengar's land is to the east of the suit property. This also tallies with the description of the suit property in the plaint schedule. No doubt, it has been elicited from P.W.1 in cross-examination that he does not have any record showing that the said land on the eastern side of the suit land is that of Perumal Iyengar. But, there is no specific suggestion that east of the suit property was never owned by Perumal Iyengar. Simply because, P.W.1

did not have a record of his adjacent land, it cannot be said that the plaintiff has not proved the identity of the suit property. Further, I also find that no issue has also been framed regarding the identity of the suit property.

11. Therefore, I hold that the lower appellate court has erred in dismissing the suit and that the error committed by the lower appellate court is a substantial one, warranting interference by this Court in second appeal. In the result, the second appeal is allowed, the Judgment and decree of the lower appellate court are set aside and that of the trial court are restored. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.No.2813 of 1992

22nd February, 1993.

Subba Navithan

...Petitioner

v.

Veluchami Gounder

...Respondent.

Civil Procedure Code (V of 1908), O.21, Rules 64 and 66 - Decree amount of Rs.6,020 - Lands of judgment-debtor worth Rs.67,200 if can be brought to sale in execution.

The decree-holder is trying to bring 4 acres and 48 cents of property belonging to the judgment-debtor to sale. Even according to the decree-holder, the value of the said property would be Rs.67,200. But according to the judgment-debtor, the value of the said property would be about Rs.1,00,000. The decree amount is stated to be Rs.6,020. In view of the decision of the Supreme Court rendered in *Ambatti Narasayya v. M.Subba Rao, A.I.R. 1990 S.C. 119*, the execution court is directed to consider whether the division of property and sale of a portion of the property would be advantageous to the judgment-debtor. If that is so, the property may be divided and a portion of the property can

be brought to sale.

[Para 10]

Cases referred to:

Ambatti Narasayya v. M. Subba Rao, A.I.R. 1990 S.C. 119. [Paras 2, 5]

P.L.V. Giri v. A. Subramaniam, (1992) 2 L.W. 237. [Paras 2, 9]

Direndranath Gorel v. Sudir Chandra Gosesh, (1965) 1 S.C.J. 219. [Para 9]

M.V. Krishnan, for Petitioner.

K. Srinivasan, for Respondent.

The Court made the following

ORDER:- This revision is directed against the order passed in E.A.No.560 of 1991 in E.P.No.258 of 1990 in O.S.No.697 of 1985 on the file of the District Munsif, Palani. The judgment-debtor is the petitioner herein. The respondent herein, who is the plaintiff in the suit, obtained a decree against the petitioner herein. A preliminary decree was passed in the suit on 22.7.1986 and a final decree was passed in I.A.No.1442 of 1988 on 16.6.1989. Thereafter, the decree-holder filed E.P.No.258 of 1990 to realise the decree amount of Rs.6,020. The property of the judgment-debtor was brought to sale on four occasions. In the sale proclamation the decree amount is shown as Rs.6,020. The value of 4 acres and 48 cents of property was shown as Rs.67,200. According to the judgment-debtor, the value of the said property would be about Rs.1,00,000. The judgment-debtor contended that since the decree amount is only Rs.6,020, the entire property worth about Rs.1,00,000 according to the judgment-debtor and Rs.67,200 according to the decree-holder should not be brought to sale. The judgment-debtor contended that a portion of the property can be brought to sale so as to satisfy the decree amount. Before the execution court, the judgment-debtor contended that the provisions of O.21, Rules 64 and 66, C.P.C. were not properly complied with by the judgment-debtor. Accordingly, the judgment-debtor requested the execution court to stop the sale. However, the execution court pointed out that the entire property belonging to the judgment-debtor cannot be divided as requested by the judgment-debtor since the property mortgaged is a single unit. On that basis the execution court dismissed E.A.No.560 of 1991 filed under Sec.47, C.P.C.

2. It is against this order, the judgment-debtor is in revision before this Court. The learned counsel appearing for the petitioner herein submitted that the decree amount is only Rs.6,020 and the

property admeasuring 4 acres and 48 cents worth about Rs.1,00,000 need not be brought to sale to realise the paltry decree amount. In support of his contention, the learned counsel relied upon a decision of the Supreme Court in the case of *Ambatti Narasayya v. M. Subba Rao, A.I.R. 1990 S.C. 119*. The learned counsel appearing for the decree-holder submitted that the property was brought to sale for four times earlier, but the sale was not fructified. When the property was brought to sale for the fifth time, the judgment-debtor came forward with this application so as to prevent the decree-holder from realising the decree amount. It was further pointed out that the property mortgaged is a single indivisible unit and therefore it cannot be divided. According to the learned counsel the provisions contained in O.21, Rules 64 and 66, C.P.C. were not violated in this case. In support of this contention, the learned counsel appearing for the respondents relied upon a decision of this Court in the case of *P.L.V. Giri v. A. Subramaniam and another, (1992) 2 L.W. 237*.

3. I have heard the rival submissions.

4. The fact remains that the decree-holder obtained a decree against the judgment-debtor on a mortgage executed by the judgment-debtor. The suit property was brought to sale. According to the sale proclamation, a sum of Rs.6,020 is due to the decree-holder. The decree-holder brought to sale a property admeasuring 4 acres and 48 cents belonging to the judgment-debtor. According to the decree-holder, the value of the said property is Rs.67,200. But according to the judgment-debtor the value of the said property would be Rs.1,00,000. The learned counsel for the judgment-debtor contended that the entire property need not be brought to sale and a sale of a portion of the said property would satisfy the decree amount. But according to the decree-holder the entire property is a single indivisible unit and therefore it cannot be divided. Hence, according to the decree-holder there is nothing wrong in bringing the entire property to sale.

5. This point came up for consideration before the Supreme Court in the case of *Ambatti Narasayya v. M. Subba Rao, A.I.R. 1990 S.C. 119*, wherein the Supreme Court while considering the provisions of O.21, Rule 64, C.P.C. held as under:

"It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring

the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."

6. On this aspect another decision of the Supreme Court in the case of *Direndranath Gorel and another v. Sudir Chandra Gosesh and others*, (1965) 1 S.C.J. 219, was also brought to my notice. According to the facts arising in the above cited decision, two appeals raised the question of the validity of the court sale held in contravention of Sec.35 of the Bengal Money Lenders Act, 1940 (Bengal Act 10 of 1940). In the appeal before the Supreme Court, learned counsel for the appellants in both the appeals contended that whether Sec.35 of the Act is mandatory or directory the sale held in violation of the said provision is only illegal but not a nullity and therefore it can be set aside only in the manner and for reasons prescribed in O.21, Rule 90 of the Code of Civil Procedure and further that as the respondents did not attend at the drawing up of the proclamation of sale the sale cannot be set aside at their instance.

7. While answering these contentions, the Supreme Court held as under:

"In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that Sec.35 of the Act is a mandatory provision. If so, the question is whether the said provision is conceived in the interest of the public or in the interest of the person affected by the non-observance of the provision. It is true that many provisions of the Act were conceived in the interest of the public. But the same cannot be said of Sec.35 of the

Act, which is really intended to protect the interest of the judgment-debtor and to see that a larger extent of his property than is necessary to discharge the debt is not sold. Many situations may be visualised when the judgment-debtor does not seek to take advantage of the benefits conferred on him under Sec.35 of the act. For instance, if the part of the property carved out by the court for sale is separated from the rest of his property, the value of the remaining property may be injuriously affected by the carving out, in which case the judgment-debtor may prefer to have his entire property sold so that he may realise the real value of the property and pay part of the sale price towards the decretal amount. He cannot obviously be compelled to submit to the sale of a part of the property to his disadvantage. A provision intended for his benefit cannot be construed in such a way to work to his detriment."

8. This judgment of the Supreme Court was rendered by three learned Judges of the Apex Court. The decision in *Ambatti Narasayya v. M. Subba Rao*, A.I.R. 1990 S.C. 119, was rendered by two learned Judges of the Apex Court. According to the facts arising in the decision reported in *Direndranath Gorel and another v. Sudir Chandra Gosesh and others*, (1965) 1 S.C.J. 219, cited supra, the auction sale had taken place and the application under O.21, Rule 90, C.P.C. was filed to set aside that sale. But in the present case, the sale has not yet taken place. In the decision reported in *Direndranath Gorel and another v. Sudir Chandra Gosesh and others*, (1965) 1 S.C.J. 219, cited supra, the Supreme Court rendered its decision on the facts available on record in the light of Sec.35 of Bengal Money Lenders Act, 1940 and the provisions of O.21, Rule 90, C.P.C. But the facts arising in the present case are entirely different.

9. Yet another decision rendered by a learned single Judge of this Court in the case of *P.L.V. Giri v. A. Subramaniam and another*, (1992) 2 L.W. 237, was also brought to my notice. While considering the facts arising on record in the abovesaid case in the light of provisions of O.21, Rules 64, 66 and 90, C.P.C., the learned single Judge held as under:

"Considering the conduct of the judgment-debtor all along and also the in-built and intrinsic circumstances to be culled out from the facts of this case, it goes without saying that the executing Court fully applied its mind,

taking into consideration the amount of the decree that remains to be satisfied and other peculiar facts and circumstances of the case, in bringing the entirety of the suit property to sale and such act cannot amount to bringing more extent of property for sale than what was necessary for the satisfaction of the decree.”

In the abovesaid decision, the learned single Judge has also observed that the latter pronouncement of a Bench of two learned Judges of the Supreme Court in *Ambatti Narasayya v. M. Subba Rao*, A.I.R. 1990 S.C. 119, will have to give way to an earlier pronouncement of a larger Bench of three learned Judges of the Supreme Court in *Direndranath Gorel and another v. Sudir Chandra Gosesh and others*, (1965) 1 S.C.J. 219.

10. According to the facts arising in the instant case, the sale has not yet taken place. The decree-holder is trying to bring 4 acres and 48 cents of property belonging to the judgment-debtor to sale. Even according to the decree-holder, the value of the said property would be Rs.67,200. But according to the judgment-debtor, the value of the said property would be about Rs.1,00,000. The decree amount is stated to be Rs.6,020. Under such circumstances, the judgment-debtor contended that sale of a portion of the property would satisfy the decree amount and the entire property need not be brought to sale in view of the decision of the Supreme Court rendered in *Ambatti Narasayya v. M. Subba Rao*, A.I.R. 1990 S.C. 119. Under such circumstances, I direct the execution court to consider whether the division of property and sale of a portion of the property would be advantageous to the judgment-debtor. If that is so, the property may be divided and a portion of the property can be brought to sale. Accordingly, I set aside the order passed by the execution court in E.A.No.560 of 1991 and restore the same to the file of the execution court with a direction to dispose of the same in accordance with law after taking into consideration the direction given above and after giving an opportunity of being heard to both the parties. Accordingly, the revision stands allowed. However, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *K.M.Natarajan, J.*

C.R.P.Nos.707 and 1098 of 1992

13th November, 1992.

Bhuvunambal and others

...Petitioners

v.

N.Selvam Ammal

...Respondent.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.11(4) - Petition under - Enquiry as to quantum of arrears - Tenant to be given opportunity to show cause why he was not able to pay the amount - Procedure not followed - Order, if sustainable.

The court feels that the orders passed by the courts below are not sustainable as they have not followed the procedure laid down with regard to the dealing with the petition under Sec.11(4) of the Act and in view of the fact that the opportunity was given before fixing the quantum of arrears and no opportunity was given for explaining the reason for not paying the rent within the time. In spite of the petition filed by the revision-petitioners for extension of time, the court below allowed the petition for eviction holding that there was wilful default and evidence was necessary for demolition and reconstruction. In view of the failure to receive the additional documents filed by the petitioners on erroneous reasons of the matter requires reconsideration to prevent miscarriage of justice. It is further seen that as per the calculation statement produced before this Court by the petitioners they have paid an excess rent of Rs.50 upto August, 1992. However, according to the statement produced by the respondent-landlady, a sum of Rs.650 is due as arrears. This also requires an enquiry at the hands of the Rent Controller. For all these reasons, this Court feels that the matter should be remitted to the court below in order to give an opportunity to the revision-petitioners/tenants to substantiate their case, by holding the necessary enquiry as contemplated under Sec.11(4) of the Act. [Para 5]

Cases referred to:

Abdul Wahab v. Dorairaj, (1957) 1 M.L.J. 33. (NRC.) [Para 4]

Hyderabad Construction Company v. Major E. Hussain, (1966)2 *An.W.R.* 373. [Para 4]

Mohd. Sabar Ali v. Mubarak Begum, (1982)1 *An.W.R.* 195. [Para 4]

Babu Syed v. Subaida Bee, (1991)1 *M.L.J.* 412. [Para 5]

A. Tamizharasan, for Petitioners.

V. Sairam, for Respondent.

The Court made the following

ORDER:- These two revisions are directed by the unsuccessful tenants before both the forums below against the order passed under Sec.11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as 'the Act') to stop proceedings and also the consequential order of eviction passed in the main R.C.O.P.

2. The brief facts which are necessary for the disposal of these two revisions are as follows:

The respondent herein (Landlord) filed R.C.O.P.No.10 of 1987 against the tenant Sankar Chettiar (who died and whose legal representatives are the revision-petitioners) under Secs.10(2)(i) and 14(1)(b) of the Act on the ground that tenant committed wilful default in payment of rent from August, 1986 till December, 1986, for 5 months and also for demolition and reconstruction on the ground that the building is aged about 80 years and requires demolition and reconstruction. The said petition was resisted by the tenant. When the enquiry was pending, the respondent-landlord filed a petition, I.A.No.137 of 1987 under Sec.11(4) of the Act alleging that the tenant has not paid the rents for the subsequent period. The tenant paid a sum of Rs.1500 and the said petition was terminated. Again another petition was filed in I.A.No.88 of 1989 under Sec.11(4) of the Act alleging that the tenant has not paid the rent for the period from January, 1987 to January, 1989 to the extent of Rs.3,750 and out of the sum, Rs.2,500 alone was paid and the balance of Rs.1,250 is payable. Hence the respondent-landlord prayed for a direction not to permit the tenant to take part in the eviction proceedings and allow the petition. The said application was resisted by the tenant. While denying the said allegations, it is stated that these applications were filed in order to evict the tenant from the premises with *mala fide* intention. The respondent-landlord was not in the habit of issuing receipts. The tenant has paid the rent for the month of January, 1987 to the respondent directly, and for the months of February and March,

1987, he paid the rent on 5.4.1987 to the mother-in-law of the respondent, one Yasodai Ammal. She also received the rent for April, 1987 on 21.5.1987 on behalf of the respondent. He also sent a sum of Rs.750 by money order being the rent up to the period of September, 1987. After the filing of the petition, he paid Rs.1,500 and he is not liable to pay any rent. He has already narrated all the facts in I.A.No.137 of 1987. He has to pay rent for a period of six months upto March, 1989. Since the respondent was in the habit of receiving rent in lump sums and not in the habit of receiving rent every month, he would pay the rent to him. The allegation that the tenant was in arrears of rent of Rs.1,750 is false. After the filing of the petition, the Rent Controller directed the tenant to pay a sum of Rs.1,950 on or before 22.8.1989, after deducting a sum of Rs.750 only, in his order dated 8.8.1989. The tenant paid a sum of Rs.500 on 22.8.1989 towards arrears of rent before the Rent Controller, to the respondent-landlord, and another sum of Rs.300 on 11.9.1989. After deducting the said sum of Rs.800, it was found that the balance of 1,150 was not paid. Hence, I.A.No.88 of 1989 under Sec.11(4) of the Act was allowed on 3.10.1989 and on the same day the consequent order of eviction was passed in the main petition, R.C.O.P.No.10 of 1987. Challenging the said order, the tenant preferred appeals before the appellate authority and he was unsuccessful. In the meantime, the tenant died and his legal representatives were added and they are the revision-petitioners herein.

3. The learned counsel for the revision-petitioner-tenants submits that the tenants filed a petition I.A.No.5 of 1992 before the appellate authority, wherein they produced two money order acknowledgements in respect of the payment of Rs.300 on 7.6.1989 and Rs.150 on 13.11.1987 and the court did not receive the same on the ground that only a xerox copy of the acknowledgement was produced and further the tenant has not stated in the counter-affidavit filed in the petition 88 of 1989. The learned counsel would submit that the petitioners were not given an opportunity to prove the same by adducing necessary evidence and the court straightway allowed the application and ordered eviction and that it is not sustainable. He would submit that even as per the orders passed by the Appellate Authority as well as the Rent Controller, the revision-petitioner/tenants were in the

habit of sending rent by money orders, as even according to the Appellate Authority on 6.2.1987 a sum of Rs.300 was received by the respondent-landlord by money order and another sum of Rs.750 was received by money order on 26.10.1987. A sum of Rs.1,500 was paid during the pendency of the application, I.A.No.137 of 1987. The learned counsel would submit that the court below did not hold any enquiry for ascertaining the arrears of rent. Even though the revision-petitioners filed the petition I.A.No.302 of 1989 for granting sufficient time to pay the arrears as determined by court, the court has not given sufficient opportunity to pay the arrears. Both the courts below erred in presuming that the petitioners admitted the amount of Rs.1,950 as arrears upto the filing of the petition for extension of time. The learned counsel also vehemently argued that as on to-day there is no arrears payable and the entire amount has been paid to the landlord respondent herein. He has filed a statement of rental payments upto August, 1992. The learned counsel for the respondent also filed a statement of rental payments, wherein he has stated that upto the end of August, 1992, there is a balance of Rs.650. According to the learned counsel for the petitioners, the tenants have paid an excess of Rs.50 while according to the learned counsel for the respondent, the balance payable to the landlord is Rs.650. The petitioners-tenants have filed a petition in this Court, C.M.P.No.8403 of 1992 to receive additional evidence to establish that during the pendency of the proceedings, Sankar Chettiar, tenant, who is the husband of the deponent of the affidavit, was affected by several diseases like giddiness and urinal and eye problems and he was undergoing treatment in the Christian Medical College Hospital from 30.10.1987 to 5.4.1990 and to prove the *bona fide* treatment, they produced number of documents. Subsequently the diseases developed into high pitch and Sankar Chettiar died on 22.7.1990. Subsequent to his death, his son met with an accident on 20.9.1990. The petitioners were attending to their needs till their death, besides attending to the court proceedings. Subsequent to their deaths, they were grief-stricken and they were unable to bear their loss. The circumstances caused were beyond their control and it is neither wilful nor wanton but due to the above just cause. Further, they have produced medical certificate for the period Sankar Chettiar suffered, in

the lower appellate court. According to them there was no arrears. The learned counsel contended that the court ought to have given sufficient opportunity to establish the circumstances under which they were prevented from paying the rent. Further, the court failed to make an enquiry before ever the amount is determined. They produced 9 documents in support of the same. *Per contra* the learned counsel for the respondent submits that the application is not maintainable and the court cannot entertain the documents. Even if those documents are admitted, they will only explain the wilful default committed by the tenant in payment of rent for a long period prior to the filing of the petition under Sec.11(4) of the Act. The respondent-landlord reserved his right to file additional counter as and when copies are furnished to him.

4. The learned counsel for the petitioners-tenants vehemently argued that this is a case where the court below straightway ordered eviction consequent on allowing the petition under Sec.11(4) which was also straightway allowed. The case of the petitioners is that when the court fixed the quantum of arrears as Rs.1,950 without holding any enquiry, when it was opposed the tenant should have been given an opportunity to show cause why the court should not determine the quantum of arrears as Rs.1,950. A further opportunity should also have been given to show cause why they were not able to pay the amount. In the absence of enquiry, the order is vitiated. In this connection, the learned counsel for the petitioner relied on the decision reported in *Abdul Wahab v. Dorairaj*, (1957) 1 M.L.J. 33 (NRC.), wherein it was held that in cases where the Controller or the Appellate Authority under the Madras Buildings (Lease and Rent Control) Act, 1949, acts under the provisions of Sec.7-A(4) of the Act, the procedure contemplated by the sub-section should be followed, viz., the tenant should be given an opportunity to show cause as to why he was not able to deposit the arrears of rent. In the absence of any enquiry on that point, the order will be vitiated. The learned counsel for the petitioner would submit that Sec.7-A(4) of the Madras Buildings (Lease and Rent Control) Act, 1949, is *in pari materia* with the present Sec.11(4) of the Act, and in view of the ratio laid down in the abovequoted decision, since no opportunity was given to the petitioners to show cause as to why they were not able to deposit

the arrears of rent, the order of eviction is vitiated. In any event, the matter should be remitted back to the Controller so as to enable the Controller to give an opportunity to the petitioners to explain the same. The learned counsel for the petitioners relied on another decision in *Hyderabad Construction Company v. Major E. Hussain*, (1966) 2 An.W.R. 373, wherein while dealing with the provisions in Sec.11(1) and (4) of the Andhra Pradesh Buildings (Lease, Rent and Eviction Control) Act, 1960, it was held: "In respect of each default, unless the previous default is sufficient to order eviction, an opportunity should be given to the tenant to show cause as to why he has not been able to pay the rent."

"In the instant case, if the petitioner had explained the default committed in respect of payment of rent for December, 1964, it would not have been necessary to refer to the default committed in January, 1965. But once the default in January, 1965, is taken as the basis for eviction, unless the petitioner is given an opportunity to show sufficient cause for non-payment, an order under Sec.11(4) of the Act cannot be made."

In *Mohd. Sabar Ali v. Mubarak Begum*, (1982) 1 An.W.R. 195, it was held:

"The petitioner-tenant disputed the arrears of rent claimed by the land-lady. Therefore, it is always safe to post the case of enquiry. It is necessary that the learned Judge should have posted the case for enquiry so that there could have been no scope for passing such an order. The tenant could have also an opportunity to state the facts in the enquiry in respect of the payment of rents whether they are due or not. So far as sub-sec.(4) of Sec.11 of the Rent Control Act is concerned, it seems to have an important bearing on this case. It is quite evident that in this case, the tenant has not deposited or paid the arrears of rent. Therefore, under the provisions of Sub-sec.(4) of Sec.11 of the Act, it was necessary for the Rent Controller to have issued a notice to the tenant as to why he has failed to pay or deposit the rents, as directed by him and if the tenant failed to show sufficient cause, then only further proceedings should have been stopped directing the tenant to put the landlady in possession. In the instant case, proceedings were not taken under Sub-sec.(4) of Sec.11 of the Rent

Control Act. It was necessary that the Rent Controller should have complied with this provision of the Act to find out as to why the amount was not deposited or paid. Therefore, the proceedings issued by the Rent Controller on 28th December, 1977 are vitiated on account of non-compliance of sub-sec.(4) of Sec.11 of the Rent Control Act.

When the default for a particular month is sought to be pressed against the tenant, which is not pleaded in the petition, it becomes necessary for the court to bring it to the notice of the tenant and afford him an opportunity to explain and show sufficient cause as to why he committed default for that period, before an order is passed.

When the case was posted to 27th December, 1977, it was the duty of the court to ask the tenant to show cause as to why the amount was not deposited. If the tenant failed to show sufficient cause, then only the court could have passed the order stopping further proceedings and directing the tenant to put the landlady in possession of the property. This was not done, as contended by the learned counsel for the petitioner, in the case on hand. Therefore the order of the Principal Rent Controller is vitiated."

5. The learned counsel for the petitioners vehemently argued that in the instant case the petitioners opposed the application and filed a counter contending that the amount claimed by the respondent is not correct, that he has made certain payments, that it has to be determined and that he is to pay only a lesser sum. The court below did not hold an enquiry and did not reach any finding and simply accepted the case of the respondent-landlady and fixed the quantum of arrears as Rs.1,150 and directed the petitioners to pay the amount. Further, even though the petitioners asked for time, sufficient opportunity was not given. The court below also refused to receive additional documents with regard to payment of rent made by money order and the court straightway ordered eviction without considering the question as to whether there is any wilful default and the building requires immediate demolition in the main application. He would submit that the petitioners have filed additional documents and they may be permitted to file the additional documents and the same may be received in the revision proceedings

as they can be received in view of the decision of this Court in *Babu Syed v. Subaida Bee*, (1991)1 M.L.J. 412, wherein it was held:

"In view of the legal position it has to be held that the provisions of the Code of Civil Procedure are applicable to the revision petition filed before this court under Sec.25 of the Act. From this it follows that a petition filed under O.41, Rule 27, C.P.C. to receive document as additional evidence in the revision petition filed under Sec.25 of the Act is maintainable and the documents can be received as additional evidence provided the requirements of O.41, Rule 27 of the Code of Civil Procedure are satisfied. In this case, the documents are necessary for deciding the issue."

In the instant case, the documents sought to be filed as additional evidence show the illness of the tenant and his subsequent death and also the death of his son due to accident. According to the learned counsel for the petitioners these documents are necessary to decide the issue with regard to the default in payment of rent which has been directed to be paid by the court below. On a careful consideration of the entire materials, this Court feels that the orders passed by the courts below are not sustainable as they have not followed the procedure laid down with regard to the dealing with the petition under Sec.11(4) of the Act and in view of the fact that the opportunity was given before fixing the quantum of arrears and no opportunity was given for explaining the reason for not paying the rent within the time. In spite of the petition filed by the revision-petitioners for extension of time, the court below allowed the petition for eviction holding that there was wilful default and eviction was necessary for demolition and reconstruction. In view of the failure to receive the additional documents filed by the petitioners on erroneous reasons of the matter requires reconsideration to prevent miscarriage of justice. It is further seen that as per the calculation statement produced before this Court by the petitioners, they have paid an excess rent of Rs.50 upto August, 1992. However, according to the statement produced by the respondent-landlady, a sum of Rs.650 is due as arrears. This also requires an enquiry at the hands of the Rent Controller. For all these reasons, this Court feels that the matter should be remitted to the court below in order to give an opportunity to the

revision-petitioners/tenants to substantiate their case, by holding the necessary enquiry as contemplated under Sec.11(4) of the Act.

6. In the result, both the revisions are allowed, the impugned orders passed by both the courts below are set aside and the matter is remitted to the Rent Controller who is directed to restore both the petitions, namely, R.C.O.P.No.10 of 1987 and I.A.No.88 of 1989, and give opportunity to both the parties to adduce necessary evidence and dispose of the same according to law as expeditiously as possible, in any event within two months from the date of receipt of the order copy. The parties are directed to bear their costs in these proceedings. The parties are directed to appear before the Rent Controller on 30.11.1992.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra and Arumugham, JJ.*

O.S.A.No.158 of 1986

16th December, 1992.

V.D.Swami and Company (P) Ltd. ...Appellant
v.

Southern Switchgear Ltd., Madras-2.

...Respondent.

(A) *Companies Act (I of 1956) - Sole agent - Not defined - Legal relationship of principal and agent - Not that of employer and employee.*

(B) *Companies Act (I of 1956), Sec.294(1), (2) and (2-A) as substituted by Amending Act (LXV of 1960) - Contract Act (IX of 1872), Secs.64 and 65 - Agreement between parties - Failure of company to place agreement before the next general body meeting of the company - Whether invalid - Court not considering whether plaintiff was in pari delicto - Agreement whether would give plaintiff right to realise obligations - To the extent of the advantage received by defendant not considered - Order set aside.*

(C) *Maxims - In pari delicto potior est conditio defentis.*

The defendants who were manufacturers of switchgears equipment appointed the plaintiff as

the sole selling agent to fix export of switchgears in the area covered by the Middle East, Africa and South East Asia. The plaintiff was able to obtain a contract from the National Electricity Administration of Baghdad for supply of 11 Kv switchgear to the value of Rs.15-lakhs. The consignment should have been completed by 15.9.1970. The defendant was not able to ship the goods as per schedule. Further extension was obtained so that the last shipment could make only a partial supply. The foreign buyers cancelled contract and levied a penalty on the plaintiff and blacklisted them from securing any further business from them. The plaintiff sued the defendant for the recovery of a sum of 20 lakhs by way of damages and costs.

Held: There is no definitions of sole agent under any provision of the Companies Act. But it has been understood to mean any individual (firm or Company) who is given exclusive rights to sell in a particular area the goods of the Company concerned to the exclusion of even the Company. It is, however, a legal relationship of principal and agent and not that of employer and employee.

[Para 7]

On the pleadings of the parties, it has to be held that a certain agreement was entered into between the plaintiff and the defendant in which according to the former, the latter appointed it as the sole selling agent for export of switchgears and according to the latter, the former's appointment as sole selling agent of the defendant ought to have been approved by the company at its next general meeting which meeting was held but the appointment of the plaintiff as the sole selling agent was not placed before the meeting and consequently the plaintiff ceased to be the sole selling agent on or after the said meeting and/or there was no appointment of the plaintiff as the sole selling agent in accordance with the provisions of the Companies Act, 1956, the parties were, therefore, dealing as principal to principal in respect of the transaction. In the agreement under which the plaintiff was appointed as the sole selling agent for the defendant, there was no reference at all about the placing of the said agreement before the next general body meeting of the defendant company and admittedly it was not so placed before the general body meeting held on 9.9.1968. Thus, the said agreement itself was void *ab initio* and as such the claim based thereon is void *ab initio* and is bound to fail. It appears that at no stage in the

course of the trial anyone took notice of the admitted existence of the agreement between the plaintiff and the defendant and the exceptions to the rule *in pari delicto potior est conditio* defendant is, so that the court could test the facts and circumstances of the case to find out, whether, actually, the plaintiff and the defendant were in *in pari delicto potior est conditio* defendant is for, if the defendant was to perform a certain act and did not do so, the defendant is the wrong-doer and the plaintiff was wronged by what it did in the sense that the defendant failed to bring on the agenda of the meeting of the company after the agreement was entered into, the question of approval. Thereof the judgment was set aside and remitted the same to the trial court for rehearing in accordance with law.

[Paras 14, 15 & 18]

Cases referred to:

Sita Ram v. Radha Bai, (1968) 2 S.C.J. 251: A.I.R. 1968 S.C. 534. [Para 8]

Kuju Collieries v. Jharkhand Mines, (1974) 2 S.C.C. 533: A.I.R. 1974 S.C. 1892. [Para 10]

Sivaramakrishnaiah v. Narahari Rao, A.I.R. 1960 A.P. 186. [Para 10]

Kanniappa v. Karupiah, (1962) 2 M.L.J. 109: I.L.R. (1962) Mad. 441: 75 L.W. 119: A.I.R. 1962 Mad. 240. [Para 11]

Govindaraj v. Kandaswami Goundan, (1956) 2 M.L.J. 578: A.I.R. 1957 Mad. 186. [Para 13]

Velu Padayachi v. Sivasoorian, (1950) 1 M.L.J. 315: 63 L.W. 234: I.L.R. (1950) Mad. 987: A.I.R. 1950 Mad. 444 (F.B.). [Para 13]

Muralidhar Chatterjee v. International Film Co. Ltd., (1943) 2 M.L.J. 869: A.I.R. 1943 P.C. 34.

[Para 13]

N.Srivasthamani, for Appellant.

T.K.Seshadri, for Respondent.

The Judgment of the Court was delivered by *Mishra, J.*: A Private Limited Company carrying on business as exporters of various goods claiming to have been appointed as the sole agent for export of switchgears by the defendant, a Public Limited Company by letter dated 2.9.1967, has filed a suit for recovery of a sum of Rs.2,00,000 by way of damages and for costs. A learned single Judge of this Court has dismissed the suit, holding that Sec.294(2A) of the Companies Act operated as a bar to the maintainability of the suit, besides the *force majeure* clause in the agreement completely answered the suit claim of damages. The plaintiff has preferred this appeal.

2. The plaintiff's case has been that the defendants who are manufacturers of switchgear equipment, by its letter dated 2.9.1967, appointed the plaintiff as its sole agents for export of switchgears. The plaintiff was appointed as the sole agent to represent the defendant in the areas covered by the Middle East, Africa and South East Asia. The plaintiff, by reason of its contacts and influence, was able to obtain for and on behalf of the defendant a contract from the National Electricity Administration of Baghdad for supply of 11 KV switchgears to the value of about Rs.15,00,000 (C & F Baghdad). The plaintiff received this order from the National Electricity Administration of Baghdad on 4.8.1969. The plaintiff thereafter in terms of the arrangement with the defendant, communicated vide its letter dated 20.8.1969, the order of Iraqi buyers to the defendant who had irrevocably and without any reservation accepted the said order which was in all respects and entirely identical and essentially similar to the terms and conditions of the Iraqi buyers order. In terms of the said order, the first consignment should have been effected by April, 1970 and the remaining balance consignment should have been completed by 15.9.1970. On 9.11.1969, the plaintiff also received a letter from the tendering authorities by which the plaintiff was informed that a letter of credit had been opened on 5.11.1969 in its favour for a sum of Stg 86,250 being the total C & F Baghdad value of the order of the F.O.B. value of the order being Stg 78003-13-06 (equivalent to Rs.14,00,550-70). The defendant ought to have shipped the first lot of equipment by April, 1970 and completed the shipment of the remaining portion of the order by the 15th September, 1970 as provided in the order and in the letter of credit and unconditionally accepted by the defendant. However, the first shipment was effected by the defendant only on 3.8.1970 and thereafter no shipment was made by the defendant even though the letter of credit was extended by the Iraqi buyers from time to time on the request of the plaintiff and finally on 31.1.1972. The defendant wrote to the plaintiff on 21.1.1972 furnishing a revised delivery schedule by which it agreed to complete the order of shipping the remaining items three instalments, the first one by the end of January, 1972, the second by the end of February, 1972 and the third by the end of March, 1972 and requested the plaintiff to persuade the foreign buyer to

extend the validity of the letter of credit upto 31.3.1972 by which time it assured the plaintiff that it would definitely be completing the shipments of the balance portion of the equipment. On the persuasion of the plaintiff, the Iraqi buyers extended the validity of the letter of credit upto 31.3.1972. The defendant, however, failed to keep up its promise and the undertaking and no shipment was effected even as per the revised schedule except a part shipment towards the end of March, 1972 leaving a sizeable quantity unshipped as on 31.3.1972. The foreign buyers, left with no option cancelled the orders for the remaining quantity and invoked the performance guarantee issued by the plaintiff and the defendant which action was eventually taken by the Iraqi buyers and communicated to the plaintiff by letter dated 29.8.1972 besides levying a penalty of Stg. \$460.74 and black-listing the plaintiff from securing any further business from them.

3. The plaintiff has then stated that it was only acting as an export agent of the defendant, though this position is now being disputed by the defendant. The plaintiff has relied on several circumstances and documents to demonstrate its position as export agent of the defendant. According to the plaintiff, the total C & F value of the unexecuted portion of the goods as on 1.4.1972 is Stg. £21,375.12 which is equivalent to Rs.4,00,020.90 and that of the commission which had been increased by 1% by the letter of the defendant dated 22.2.1971, calculated on the F.O.B. value of the unshipped portion of the contract amounted to Rs.30,403.82. In addition, the plaintiff has claimed, it is also entitled to receive a sum of Rs.2,915.32 being the commission due by the defendant to the plaintiff on the shipment already made. The plaintiff addressed a legal notice to the defendant dated 31.1.1973 claiming a sum of Rs.5,00,000 inclusive of the commission due to them by reason of the failure of the defendant to carry out their obligations. By final reply the defendant, through its counsel, refuted the claim of the plaintiff and pleaded that it was unable to keep up to the terms of the delivery schedule by reason of circumstances beyond its control and pleaded that having paid the penalty under the contract for delay in delivery, there could be no further liability on the part of the defendant. The defendant also denied that there was any agreement to refer the matter to arbitration.

4. The defendant, on appearance, stated first as follows: The alleged appointment of the plaintiff as a sole selling agent of the defendant ought to have been approved by the company at its next general meeting after 2.9.1967. The company held a general meeting on 9.9.1968. The plaintiff's appointment as sole selling agent was not placed before the said meeting and consequently the plaintiff ceased to be the sole selling agent on and after 9.9.1968 and no commission was payable to the plaintiff thereafter. It is also averred that without prejudice to the foregoing the defendant does not admit the averments in paragraph 3 of the plaint that the plaintiff was appointed as the sole selling agent of the defendant for export of switchgear. No appointment of the plaintiff as sole selling agent in accordance with the provisions of the Companies Act, 1956 was made at any time. The parties were, therefore, dealing as principal to principal in respect of this transaction, the defendant having agreed to give the plaintiff a discount of 5% on the F.O.B. value of the order placed by the plaintiff with it. The defendant also pleaded that the quotation of the defendant and communication addressed to the plaintiff would establish that the contract between the parties was subject to the usual *force majeure* clause in and by which the defendant was relieved of all the obligations under the contract if the performance thereof was prevented by *force majeure*. The defendant denied the other allegations in the plaint and contested practically every item of the claim made by the plaintiff in the suit. On the issue, however, as to the quantum of damages to be awarded to the plaintiff, in case the defendant is found to have committed breach of the agreement, the learned single Judge has found that the plaintiff is entitled to damages of Rs.30,403.82 towards the unexecuted portion of the goods as on 14.1.1972 and Rs.2,915.32 being the commission due to it in respect of the shipment already made, the total being Rs.33,319.14.

5. As to the counter claim made by the defendants in the written statement, the learned single Judge has stated as follows:

"In view of the admission made by P.W.1 in cross-examination and Ex.D-6, the plaintiff is bound to render account in respect of 2589 sterling pounds to the defendant."

The learned single Judge has also held that the defendant is not entitled to call upon the plaintiff

to pay any sum as damages.

6. Learned counsel for the appellant has attacked the findings recorded by the learned single Judge on the issue whether the provisions of Sec.294 (2-A) of the Companies Act would operate as a bar to the maintainability of the suit on the ground, *inter alia*, that Sec.294(1) and (2-A) of the Companies Act read together ceased the validity of the appointment of a sole selling agent for any area with effect from the date of a general meeting of the company which disapproved the appointment or did not approve the appointment, but operated as no bar to the maintainability of the suit which in common law and the Law of Contract were/are available to the plaintiff. He has, for the said purpose, drawn our attention to Sec.294(1) substituted by Act 65 of 1960. Sec.294(1)(2) and (2-A) read:

"B.294. Appointment of sole selling agents to require approval of company in general meeting: (1) No company, shall, after the commencement of the Companies (Amendment) Act, 1960, appoint a sole selling agent for any area for a term exceeding five years at a time. Provided that nothing in this sub-section shall be deemed to prohibit the re-appointment, or the extension of the term of office, of any sole selling agent by further periods not exceeding five years on each occasion.

(2) After the commencement of the Companies (Amendment) Act, 1960, the Board of Directors of a Company shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the Company in the first general meeting held after the date on which the appointment is made;

(2-A) If the company in general meeting as aforesaid disapproves the appointment, it shall cease to be valid with effect from the date of that general meeting.

7. There is no definition of 'sole agent' under any provision of the Companies Act. But it has been understood to mean any individual (firm or company) who is given exclusive rights to sell in a particular area the goods of the company concerned to the exclusion of even the company. It is, however, a legal relationship of principal and agent and not that of employer and employee. The executive power of the Company's Board of Directors to appoint a sole selling agent has been

subjected to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made and the invalidity shall be effective from the date of that general meeting. Courts, however, have construed this condition of approval of the appointment of the sole selling agent at the general meeting as a mandatory condition in all appointments of sole selling agents and have gone further to say that if any appointment is made without containing such a clause, the appointment is void *ab initio*. We, however, do not think it necessary in the instant case to go into any details on this aspect of the law as engrafted in Sec.294 of the Act, aforequoted, for whether a sole selling agent's appointment would fall within the mischief of Sec.294 of the Act and when shall it become inoperative, do not appear to be beyond the terms and conditions of the appointment of a certain person as the agent of another and in case there is a claim of sole selling agency, it would depend upon the fulfilment of the condition of approval by the company in the first general meeting held after the date on which the appointment is made, upon which would depend whether the appointment would be valid or cease to be valid.

7A. What is noticeable in the instant case is, however, that the defendant has not disputed the *de facto* transaction of business with the foreign buyers through the plaintiff and conceded that it did give to the plaintiff the contract which according to the plaintiff was the plaintiff's appointment as the sole agent for export of such orders in the areas covered by the Middle East, Africa and South East Asia. According to the defendant, the company held a joint meeting on 9.9.1968 (after the defendant's appointment on 2.9.1967) and the plaintiff's appointment as the sole selling agent was not placed before the said meeting and consequently the plaintiff ceased to be the sole selling agent on and after 9.9.1968 and/or there was no appointment of the plaintiff as the sole selling agent in accordance with the provisions of the Companies Act 1956 and/or the parties (plaintiff and defendant) were dealing as principal to principal.

The learned single Judge has stated:

"It is not in dispute that the said appointment under Ex.P-1 was not placed in the general body meeting of the company of the defendant

and there is no reference at all about the placing of the same in the general body meeting in Ex.P-1."

He has also noticed the fact that there was no mention in the agreement that it was subject to the approval of the company in the general body meeting and that it would cease to be valid if not approved as per Sec.294 (2-A) of the Companies Act. He has, on that basis, held:

"In Ex.P-1 agreement under which the plaintiffs were appointed as the sole selling agent for the defendant-company, there is no reference at all about the placing of the said agreement before the next general body meeting of the defendant-company. Further, admittedly it was not so placed before the general body meeting held on 9.9.1968. The said agreement itself is *void ab initio* and as such the claim based on that agency agreement is bound to fail."

8. Learned counsel for the respondent has supported the aforesaid finding mainly on the ground that once it is found that the agreement is *void ab initio*, it is right to contend that no claim can be based on a void contract. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to the illegality or fraud is expressed in the maxim *in pari delicto potior est conditio defendantis*. But there are exceptions to that. The Supreme Court in the case of *Sita Ram v. Radha Bai*, (1968) 2 S.C.J. 251; A.I.R. 1968 S.C. 534, has said:

"But as stated in Anson's Principles of English Law of Contracts', and 22nd Edn. P.343, there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered-cases to which the maxim does not apply. They fall into three classes; (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not *in pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim."

In this judgment, the Supreme Court has further added:

"It is settled law that where the parties are not *in pari delicto*, the less guilty party may be able to recover money paid, or property transferred, under the contract. First, the contract may be

of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property, or to refuse to account for moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction. - See Anson's Principles of The English Law of Contract page 346."

9. In the Indian Contract Act, we have in Sec.64 the consequences of rescission of voidable contract and in Sec.65, the obligation of persons who have received advantage under void agreement or contract that became void. Sec.64 of the Contract Act says that when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to person from whom it was received. Sec.65 spells out the obligation of the person who has received advantage under void agreement or contract that becomes void in these words:

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

10. The Supreme Court has in the case in *Kuju Collieries v. Jharkhand Mines*, (1974) 2 S.C.C. 533: A.I.R. 1974 S.C. 1892, examined the scope of Sec.65 of the Contract Act and stated as follows:-

"Sec.64 makes a distinction between an agreement and a contract. According to Sec.2 of the Contract Act, an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of Sec.65 speaks of an agreement being discovered to be void, it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the

agreement, knowing that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the Section, refers to a contract becoming an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases, any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both parties know that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings."

The Supreme Court has in the case of *Kuju Collieries v. Jharkhand Mines*, (1974) 2 S.C.C. 533: A.I.R. 1974 S.C. 1892, approved the decision of the Andhra Pradesh High Court in the case of *Sivaramakrishnaiah v. Narahari Rao*, A.I.R. 1960 A.P. 186, in which it is stated:

"In order to invoke Sec.65 the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement i.e., without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of Sec.65 is that, in such a situation, it enables a person not *in pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo ante*. Sec.65 also does not recognise the distinction between a contract being illegal by reason of its being opposed to public policy or morality of a contract void for other reasons. Even agreements, the performance of which is attended with penal consequences, are not outside the scope of Sec.65. At the same time, Courts will not render assistance to persons who induce

innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong."

The Supreme Court has clearly laid down that an agreement on being discovered void and which is not enforceable as a contract can give to a person a right to restoration or compensation and have all the advantages derived by another if they are parties to the agreement and if the agreement was not invalid in the sense that it was a valid contract until it ceased to be valid for the reason of statute or otherwise, any person who has received any advantage under such a contract is bound to restore such advantage or to make compensation for it to the person from whom he received it. Courts usually in these matters also bear in mind that no one should be allowed to retain the benefit which he obtained by his own wrong. In other words, no one should be given any premium on his own recalcitrance.

11. In a Full Bench decision of this Court in *Kanniappa v. Karuppiah*, (1962) 2 M.L.J. 109: I.L.R. (1962) Mad. 441: 75 L.W. 119: A.I.R. 1962 Mad. 240 (F.B.), the respondent who had obtained licence under the provisions of the Central Excise and Salt Act, 1944 was carrying on business in the manufacture and sale of safety matches under the name and style of Sarada Match Works, Ramalingapuram. He admitted the appellant as a partner in the business which both agreed to run for a minimum period of six years. The agreement which was reduced to writing on 16.7.1955, expressly stipulated that the partners were to obtain an amendment of the existing licence in favour of one of them in their joint names and that the appellant should contribute capital in a sum of Rs.10,000. The firm was duly registered under the Indian Partnership Act. The appellant advanced on various dates a sum of Rs.10,000 to the respondent. The appellant and his son were put in charge of a section of the business. But by the rules framed under the Central Excise Act, a licensee who admits a partner in his business should intimate the fact to the licensing authority within 30 days thereof. The respondent did not do so and the business continued as before till the parties fell out and the respondent expelled the appellant from the business. The latter instituted the suit.

12. The principal point for determination in the above case was whether the suit partnership was illegal, in that it contravened the provisions of the

Central Excise and Salt Act, 1944, and whether even if the partnership was illegal, the appellant would be entitled to the alternative relief for restitution of the moneys paid to him for the business. The trial Court as well as the first Appellate Court accepted the defence that the contract of partnership which enabled the appellant to join the business without an appropriate licence was prohibited by the statute and, therefore, illegal. They also negated the appellant's prayer for the alternative relief on the ground that it was a more equitable claim which did not deserve to be granted in the light of the circumstances that the appellant was put in charge of the business for some time.

13. The two contentions which were before Court, however, were based on the appellant's claim for accounts in two ways: (1) that the partnership was not illegal, in that one of the parties had a licence and business could be done under it. (2) further as under that rule the parties had 30 days time to intimate the authorities about the formation of the partnership, the firm should be considered to be legally constituted for that period of 30 days. The Full Bench observed:

"The second of the two contentions cannot be sustained, for the obvious reason that no contract between the parties to have a partnership for 30 days existed and indeed there could be none as what the agreement envisaged was the carrying on of the business by the firm only on obtaining a joint licence; if the licence was not obtained the contract itself would fail on account of impossibility of performance or the non-fulfilment of the basic condition thereof."

The Full Bench then noticed that the District Judge rejected both the contentions on the authority of the decision in *Govindaraj v. Kandaswami Goundan*, (1956) 2 M.L.J. 578: A.I.R. 1957 Mad. 186, as also took notice of the reference ordered by a Bench of this Court that an earlier Full Bench of this Court in the case of *Velu Padayachi v. Sivasoorian*, (1950) 1 M.L.J. 315: 63 L.W. 234: I.L.R. (1950) Mad. 987: A.I.R. 1950 Mad. 444 (F.B.), required consideration and that the decision in the case of *Govindaraj v. Kandaswami Goundan*, (1956) 2 M.L.J. 578: A.I.R. 1957 Mad. 186, was incorrect and then said as follows:

"It can be taken as settled law that if a contract is forbidden by a statute either expressly or by necessary implication or the contract itself is *ex facie* illegal or where the contract though

legal can be performed only illegally or was intended to be so performed neither party would be entitled either directly or indirectly to enforce his rights under such a contract. The question then is whether the parties in the present case intended to do anything which was prohibited by law or was in contravention of the provisions of the Central Excise and Salt Act of 1944 by entering into a partnership for the sale and manufacture of safety matches. Entering into partnership by a licensee cannot be held to be *per se* illegal. Rule 178 of the rules framed under the Central Excise and Salt Act impliedly recognises that when it states that a licensee on entering into such partnership shall report the fact to the licensing authority within 30 days of his entering thereto. It assumes that the partnership can be entered into even before the licence is amended under Rule 178(4). In the instant case, it was the respondent who under the terms of the contract and under Rule 178 was to apply for an appropriate amendment of the licence; and he failed to do so. He, therefore, committed a breach of the terms of the agreement which disabled further performance. He will normally be under a duty to restore the benefits received under the contract which had been put an end to."

The Full Bench also referred to the judgment of the Privy Council in the case of *Muralidhar Chatterjee v. International Film Co. Ltd.*, (1943) 2 M.L.J. 869; A.I.R. 1943 P.C. 34, to say as follows:

"In *Muralidhar Chatterjee v. International Film Co. Ltd.*, (1943) 2 M.L.J. 869; A.I.R. 1943 P.C. 34, Sir George Ranking in delivering the judgment of the Privy Council analysed the various provisions of the Indian Contract Act and held that money received by a party to a contract in part discharge of the consideration due or to become due, though applied for defraying the expenses of carrying out this part of the contract and spent for that purpose was nevertheless a benefit or advantage had by him, liable to be restored under Sec.64, on his rescission of by contract by reason of breach thereof. It would follow that where an agreement of partnership like the present one has either become impossible of performance by reason of the fact that no joint licence had been obtained in favour of both the partners or by reason of the rescission by one party or the other to the contract the

party in the position of the appellant will be entitled to restitution of the monies paid by him towards the contract."

14. When we advert to the facts of the instant case, however, we have to say that on the pleadings of the parties, it has to be held that a certain agreement was entered into between the plaintiff and the defendant in which according to the former, the latter appointed it as the sole agent for export of switchgears and according to the latter, the former's appointment as sole selling agent of the defendant ought to have been approved by the company at its next general meeting which meeting was held, but the appointment of the plaintiff as the sole selling agent was not placed before the said meeting and consequently the plaintiff ceased to be the sole selling agent on or after the said meeting and/or there was no appointment of the plaintiff as the sole selling agent in accordance with the provisions of the Companies Act, 1956, the parties were, therefore, dealing as principal to principal in respect of the transaction.

15. We have already noticed in the judgment of the learned single Judge a reference to this controversy between the parties and said that in Ex.P-1 the agreement under which the plaintiff was appointed as the sole selling agent for the defendant, there was no reference at all about the placing of the said agreement before the next general body meeting of the defendant company and admittedly it was not so placed before the general body meeting held on 9.9.1968. Thus, the said agreement itself was *void ab initio* and as such the claim based thereon is *void ab initio* and is bound to fail. None of the parties, however, addressed the Court on the question whether the kind of invalidity as attached to the agreement will give to the plaintiff, if no other rights, at least the right to realise the obligations to the extent of the advantages received by the defendant in terms of Sec.64 or Sec.65 of the Contract Act. It appears that at no stage in the course of the trial any one took notice of the admitted existence of the agreement between the plaintiff and the defendant and the exceptions to the rule in *pari delicto potior est conditio defendantis*, so that the court could test the facts and circumstances of the case to find out, whether, actually, the plaintiff and the defendant were in *pari delicto potior est conditio defendantis* for, if the defendant was to perform a certain act and did not do so, the defendant is the wrong-doer

and the plaintiff was wronged by what it did in the sense that the defendant failed to bring on the agenda of the meeting of the company after the agreement was entered into, the question of approval thereof.

16. Dealing with the clause "delays due to causes beyond control (*force majeure*) will not be liable to penalties provided, however, that such causes will have been immediately notified by registered letter", Ex.P-2 purchase order and the mention under Ex.P-3 that the same general conditions will equally apply to the pay order and other evidence in this behalf, the learned single Judge has stated;

"It must be noted that even though details of the circumstances under which the defendants were prevented from fulfilling the contract are not mentioned, yet the defendants have been consistently urging that it was only because of the reasons beyond their control, they are relying on the *force majeure* clause and that they could not fulfil the agreement and in support of the same, they can certainly rely on the document produced by the plaintiffs. It is not in dispute that time has been periodically extended on number of occasions till 31.3.1972 and even after 31.3.1972 the plaintiffs themselves have admitted in the correspondence under Ex.D-15 that the same situation continued. In Ex.D-15 they have given details of various circumstances, which were responsible for non-fulfilment of the agreement. They have stated that the circumstances are beyond the control of the defendants and sought for extension of time till August 1972. For all these reasons, I am of the view that the defendants have satisfactorily established that they can rely on the *force majeure* clause in the agreement as complete answer to the suit claim and accordingly this issue is answered in favour of the defendants."

17. We are not required to go into many details, either of the facts or the principles of law in this behalf, as according to the pleadings of the defendant, its failure to perform its part of the contract was occasioned for the reasons beyond its control, meaning thereby it was not possible for it to fulfil its obligations under the contract/agreement. In *Kanniappa v. Karupiah*, (1962) 2 M.L.J. 109: 1 L.R. (1962) Mad. 441: 75 L.W. 119: A.I.R. 1962 Mad. 240, the Full Bench of this court has also gone into this aspect and said if it is a case of the agreement

becoming impossible of performance for the reasons beyond the control of the defendant, still the law will protect the plaintiff to the extent of the obligations of the defendant as in Secs. 64 and 65 of the Contract Act. It is surprising how without asking the defendant whether it notified by registered letter to the plaintiff the causes as contemplated in the agreement, the learned single Judge has accepted the case of the defendant that the *force majeure* clause in the agreement is a complete answer to the suit claim. Since we have good reasons to interfere with the findings of the learned single Judge that the provisions of Sec. 294 of the Companies Act operate as a bar to the maintainability of the suit and for the reason that there has been no examination by the learned single Judge of the question falling under Sec. 64 and 65 of the Indian Contract, exceptions to the rule, *in pari delicto potior est conditio defendantis* and whether the plaintiff and the defendant are in *in pari delicto potior est conditio defendantis* for which specific issues are necessary, we propose to remand the case. We do not proceed to examine the evidence on the question whether the defendant can rely on *force majeure* clause in the agreement as a complete answer to the suit claim ourselves. We think our recording that the finding in this behalf by the learned single Judge in the Judgment is without sufficient consideration of the principles of law and the evidence on the subject will be enough for the limited purpose of remand. There are findings recorded in the impugned judgment with respect to certain claims and a certain quantum of damages has also been determined by the learned single Judge. The learned single Judge, as we have already noticed, has also examined the counter claim of the defendant and found that the claim of accounting is justifiable but not any damages on account of penalty levied for the delayed delivery and collected by the foreign buyers. The case of the parties in this regard, however, will have to be redetermined as damages for the alleged breach of contract and compensation in terms of Secs. 64 and 65 of the Contract Act create different kind of obligations and require different kind of evidence. Since we are interfering with the impugned judgment and remitting the case for a fresh hearing, after reframing the issues in the light of the observations made above, we think it proper to reopen the determination of the issues as to the quantum of compensation to either side or accounting as

the case may be.

18. In view of what has been found by us, we have no hesitation in setting aside the impugned judgment and remitting the case to the trial court for rehearing in accordance with law after reframing the issues and if necessary affording opportunity to the parties to adduce evidence, if any.

19. In the result, the appeal is allowed, the impugned judgment is set aside and the case is remitted for trial and disposal in the light of the observations made above. There shall be no order as to costs. Court-fee paid on the memorandum of appeal will be refunded in accordance with law.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra and Swamidurai, JJ.*

L.P.A.No.93 of 1984

14th August, 1992.

R.Ashok and another
v.

...Appellants

R.Bhagavathi Ammal (Deceased) and others

...Respondents.

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), Secs.8 and 11 - Widow having no child - Co-widow having a child through her husband - Widow whether can adopt a son or daughter to herself - Effect of such adoption.

There is a strong reason for accepting the right of a widow to adopt a son or daughter for herself even though there may be a child to her co-widow through her husband for the reason of the concept of full blood, half blood and uterine blood relationship that have been one of the vital postulates of the rule of inheritance when two persons stand together to inherit a certain property. A son of the co-widow is the step-son to a Hindu widow and it is different in the case of inheritance of the properties exclusively going to the step son in the same moiety as he is equal to her son when the devolution as contemplated under Sec.15 of the Hindu Succession Act is confined to the sons and

daughters including the children or predeceased son or daughter and the husband and consequently upon the basis of the husband. Chapter II of the Hindu Adoptions and Maintenance Act, 1956 which regulates adoptions by a male or female Hindu does not in any way inhibit a Hindu female who is not married and if married whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been so declared by a Court of competent jurisdiction from adopting a child either male or female if her husband has left a child through another wife. If such an inhibition is to be found, then courts will have to read in Sec.8 of the Hindu Adoptions and Maintenance Act, 1956, additional Words that only such female Hindu whose husband is dead and has not left a child through another wife can alone adopt. That will be a violation of the provisions in Secs.8 and 11 of the Act. The conditions in Sec.11 leave no room to doubt that in the case of the adoptive father, he should not have a son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption and in the case of adoptive mother, she should not have son or son's son or son's son's son (whether by legitimate blood relationship or by adopting) the right given to the adoptive mother is independent of the right given to the adoptive father. This right she can exercise not on the basis of the existence of a son to her husband but a son to herself. A son to a co-widow may be a step-son to her but cannot be accepted as a son for the purpose of adoption. As the effect of the adoption, the child will not only become entitled to inherit the properties exclusively belonging to his/her father but also get all such rights that would accrue to a son to the adoptive mother because such a son enters into the co-parcenary as found by the Supreme Court in the case of a joint family as also otherwise entitled to intestate succession to the estate of her mother's husband who becomes the fictional or legal father. [Paras 9 and 10]

Cases referred to:

Arumugha Udayar v. Valliammal, A.I.R. 1969 Mad. 72. [Para 7]

Sawan Ram v. Kalwanti, A.I.R. 1967 S.C. 1761. [Para 7]

Hanumantha Rao v. Hanumayya, I.L.R. 1966 A.P. 140. [Para 7]

Sitabai v. Ramchandra, A.I.R. 1970 S.C. 343: (1970)1

S.C.J. 476: (1970)2 S.C.R. 1: 1970 S.C.D. 420: (1970)1 S.C.A. 222. [Para 7]

Ankush Narayan v. Janabai Rama Sawat, 67 Bom.L.R. 864: A.I.R. 1966 Bom. 174. [Para 7]

G.Hanumantha v. Nagappa, A.I.R. 1972 S.C. 1401: 1972 S.C.D. 231: (1972)3 S.C.R. 360. [Para 7]

Babu Nanjappa v. Arunkumar, A.I.R. 1988 Karn. 139. [Para 7]

Appeal under Clause 15 of the Letters Patent against the Order of Venugopal, J. dated 8.2.1984 and made in the exercise of the Special Original Jurisdiction of the High Court in Appeal No.504 of 1979, etc.

The Judgment of the Court was delivered by *Mishra, J.*:- This appeal on behalf of the first defendant has arisen out of a proceeding in O.S.No.115 of 1977 of the Court of the Subordinate Judge, Nagercoil for declaration of the plaintiff's title and for recovery of possession of the suit property and other reliefs. The suit property originally belonged to one Andiappa Chettiar. He had two daughters Valliammal and Umayaparvathi. The plaintiff is the son of Valliammal, Umayaparvathi's husband Jeevarathinam Chettiar had two wives. The first wife is Umaayaparvathi and the second wife is Iyyin Pillai. The first defendant (appellant) is the son of the second defendant and the second defendant is the son through the abovesaid Iyyin Pillai, the second wife. Andiappa Chettiar executed a Will under which, on his demise, Umayaparvathi got a life estate over the suit property and the vested remainder was left with the plaintiff and his brother Rengaswami, who predeceased him. Umayaparvathi, adopted the first defendant as her son and executed a Will with regard to the suit property in his favour.

2. According to the plaintiff Umayaparvathi was not competent to adopt a son after the death of her husband since her husband Jeevarathinam had another wife Valliammal and through him, sons including the plaintiff. She also had no right except the limited estate that had been given to her in the property to execute a Will. The first defendant, however pleaded that Umayaparvathi validly adopted him by observing all formalities and she was perfectly competent to bequeath the suit property in favour of her adopted son, the first defendant for her life interest got enlarged into an absolute estate.

3. The trial court found that on the date of death of Andiappa Chettiar, the succession

opened and Umayaparvathi got only a life interest and as she had got only a life interest since she had no children the contingent interest was enlarged into a vested remainder to Valliammal's heirs; that as Umayaparvathi had got only a life interest she cannot make a bequest by conveying absolute interest in favour of the first defendant and that the adoption of the first defendant by Umayaparvathi was invalid in law and the plaintiff is entitled to the suit property on the death of Umayaparvathi and the first defendant, the alleged adopted son did not derive any interest over the suit property on the basis of the Will executed by Andiappa Chettiar.

4. In the appeal, A.S.No.804 of 1979, that was brought to this Court, it was contended that the legacy bequeathed in favour of Valliammal's heirs being contingent on Umayaparvathi having no children and the bequest to the legatee being a contingent interest contingent on Umayaparvathi dying without children succession to the heirs of Valliammal would open only when Umayaparvathi died without children and that even if the bequest to unborn children of Umayaparvathi was void, the provisions of the Hindu Succession Act would apply and the first defendant being the adopted son of Umayaparvathi was entitled to a half share in the suit property. The learned Judge has, however, found on both counts against the first defendant/appellant.

5. The findings aforementioned, however, are assailed before us by learned counsel for the appellant for the reason *inter alia* that the court below has fallen in error in not appreciating the role that the provisions in the Hindu Adoptions and Maintenance Act, 1956, introduced in the field of law of adoption and the fact that once adoption is found valid as a consequence thereof, the first defendant would be entitled to a share in the property along with the plaintiff.

6. Since no serious arguments have been advanced before us with respect to the finding that the bequest made under Ex.A-1 in favour of the children of Umayaparvathi is void we do not enter into any discussion in this behalf. We do not also advert to the question as to whether the Will which Umayaparvathi executed could not confer absolute interest in favour of the first defendant as parties appeared to take the position that in case it is found that Umayaparvathi had validly adopted the first defendant, the plaintiff and defendants

would share the properties in equal moieties.

7. The origin of the custom of adoption is lost in antiquity. It has been recognised for the reasons of *sashtric* belief that a male child alone would discharge the spiritual debts and unless there is a son the spiritual welfare of the soul is in jeopardy. Texts recognize that a male Hindu could adopt a son for himself and his wife not only without consulting his wife but even in spite of her opposition but a wife could not adopt a son without being authorised by her husband. An Act to amend and codify the law relating to adoptions and maintenance among Hindus known as the Hindu Adoptions and Maintenance Act, 1956, hereinafter referred to as 'the Act' brought about some revolutionary changes in the known law of adoption. The Chapter of the Act dealing with 'Adoption' in Sec.5 thereof states that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in the Chapter (*viz.* Chapter II) and any adoption made in contravention of the said provisions shall be void. After stating about the requisites of a valid adoption and saying that in a valid adoption the person adopted not only has the capacity but also the right to take in adoption; the Act had recognised the capacity of a male Hindu to take in adoption but added that if he has a wife living he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of Competent jurisdiction of unsound mind. The Act as in Sec.8, however, recognizes the capacity of a female Hindu to take in adoption stating as follows:

"8. *Capacity of a female Hindu to take in adoption:* Any female Hindu-

- (a) who is of sound mind,
- (b) who is not a minor, and
- (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption."

After providing as to persons capable of giving in adoption and persons who may be adopted, the Act has enumerated under Sec.11 other conditions of a valid adoption. It reads as follows: "In

every adoption, the following conditions must be complied with:

(i) If the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption...

(ii) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption;

Provided that the performance of *Datta Homam* shall not be essential to the validity of an adoption."

Marked departures from the *Shastric Law*, however, have not completely removed control upon the power of the adoptive father or mother. The general conditions in Sec.11 for a valid adoption are besides the conditions, which are enumerated in the provisions preceding that section. Sec.12 which precede the general conditions of adoption, however, states what are the effects of adoption in these words:

"An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family;

Provided that--

- (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

The circumstances in which Umayaparvathy came to adopt the first defendant are not in dispute. Umayaparvathy is the first wife of her husband Jeevarathinam Chettiar. Through his second wife, Jeevarathinam had a son, the second defendant. The first defendant, the adopted son of Umayaparvathy, is the second defendant's natural son. The learned single Judge has come to the conclusion that though the adoption is by the widow Umayaparvathy, the adopted son became a member of the widow's family with the ties of relationship with the deceased husband of the widow as his adoptive father, but, has in the same breath, stated, "This being the effect of adoption, a widow cannot adopt a son if her husband has already a natural son through her or through another wife. To test the validity of an adoption, we have not only to see whether the conditions laid down under Sec.11 for a valid adoption are complied with but also to see whether the effect of adoption, as provided under Sec.12 in any way infringes the conditions imposed under Sec.11. Thus, Secs.11 and 12 are interlinked and interconnected and Sec.11 cannot be read in isolation as sought to be made out by the learned counsel for the appellant. Both Secs.11 and 12 have to be read together and if the effect of adoption is such that it infringes the conditions laid down under Sec.11, the adoption has to be held invalid. In the present case, the effect of adoption is that the adopted son by the widow is son, not only to her but also to her husband and as the husband has already a natural son in existence through his second wife, the adoption made by the widow infringes the condition laid down under Sec.11(1) of the Act and consequently, the adoption has to be held as void."

We have seen above that this Act has particularly introduced a provision in Sec.8 about the capacity of a female Hindu to take in adoption a son or a daughter. This section states that any female of sound mind, not a minor and who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind as the capacity to take a son or daughter in adoption. Thus, a widow or a divorced wife has been given the capacity to take a son or daughter in adoption. Can this power to adopt be restricted if there is a child born to the husband of a divorced wife, who married another woman, after divorcing her and can a widow be denied the capacity to adopt a child on the ground that her husband had a child through another wife? Learned single Judge has, on the basis of the principles that appeared to merge from the effect of adoption, as stated in Sec.12 of the Act, taken the view that a widow whose husband had a son by another woman, cannot adopt. In effect, thus a divorced wife will have no capacity to adopt a son to herself, if her husband remarried and got a child by the second wife. We shall dilate a little further into it, but before we do so, we may have taken notice of the definition of the word 'agnate' in Sec.3 of the Hindu Succession Act, 1956, which says, one person is said to be an agnate of another if the two are related by blood or adoption wholly through males and the definition of 'cognate', which says, one person, is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males. The word 'related' has been defined in this section of the Hindu Succession Act to mean related by legitimate kinship and provided that illegitimate child shall be deemed to be related to their mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly. It is unnecessary to say that sons are class I heirs, both of a male Hindu as well as a female Hindu. But, the Hindu Succession Act, in Sec.9 says, those in class I shall take simultaneously and to the exclusions of all other heirs and Sec.10 says, the property of an intestate shall be divided among the heirs in class I of the schedule in accordance with the following rules-

Rule 1: The intestate's widow or if there are more widows than one, all the widows together, shall take one share.

Rule 2: The surviving sons and daughters and the mother of the intestate shall each take one share;

Rule 3: The heirs in the branch of each predeceased daughter of the intestate shall take between them one share and the distribution of the share referred to in the last rule shall be one among the heirs in the branch of the predeceased son, widow or widows together and the surviving sons and daughters equal portions and the branch of predeceased sons the same portion and among the heirs in the branch of the predeceased daughter, the surviving sons and daughters in equal portions. We have proceeded in this case on the footing, since it has been conceded that there would be no use contesting that Umayaparvathy had a limited interest or that she had enlarged her interest in the property because in any case the validity of the adoption alone shall permit the first-defendant to inherit as the son of Umayaparvathy any share in the estate of the family of Andiappa Chettiar. It has not been contested seriously before us that in case adoption is found valid, the second defendant, as the son of Umayaparvathy shall be entitled to half of the estate and the remaining half will go to the child of Valliammal. A learned single Judge of this Court in *Arumugha Udayar v. Valliammal*, A.I.R. 1969 Mad. 72, has taken the view that a son adopted by the widow does not become adopted of deceased husband conferring upon him rights of inheritance to the estate of the deceased husband. He, in his detailed study of the law on the subject, found a provision in Sec.14 of the Adoption Act of some help, which says, where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother and where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers. Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child, and where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child. The Supreme Court, however, in the case of *Sawan Ram v. Kalwanti*, A.I.R. 1967 S.C. 1761,

commenting upon a similar view expressed in a judgment of the Andhra Pradesh High Court in *Hanumantha Rao v. Hanumayya*, I.L.R. 1966 A.P. 140, wherein the Andhra Pradesh High Court has observed:

"The Act has made a notable departure from the previous law in allowing a widow to adopt a son or daughter to herself in her own right. Under the Act, there is no question of the adopted child divesting of any property vested in any person or even in herself. The provisions of Sec.13 make this position clear, by providing that an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will..... On a fair interpretation of the provisions of Sec.12 of the Act, we are of the opinion that the section has the effect of abrogating ordinary rule of Mitakshara Law that, as a result of the adoption made by the widow, the adoptee acquires rights to the share of his deceased adoptive father which has passed by survivorship to his father's brothers."

The Supreme Court has said,

"We are unable to accept this interpretation of the provisions of the Act by the Andhra Pradesh High Court as it appears to us that the High Court ignored two important provisions of the Act and did not consider their effect when arriving at its decision. The first provision, which is of great significance, is contained in Sec.5(1) of the Act, which lays down:

"No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter and any adoption made in contravention of the said provisions shall be void'. It is significant that, in this section, the adoption to be made is mentioned as 'by order to a Hindu'. Thus, adoption is envisaged as being of two kinds. One is adoption by a Hindu and the other is adoption to a Hindu. If the view canvassed on behalf of the appellant be accepted, the consequence will be that there will be only adoptions by Hindu and not to Hindus. On the face of it, adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other

person. The most common instance will naturally be that of adoption by a female Hindu, who is married and whose husband is dead, or has completely and finally renounced the world, or has been declared by a court of competent jurisdiction to be of unsound mind. In such a case, the actual adoption would be by the female Hindu, while the adoption will be not only to herself, but also to her husband who is dead, or has completely and finally renounced the world or has been declared to be of unsound mind. The second provision, which was ignored by the Andhra Pradesh High Court is one contained in Sec.12 itself. The section, in its principal clause not only lays down that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, but in addition, goes on to define the rights of such an adopted child. It lays down that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. A question naturally arises which is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. It is well recognised that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family. The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth is, thus, clearly to be replaced by similar rights in the adoptive family and consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow, or the married female, taking him in adoption. This provision in Sec.12 of the Act, thus itself makes it clear that, on adoption by a Hindu female who has been married the adopted son or will, in effect,

be the adopted son of her husband also. This aspect was ignored by the Andhra Pradesh High Court when dealing with the effect of the language used in other parts of this section". The Supreme Court again in the case of *Sitabai v. Ramchandra*, A.I.R. 1970 S.C. 343: (1970)1 S.C.J. 476: (1970)2 S.C.R. 1: 1970 S.C.D. 420: (1970)1 S.C.A. 222, adverted to this aspect of the law and in this judgment has said as follows:

"It is clear on a reading of the main part of Sec.12 and sub-sec.(VI) of Sec.11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Sec.11(4) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father, but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption his wife becomes the step-mother of the adopted child, when a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of Secs.11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words, the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son and in this way, the adopted

son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that Sec.14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But, it is a necessary implication of Secs.12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in Sub-sec.(4) of Sec.14, a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the 'step-father' of the adopted child. The true effect and interpretation of Secs.11 and 12 of Act No.78 of 1956 therefore is that when either of the spouse adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words, the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses. This view is borne out by the decision of the Bombay High Court in *Ankush Narayan v. Janabai Rama Sawat*, 67 Bom.L.R. 864: A.I.R. 1966 Bom. 174. It follows that in the present case, plaintiff No.2 Suresh Chandra, when he was adopted by Bhagirath's widow, became the adopted son of both the widow and her deceased husband Bhagirath and, therefore, became a coparcener with Dulichand in the joint family properties. After the death of Dulichand, plaintiff No.2 became the sole surviving coparcener and was entitled to the possession of all joint family properties. The Additional District Judge was, therefore, right in granting a decree in favour of the plaintiff No.2 declaring his title to the agricultural lands in the village Palasia and half share of the house situated in the village".

The Supreme Court reiterated this view in the case of *G.Hanumantha v. Nagappa*, A.I.R. 1972 S.C. 1401: 1972 S.C.D. 231: (1972) 3 S.C.R. 360. A Bench of the Karnataka High Court in *Babu Nanjappa v. Arunkumar*, A.I.R. 1988 Karn. 139, has after taking notice of all relevant authorities on the subject found, on the set of facts that were in the case, that if adoption, after the adoption Act came into force, is found valid, then the question

that the adopted son was not born to his father would not be relevant for entitling the adopted child to claim a share in the family property as a coparcener.

8. The principles of law aforesaid lead us to split the questions as to validity of adoption and the right of the adopted child in the estate of the husband of the widow, who adopted him, for the validity of the adoption has absolutely no correlation with the right of the adopted child in the estate of the husband of the adoptive mother. The question that is posed before us, however, is slightly different from what has been decided by the Supreme Court or other courts. No case law has been brought to our notice in which a woman, whose husband has died, and who does not have a child of her own, was not found capable to adopt on the ground that her co-widow had a child of her husband.

9. There is a strong reason for accepting the right of a widow to adopt a son or daughter for herself even though there may be a child to her co-widow through her husband for the reason of the concept of the full blood, half blood and uterine blood relationship that have been one of the vital postulates of the rule of inheritance when two persons stand together to inherit a certain property. Two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives and two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands. (See: Sec.3(1)(c) of the Hindu Succession Act). Sec.18 of the Hindu Succession Act says:

"Full blood preferred to half blood. Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect".

A son of the co-widow is the step-son to a Hindu widow and it is difficult in the case of inheritance of the properties exclusively belonging to her going to the step-son in the same moiety as if he is equal to her son when the devolution as contemplated under Sec.15 of the Hindu Succession Act is confined to the sons and daughters including the children or predeceased son or daughter and the husband and consequently upon the basis of the

husband. Chapter II of the Hindu Adoptions and Maintenance Act, 1956, which regulates adoptions by a male or female Hindu does not in any way inhibit a Hindu female who is not married and if married whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been so declared by a court of competent jurisdiction, from adopting a child either male or female if her husband has left a child through another wife. If such inhibition has to be found then, courts will have to read in Sec.8 of the Hindu Adoptions and Maintenance Act, 1956, additional words that only such female Hindu whose husband is dead and has not left a child through another wife can alone adopt. That will be, in our opinion, a violation of the provisions in Secs.8 and 11 of the Act. The conditions in Sec.11 leave no room to doubt that in the case of the adoptive father he should not have a son, son's son or son's, son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption and in the case of the adoptive mother she should not have a son, son's son or son's son's son (whether by legitimate blood relationship or by adoption). The right given to the adoptive mother is independent of the right given to the adoptive father. This right she can exercise not on the basis of the existence of a son to her husband but a son to herself. A son to a co-widow may be a step-son to her but cannot be accepted as a son for the purpose of adoption.

10. Once this question of the right of the widow who adopts a son to herself is answered then the question as to the effect of the adoption would start. As the effect of the adoption the child will not only become entitled to inherit the properties exclusively belonging to his/her father but also get all such rights that would accrue to a son to the adoptive mother because such a son enters into the coparcenary as found by the Supreme Court in the case of a joint family as also otherwise entitled to intestate succession to the estate of her mother's husband who becomes the fictional or legal father.

11. There has been some argument before us that the impugned property exclusively belonged to Umayaparvathi as it had been donated to her by her father and thus it has to devolve upon her adopted son in accordance with the rule of succession. We have quite a few reservations however to this for the reasons that the Will under which

Valliammal and Umayaparvathi got the properties in equal moiety does not appear to vest any property alone in her and there had been a time when she alone held the property it was on account of the death of Valliammal who predeceased her.

12. We, therefore, do not propose to accept the above contention. Since we have, however, held that no invalidity in the adoption of the first defendant by Umayaparvathi and we have also found that as a consequence of the adoption the first defendant would become entitled to inherit any property that vested in her mother, we find that the first defendant is entitled to take the share of Umayaparvathi in the estate jointly held by Valliammal and Umayaparvathi. As a result of this finding we hold that the first defendant would be entitled to a share equally with the plaintiff. The appeal is accordingly allowed to the extent indicated above. The decree shall be drawn accordingly. No costs.

B.S.

---- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

S.A.No.764 of 1982

8th December, 1992.

The Assistant Commissioner, Hindu Religious and Charitable Endowments (Administrative), Tirunelveli
v.
...Appellant

Peria Nadar and others

...Respondents.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959) - 'Religious denomination' - Conditions for.

The term 'religious denomination' according to the decision in *S.P.Mittal v. Union of India, A.I.R. 1983 S.C. 1: (1983) 1 S.C.J. 45: (1983) 1 S.C.R. 729: (1983) 1 S.C.C. 51*, and the earlier decisions of the Supreme Court must satisfy the following three conditions:- (i) it must be a collection of individuals who have a system of beliefs or doctrines which they regard as conclusive to their spiritual

well-being, that is, a common faith; (ii) Common organisation and (iii) designation by a distinctive name. [Para. 7]

Cases referred to:

S.P.Mittal v. Union of India, A.I.R. 1983 S.C. 1: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729: (1983)1 S.C.C. 51. [Para. 4]

Acharya Jagdiswaran v. Commissioner of Police, 1983 Cr.L.J. 1872: (1983)4 S.C.C. 522: 1983 S.C.C. (Cr.) 1: A.I.R. 1984 S.C. 51. [Paras. 4, 7, 7-D]

Assistant Commissioner, H.R. and C.E., Salem, etc. v. Nattamai K.S.Ellappa, etc., 100 L.W. 240. [Paras. 4, 7-A, 7-B]

Sankarakumara Nadar v. Assistant Commissioner, H.R. and C.E., (1975)1 M.L.J. 12 (D.B.). [Paras. 5, 8]

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954)1 M.L.J. 596: 1954 S.C.J. 335: 1954 S.C.R. 1005: 1954 M.W.N. 363: A.I.R. 1954 S.C. 282. [Para. 7-C]

K. Eranna v. Commissioner, H.R. and C.E., A.I.R. 1970 Mysore 191. [Para. 7-D]

A.V.Sabha v. H.C. and R.I. and E., Commissioner, Hyderabad, A.I.R. 1976 S.C. 475. [Para. 9]

V.Balakrishnan v. The Assistant Commissioner, H.R. and C.E., (Admn.) Department, Tirunelveli, (1978) T.L.N.J. 359. [Para. 10-A]

A.Palaniandi Pillai v. Commissioner, H.R., and C.E., Madras, 93 L.W. 12. [Para. 10-A]

R.Swaminathan, for Appellant.

P.Rathinathurai, for Respondents.

The Court delivered the following

JUDGMENT:- The defendant-Assistant Commissioner of the Hindu Religious and Charitable Endowments (Administrative) Department is the appellant in this second appeal against the reversing judgment in A.S.No.18 of 1980 on the file of the Additional Sub Court, Tuticorin. The suit O.S.No.135 of 1977 on the file of the District Munsif's Court, Tuticorin was filed by the five respondents-plaintiffs as representatives of Hindu Nadar Community of Sebathiapuram, hamlet of Sawyerpuram, Srivaikuntam Taluk. It is for a declaration that the suit temples viz., Muthumalai Amman Temple, Narayanaswamy Temple and Ananda Vinayagar temple are denominational temples belonging to the abovesaid plaintiffs' community and for a consequential permanent injunction.

2. The main defence to the suit is that the said

Temples are not such denominational temples. One other defence is that the suit is bad for mis-joinder of necessary party viz., the Commissioner, H.R. & C.E. Department, Madras. The trial court, though held that the suit is not bad for mis-joinder of necessary party as claimed by the defendant, accepted the defence that the suit temples are not denominational temples and so dismissed the suit. The plaintiffs preferred the above referred to first appeal, wherein the lower appellate court though concurred with the trial court on the abovesaid question of mis-joinder, held that the suit temples are denominational temples and decreed the suit as prayed for and allowed the appeal. Aggrieved by the said decision of the lower appellate court, the defendant has preferred this second appeal.

3. No doubt, the lower appellate court has found that the suit temples were founded by the above referred to Hindu Nadars of Sebathiapuram from out of their own funds as disclosed by Exs.A-4 to A-8, that the other community people living in Sebathiapuram did not have any right of management in the suit temples and that P.Ws.1 and 2 had spoken to the fact that Kodai Festival was used to be celebrated from out of the contribution collected from the members of Hindu Nadar community of Sebathiapuram and not from Hindu Nadars of other villages and from the members of other community of Sebathiapuram.

4. The learned counsel for the appellant seriously argues the following submission:

There is no finding by the lower appellate court as to whether the abovesaid Hindu Nadars are a "religious denomination" There is also no plea or proof regarding the ingredients of the term "religious denomination" as applied to the above referred to Hindu Nadar Community of Sebathiapuram. In this connection, he drew my attention to the decisions in *S.P.Mittal v. Union of India*, A.I.R. 1983 S.C. 1: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729: (1983)1 S.C.C. 51, *Acharya Jagdiswaran v. Commissioner of Police and another*, 1983 Cr.L.J. 1872: (1983)4 S.C.C. 522: 1983 S.C.C. (Cr.) 1: A.I.R. 1984 S.C. 51, and *Assistant Commissioner, H.R. and C.E., Salem, etc. v. Nattamai K.S.Ellappa, etc.*, 100 L.W. 240.

5. The learned counsel for the respondents made the following submissions in reply: There is plea regarding the necessary ingredients of the term "religious denomination" as it is applied to the above referred to Nadar community. The above

referred to Supreme Court decisions explaining the ingredients of religious denomination, will not apply in the present case. The abovesaid *S.P. Mittal v. Union of India*, A.I.R. 1983 S.C. 1: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729: (1983)1 S.C.C. 51, related not to a temple, but to a society called Sri Aurobindo Society. The abovesaid Nadar community is a separate sect of Hindus and no further proof is required to establish that they belong to a religious denomination. In *Sankar-kumara Nadar v. Assistant Commissioner, H.R. and C.E.*, (1975)1 M.L.J. 12 (D.B.), a particular temple in the village Sivagurnathapuram belonging to Hindu Nadars of that village was held to be a denominational temple.

6. I have considered the rival submissions. To find out whether the suit temple is a denominational temple belonging to the abovesaid Hindu Nadar community of the abovesaid village Sebathiapuram, firstly, it has to be seen whether the said community of the said village is a religious denomination by itself. If it is found to be so, then consequently, it has to be seen whether the said community has established the said temple and whether it had exclusive right of management of the said temple. Both these requirements should not be mixed up and it has to be seen whether each of the said requirements is satisfied. This aspect has also been pointed out in the abovesaid *Assistant Commissioner, H.R. and C.E., Salem, etc. v. Nattamai K.S. Ellappa, etc.*, 100 L.W. 240, in paragraph 23 thereof.

7. But, I find that the lower appellate court has not given a finding at all regarding the first of the abovesaid two questions to be decided. In fact, the term 'religious denomination' according to the decision in *S.P. Mittal v. Union of India*, A.I.R. 1983 S.C. 1: (1983)1 S.C.J. 45: (1983)1 S.C.R. 729: (1983)1 S.C.C. 51, and the earlier decisions of the Supreme Court must satisfy the following three conditions:

- (1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
- (2) Common organisation and
- (3) Designation by a distinctive name.

Even assuming that there is satisfaction of second and third of the abovesaid three conditions in the present case, it has to be seen whether the first of the three conditions has been satisfied. Regarding

this, first of all, it has to be seen whether there is plea to this effect. If there is plea, we have to see whether there is proof to that effect. The learned Counsel for the respondents-plaintiffs points out that the following passages in the plaint would amount to the abovesaid plea relating to the first of the abovesaid conditions:

"Hindu Nadars are a minority community with peculiar customs, manners and mode of religious worship, living mostly in Tirunelveli, Ramnad, Madurai Districts, of Tamil Nadu. At Sebathiayapuram, a section of that community is living and their ancestors have put up from out of their own funds, the three temples. ... The Hindu Nadars, whom the plaintiffs represent have a special mode of worship with distinct specific rituals. The plaintiffs collect subscription from among themselves and celebrate 'Kodai' festival in the month of Panguni and in Adi every year. The 'Kodai' festival itself is evolved by the plaintiffs as a separate cult not ordinarily followed by the recognised Siva and Vishnu Temples. The plaintiffs also offer special pujas at the time of Vinayagasadurthi....."

But, even after reading the above passages, I am unable to say that they speak about the abovesaid first condition mentioned in the Supreme Court decision. In the said first condition what is mentioned is that the collective body of individuals concerned must have a "system of beliefs or doctrines". Such system of beliefs or doctrines is not spoken to in the abovesaid passages. What is mentioned in the said passages is only about the mode or manner of worship and not any system of belief or doctrine, which is conducive to the spiritual well-being of the abovesaid Nadar community. No doubt, while referring to Kodai Festival, it is mentioned that it is evolved by the plaintiffs as a separate cult. The word "cult" may no doubt refer to a system of religious belief. But the celebration of a particular festival would normally represent only a mode of worship and not strictly a system of religious belief.

7-A. Anyway, in having used the word "cult", if it is assumed that there is the requisite plea, it has to be seen whether there is proof regarding the abovesaid first condition mentioned in the Supreme Court decisions. But, I find that neither of the two witnesses, who have given evidence on behalf of the plaintiffs, have spoken to this fact, viz., that the abovesaid Nadar Community of the

abovesaid village had any such separate system of beliefs or doctrines which they regard as conducive to their spiritual well-being. P.W.1, the Accountant of the abovesaid community only spoke about the management of the abovesaid temples being exclusively with the said community. Likewise, P.W.2, the 4th plaintiff also laid emphasis on the abovesaid management aspect. Though he also spoke about the abovesaid Kodai festival, he did not say that the said Kodai festival was evolved by the abovesaid Nadar community of the abovesaid village as a separate cult not ordinarily followed by the recognised Siva and Vishnu Temples. In fact, he also did not speak of any exclusive system of beliefs or doctrines held by the abovesaid Nadar Community of the abovesaid village. There is also no documentary evidence showing and such system of beliefs or doctrines of the abovesaid community.

7-B. In *Assistant Commissioner, H.R. and C.E., Salem, etc. v. Nattamai K.S. Ellappa, etc.*, 100 L.W. 240, also it has been observed thus:

"As seen from the decision of the Supreme Court the words 'Religious denomination' must take their colour from the word 'Religion'. It is, therefore, clear that the common faith of the community should be based on religion. It is essential that they should have common religious tenets. The basic chord which connects them should be religion and not anything else. If the aforesaid tests are applied in the present case, it will be seen that Senguntha Mudaliar community of Tharamangalam cannot claim to be a religious denomination. There is absolutely no evidence on record to prove that the members of the community have common religious tenets peculiar to themselves other than those which are common to the entire Hindu community..... It is well known that communities were formed in this country on account of various reasons under several circumstances. It is not as if religion is the only common bond for the members of the communities found in this country. Instances are not wanting where communities were formed on the basis of profession or business or calling."

While so, it is difficult to hold that the abovesaid community of the abovesaid village in the present case comes under the term "religious denomination".

7-C. No doubt, earlier, the Supreme Court in one

other decision, viz., *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, (1954) 1 M.L.J. 596: 1954 S.C.J. 335: 1954 S.C.R. 1005: 1954 M.W.N. 363: A.I.R. 1954 S.C. 282, observed thus:

"After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu Religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, in many cases it is the name of the founder and has a common faith and common spiritual organization."

But, I think the above reference to sects and sub-sects which go by the name of founder if the sect or sub-sect is different from the different castes in the Hindu religion, one of which, viz., the Nadars, to which the plaintiffs claim to belong. Further, in the abovesaid observation of the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirpur Mutt*, (1954) 1 M.L.J. 596: 1954 S.C.J. 335: 1954 S.C.R. 1005: 1954 M.W.N. 363: A.I.R. 1954 S.C. 282, while noting that one of such sects or sub-sects can certainly be called a religious denomination, the Supreme Court proceeds on the assumption that each of them has a separate system of beliefs or doctrines which is regarded as conducive to its spiritual well-being.

7-D. At any rate, in the subsequent Supreme Court decision, viz., the above referred to *S.P. Mittal v. Union of India*, A.I.R. 1983 S.C. 1: (1983) 1 S.C.J. 45: (1983) 1 S.C.R. 729: (1983) 1 S.C.C. 51 and *Acharya Jagdiswaran v. Commissioner of Police and another*, 1983 Cr.L.J. 1872: (1983) 4 S.C.C. 522: 1983 S.C.C. (Cr.) 1: A.I.R. 1984 S.C. 51, it is specifically reiterated that all the abovesaid three conditions must be satisfied if a group or community could be called a "religious denomination". I may also state that the decision in *K. Eranna v. Commissioner, H.R. and C.E., A.I.R. 1970 Mysore. 191*, cited by the learned Counsel for the respondents will have no application to the present case. There, it was only held that Hindus in the larger sense including all sections of Hindus constitute a religious denomination. In view of the above, I am of the view that the plaintiffs have not established that the abovesaid Hindu Nadar Community of the abovesaid village would come within the

definition of the religious denomination,

7-E. In this context I must also point out that the case of the plaintiffs is not that Hindu Nadars in general constitute a religious denomination, but that the Hindu Nadars of the abovesaid Sebatthiapuram village would constitute a religious denomination. To this effect also, there is no proof in present case.

8. No doubt in *Sarikarakumara Nadar v. Assistant Commissioner, H.R. and C.E.*, (1975) 1 M.L.J. 12 (D.B.), it was held that the suit temple therein was a denominational temple belonging exclusively to the Hindu Nadars of Sivagurunathapuram village. But, *simply because* it was held so in that case, it cannot be held in the present case that the suit temples herein are denominational temples exclusively belonging to the Hindu Nadars of Sebatthiapuram village, holding that the said Nadars constitute a religious denomination. Each case turns on its facts and unless there is the required plea and proof satisfying the above laid down conditions set out by Supreme Court decisions, the relief prayed for in the present suit, cannot be given.

9. No doubt, the learned counsel for respondents drew my attention to the decision in *A.V. Sabha v. H.C. and R.I. and E., Commissioner, Hyderabad*, A.I.R. 1976 S.C. 475, also and sought to contend that this question regarding religious denomination is a question of fact and the decision arrived at by the lower appellate court should not be disturbed. The said Supreme Court decision, did not say positively that the said question is only a question of fact. In fact, the Supreme Court, in the abovesaid decision, extracts the following observation from the judgment of the High Court, which earlier decided the case:

"Likewise, whether a particular religious or charitable institution is or is not a religious denomination or any section thereof within the meaning of Art.26 of the Constitution, is also a question of fact or, in any event, a mixed question of fact and law which can be more satisfactorily and effectively adjudicated upon in a competent civil court."

Actually, the question before the High Court and the Supreme Court therein was whether the jurisdiction under Art.226 of the Constitution of India could be invoked or whether the proper remedy would be only a suit in a civil court, and the High Court and the Supreme Court came to the

conclusion that since the matter involved is a disputed question of fact, it could not be appropriately determined under Art.226 of the Constitution of India. The said decision has no application to the present case. That apart, here, the lower appellate court did not at all give a finding on the abovesaid question regarding religious denomination, even though the case warrants a finding on the said question. Therefore, it is but proper particularly in view of Sec.103, C.P.C. that this Court goes into that question and gives a finding and dispose of the second appeal accordingly.

10. No doubt, in the present case, there is factual finding by the lower appellate court that the abovesaid temples were established and managed exclusively by the abovesaid Nadar Community of the abovesaid village. However, in view of the other fact, *viz.*, that there is no proof that the said community constitutes a religious denomination, the relief prayed for cannot be given.

10-A. No doubt the learned counsel for the respondents also relied on a passage in *V.Balakrishnan and others v. The Assistant Commissioner, H.R. and C.E., (Admn.) Department, Tirunelveli and others*, (1978) T.L.N.J. 359, saying that "the worshippers of communities other than those belonging to the denomination having access to the temple and offering worship therein is not conclusive of the question whether it is a denominational temple or not". This is no doubt true. But this passage has no relevance to the abovesaid discussion on the question whether the abovesaid Nadar Community is a religious denomination or not. Likewise, *A.Palaniandi Pillai v. Commissioner, H.R. and C.E., Madras*, 93 L.W. 12, cited by the learned counsel for the respondents, has no relevance to the abovesaid point of discussion.

10-B. The other submission of learned counsel for appellant regarding the above referred to other question of non-joinder has no merit at all and hence is not dealt with in any detail.

11. In the result, the second appeal is allowed, the judgment and decree of the lower appellate court are set aside and that of the trial court are restored. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

[*Special Original Jurisdiction*]

Present: *K.S.Bakthavatsalam, J.*

W.P.No.2527 of 1990 26th November, 1992.

S.Mohan

...Petitioner

v.

The Government of Tamil Nadu and another

...Respondents.

Civil Services - Disciplinary enquiry - Punishing authority differing from enquiring authority - Reasons for taking different decision to be given - Order passed without application of mind, cannot be sustained - High Court whether can go into the question of quantum of punishment.

On a perusal of the materials placed before the court, it has to be held that the impugned order shows the non-application of mind. The impugned order proceeds in the footing as if 'demand' and 'acceptance' are proved by the enquiry authority. A reading of the enquiry report does not show that. The enquiry authority has held that only the demand portion alone is proved. But the punishing authority has come to the conclusion that it has been clearly proved, on the report of the enquiry officer, the charge stands with regard to 'demand' and 'acceptance' of the bribe. No reasons are stated in the impugned order as to how such a conclusion has been arrived at when the punishing authority normally, differs from the enquiry report, the least what could be expected is that reasons should be stated therein as to why a different decision has been taken. A reading of the impugned order shows that no reasons are stated therein for differing from the report of the enquiry officer. In such a circumstance, the impugned order has got to be set aside. [Para. 8]

Cases referred to:

State of West Bengal v. Anil Krishna Shaw, A.I.R. 1990 S.C. 2205. [Para. 8]

Bangalore Medical Trust v. B.S.Muddappa, A.I.R. 1991 S.C. 1902. [Para. 8]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the

order of the 2nd respondent as communicated by the proceedings No.DC.4/76932/85, dated 27.8.1989 by its Chairman and Managing Director and to quash the order of the 2nd respondent as communicated by the proceedings No.DC.4/76932/85, dated 27.8.1989 by its Chairman and Managing Director.

S.Sundar for *Aiyar and Dolia*, for Petitioner.

P.Balasubramaniam, Additional Government Pleader, for Respondent No.1.

S.Doraisamy, for Respondent No.2.

The Court made the following

ORDER: The petitioner challenges the order of the second respondent dated 27.8.1989 by which the petitioner has been removed from the services of the second respondent Board. The petitioner and one Kesavan were working as Assistants in the Besant Nagar division of the second respondent Tamil Nadu Housing Board. on 14.10.1985 both were arrested for having demanded and accepted a bribe of Rs.150 from one Sriramkrishnan, for giving information regarding Flat No.102/20 and the petitioner herein was kept under suspension pending inquiry, by an order of suspension dated 18.10.1985. A charge was framed against the petitioner under Service Regulation 37(b) of Tamil Nadu Housing Board Service Regulations, 1969, stating that the petitioner has demanded and accepted a bribe of Rs.150 from one Sriramkrishnan for furnishing the details of the amount outstanding towards the Flat No.M.102/20, Besant Nagar. An enquiry was conducted in which witnesses were examined and the matter was placed before the respondent-Board and the respondent-Board by resolution dated 30.12.1988 resolved to remove the petitioner from the service of the Board and the said resolution was sent to the Government for approval. The Government by letter dated 31.7.1989 accepted the proposal of Tamil Nadu Housing Board and as such the second respondent-Board issued proceedings dated 27.8.1989, which is impugned herein by which the services of the petitioner has been terminated. The petitioner has come up before this Court challenging the said order of removal.

2. The petitioner alleges in the affidavit that the second respondent erred in thinking that the charge of demand and accepting the payment had been proved while it was the specific finding of the enquiry officer that the acceptance part of it is not proved beyond doubt. It is also alleged in the

affidavit that the disciplinary authority, while accepting the report of the enquiry officer, misread the report and imposed the punishment thinking that the charge of receiving bribe was also proved. It is also alleged in the affidavit that many of the witnesses were shown, their alleged statements recorded under Sec. 161, CrI.P.C., and those statements were treated as substantive evidence, and that the disciplinary authority has failed to note that the police officers who are originally said to have laid a trap had after detailed investigation, dropped the case and did not file a charge sheet and that it shows that the petitioner was not guilty of any misconduct. It is also alleged that the disciplinary authority and the enquiry authority ought to have seen that the said Sriramkrishnan was the only witness speaking about the alleged demand and the acceptance of bribe by the petitioner, that the enquiry officer having rightly disbelieved the said witness by holding that the acceptance of bribe by the petitioner had not been proved, ought to have disbelieved him on the aspect of demand also. It is also stated in the affidavit that nobody else was examined to prove the demand aspect, except the said Sriramkrishnan, that the charge of acceptance was not at all proved and as such the disciplinary authority ought to have seen that it is not safe to believe the evidence of the said Sriramkrishnan on the aspect of alleged demand which alone, according to enquiry officer had been proved. It is also alleged in the affidavit that the finding of the enquiry officer is perverse as some portion of the findings is based on 'no evidence' and some portions are contrary to evidence and that no reasonable person would come to a conclusion as arrived at by the enquiry officer. It is also stated in the affidavit that the report of the enquiry officer and the impugned orders are non-speaking ones and as such they have to be quashed.

3. A counter affidavit has been filed on behalf of the second respondent. It is claimed in the counter affidavit that the enquiry officer had stated in the report that though the charge that the petitioner had demanded the bribe stands proved and the acceptance part was not proved beyond doubt. It is also stated in the counter affidavit that the result of the Phenolphthelin test which was conducted on his left hand confirms turning pink and that it shows that the petitioner would have accepted the money even though the money was recovered from the complainant during the incident. It is

also claimed in the counter affidavit that two witnesses have justified the fact that the petitioner thrust the money back to the said Sriramkrishnan, the complainant and that the petitioner could have done it fearing the imminent arrest by the vigilance and anti-corruption people. It is also claimed in the counter affidavit that since the Government have directed the Tamil Nadu Housing Board to take departmental proceedings, no police action has taken place against the petitioner, that the competent persons to speak about the bribe will be the persons who demanded to pay the amount and as such there is no other evidence is available to speak about the demand made by the petitioner. It is also claimed in the counter affidavit that it is quite enough to arrive at the conclusion that the petitioner had demanded and accepted the money and thrust the money back in the hands of the complainant on seeing the vigilance and anti-corruption officers approached him.

4. The first respondent has adopted the counter-affidavit of the second respondent herein.

5. Mr. S. Sundaram, the learned counsel for the petitioner contends that according to the enquiry report, only the demand is proved even as per the evidence of the said Sriramkrishnan and acceptance was not at all proved. According to the learned counsel for the petitioner to rely upon the evidence of one portion with regard to demand and not to accept the portion of evidence with regard to acceptance is not correct on the part of the enquiry officer. According to the learned counsel for the petitioner, as per the report of the enquiry officer, the charge is partly proved in the sense the acceptance was not at all proved beyond doubt, but there must have been evidence to prove the bribe. As such, the learned counsel points out that in so far as the impugned order state that the charges framed against the petitioner are held to be proved, when the demand is not accepted by the petitioner, according to the enquiry report, the charge of bribe against the petitioner is not correct. According to the learned counsel for the petitioner, it is true that the punishing authority can differ from the findings of the enquiry officer, but in this case, no reasons are given in the affidavit for arriving at a decision that the acceptance of bribe is proved. On this score alone, the impugned order has got to be set aside is the contention raised by the learned counsel for the petitioner.

Learned counsel further contends that no reasons are stated in the impugned order for arriving at such a decision and that the respondents had passed a non-speaking order and as such it is vitiated.

6. Mr.S.Doraisamy, the learned counsel appearing for the second respondent-Board points out that the chemical analysis report has clearly proved the receipt of money, that on seeing the vigilance officers, the petitioner thrust back the money into the pocket of the said Sriramkrishnan, the complainant and that itself shows that the petitioner has made a demand of bribe. According to the learned counsel appearing for the respondent-Board, atleast 'demand' is proved, though 'acceptance' is not proved.

7. I have considered the arguments of S.Sundaram, the learned counsel appearing for the petitioner, and of Mr.P.Balasubramaniam, learned Additional Government Pleader appearing for the first respondent and of Mr.S.Doraisamy, the learned counsel appearing for the respondent-Board.

8. The short point that arises for consideration in this case is whether the punishing authority has applied its mind before passing the impugned order. On a perusal of the materials placed before me, I am of the view that the impugned order shows the non-application of mind. The impugned order proceeds on the footing as if 'demand' and 'acceptance' are proved by the enquiry authority. A reading of the enquiry report does not show that the enquiry authority has held that only the 'demand' portion alone is proved. But the punishing authority has come to the conclusion that it has been clearly proved him on the report of the enquiry officer, the charge stands with regard to 'demand' and 'acceptance' of the bribe. No reasons are stated in the impugned order as to how such a conclusion has been arrived at. When the punishing authority, normally differs from the enquiry report, the least could be expected is that reasons should be stated therein as to why a different decision has been taken. A reading of the impugned order shows that no reasons are stated therein for differing from the report of the enquiry officer. However, the learned counsel appearing for the second respondent-Board contends that this Court can come to the conclusion that, at any rate, the 'demand' is proved. I do not think that such a conclusion can be arrived at by this Court, since no reasons are stated by the punishing

authority for differing from the findings of the enquiry officer and it is not possible for this Court to guess as to what was passing on the mind of the punishing authority when the quantum of punishment was arrived at. It has been held by the Apex Court in *State of West Bengal v. Atul Krishna Shaw*, A.I.R. 1990 S.C. 2205 at 2208, to the following effect:

"..By process of judicial review we cannot appreciate the evidence and record out own findings of fact. If the findings are based on no evidence or based on conjectures or surmises and no reasonable man would on given facts and circumstances, come to the conclusion reached by the appellate authority on the basis of the evidence on record, certainly this Court would oversee whether the findings recorded by the appellate authority is based on no evidence or beset with surmises or conjectures.

..Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice...."

This view has to be arrived at necessarily in view of another decision of the Apex Court of the land in *Bangalore Medical Trust v. B.S.Muddappa*, A.I.R. 1991 S.C. 1902, wherein it has been held that the disciplinary enquiry is quasi-judicial in nature. As such, this Court cannot go into the question of quantum of punishment, as I have always stated. In such circumstances, the impugned order of the second respondent has got to be set aside and accordingly it is set aside and the punishing authority of the second respondent-Board is directed to pass an order afresh.

9. In the result, the impugned order is set aside and the writ petition is allowed and the matter is remitted back to the punishing authority for passing an order afresh as mentioned above. However, there will be no order as to costs.

B.S.

Petition allowed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

Present: *Thangamani, J.*

A.A.O.No.852 of 1985 22nd January, 1993.

S.Kuppurathinam and others ...Appellants
v.
A.R.Munirathinam ...Respondent

(A) *Civil Procedure Code (V of 1908), O.41, Rule 27 and O.13, Rule 2 - Documents available in court - Omitted to be marked due to inadvertence - Party, if can be allowed to mark them by appellate court.*

It is true that the provisions of O.41, Rule 27, C.P.C. should be strictly complied with by the lower appellate court. However, it cannot be gainsaid that only by inadvertence, the documents available in court were omitted to be marked during trial by the present respondent. At the most, it can reflect only on the carelessness of the counsel concerned in conducting the case. It is unfortunate that even in the lower appellate court, the advocate appearing for the present respondent had not cared to file an application seeking permission to let in additional evidence. However, the party need not be penalised for the mistake of the counsel. Under O.13, Rule 2, C.P.C. additional evidence could be received at any subsequent stage of the proceedings if good cause is shown to the satisfaction of the court for the non-production thereof. While, so interests of justice as contemplated under O.41, Rule 23 requires that the respondent herein is given an opportunity to mark the documents already available in court as additional evidence and have a decision on consideration of the entire materials on record in respect of his liability to render accounts in case he has functioned as an agent under the present appellants. [Para. 14]

(B) *Civil Procedure Code (V of 1908), O.41, Rule 23 - Suit whether can be remanded by appellate court merely to give opportunity to a party to let in additional evidence.*

There cannot be any remand merely for the purpose of affording an opportunity to a party to let in additional evidence. The expression 'interest of justice' occurring in O.41, Rule 23 does not widen the powers of the appellate court to remand a suit in the sense that irrespective of the fact whether it

comes to the conclusion that the judgment and decree of the trial court are liable to be reversed or set aside or not, if the appellate court is of the opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. There is no principle or authority to support such a contention. It is clear from the scheme of the rules that generally speaking, only where it is not possible to apply O.41, Rules 24 to 27, C.P.C., a remand should be resorted to under O.41, Rule 23, C.P.C. [Para. 15]

Cases referred to:

Kannu Naicker v. Kalaimani, 100 L.W. 922.

[Para. 11]

Visalakshi Ammal v. Dhanalakshmi Ammal (1989) 2 L.W. 414. [Para. 12]

Natarajan Chettiar v. Balachandran, (1990) 2 L.W. 394. [Para. 13]

P.Veeraraghavan, for Appellants.

C.Jeganathan, for Respondent.

The Court delivered the following

JUDGMENT: The appellants are the plaintiffs before the trial court. They instituted O.S.No.1187 of 1981 on the file of the learned District Munsif of Kancheepuram for declaration that the first appellant is entitled to 'D' schedule properties and for directing defendants 1 and 2 to hand over vacant possession of the same. The other reliefs claimed are recovery of vacant possession of A, B and C Schedule properties and for directing the respondent to render accounts of his management of A to D Schedule properties from the year 1975-76 onwards till delivery of possession. Appellants 1 and 3 are husband and wife. The second appellant is their son. The respondent is the son of the first appellant's aunt. The second defendant in the suit is the mother of the respondent. The case of the appellants is that plaint A and B Schedule lands were allotted to the shares of appellants 1 and 2 respectively under Ex.A-4 partition deed dated 13.4.1970. The 'C' Schedule properties were purchased by third appellant. The 1st appellant is in enjoyment of 'D' Schedule properties as their absolute owner. The respondent was entrusted with the management of all the plaint items with a direction to collect the Waram or Kuthagai from the tenants and hand over the same to the appellants. The respondent was paid 10 bags of paddy per bogum as his remuneration. Defendants 3 to 10 are the tenants of the suit lands. And the respondent had failed to render accounts from

Fasli 1385 (1975-76) onwards.

2. The respondent disputed his liability to render accounts. He pleaded that he had surrendered possession of all items of plaint A, B and 'C' Schedule properties except Survey Nos. 181/1 and 181/2. 'D' Schedule properties were given as a gift to his mother by the father of first appellant. He also contended that he was never an agent nor was he paid 10 bags of paddy per bogum as his remuneration for management. According to him, the appellants themselves have directly leased out the properties to tenants for Fasli 1386. He never collected any rent from the alleged tenants. He had paid rent in full for Fasli 1386 and nothing more is due to the appellants. He is not liable to hand over possession of Survey Nos. 181/1 and 181/2 and the 'D' Schedule properties. He is a cultivating tenant of items 2 and 3 of 'C' Schedule. The properties were never entrusted with him for management. Defendants 3 to 10 are in possession.

3. The trial court granted the declaration that the appellants are the owners of 'D' Schedule property and directed the respondent to deliver possession of 'D' Schedule property and items 2 and 3 of 'C' Schedule. Besides, it passed a decree for rendition of accounts against the respondent from 1975-76 till delivery of possession in respect of A, B, C and D Schedule items. The respondent was directed to pay the cost of the suit to the appellants. Thereupon the respondent herein took up the matter in appeal before learned Subordinate Judge of Kancheepuram in A.S.No.123 of 1983 on his file. His mother the second defendant died pending suit. The lower appellate court allowed the appeal without cost, set aside the judgment and decree of the trial court and remanded back the suit to learned District Munsif for fresh disposal according to law. Aggrieved by the said decision the plaintiffs have preferred this civil miscellaneous appeal.

4. Both sides admitted in this Court that pending this C.M.A. the appellants have taken possession of items 2 and 3 of 'C' Schedule through court by proceeding in execution.

5. Thiru P. Veeraraghavan, learned counsel for the appellants assailed the order of remand on these grounds:

1. Since the findings of the trial court in regard to the plaint 'D' Schedule lands are confirmed by learned Subordinate Judge, the remitting of

the entire case for fresh disposal is unsustainable.

2. The finding of the lower appellate court on the status of the respondent as a cultivating tenant is contrary to law.

3. The lower appellate court did not give any finding on the liability of the respondent to render accounts.

4. The lower appellate court was wrong in remanding the case with the sole object of enabling the appellants to prove the documents which they failed to exhibit in the trial court.

5. The requirements of the provisions of O.41, Rule 26, C.P.C., are not complied with.

6. Learned counsel for the appellants first submitted that the subject matter of dispute in A.S.No.123 of 1983 are items 2 and 3 of 'C' Schedule properties and 'D' Schedule property. So plaint 'A' and 'B' Schedule properties and the remaining item in 'C' Schedule are not covered by A.S.No.123 of 1983. While so, the lower appellate court went wrong in remanding the entire suit for fresh disposal. A perusal of the decree of the trial court reveals that the reliefs granted were declaration in respect of 'D' Schedule property, recovery of possession regarding 'D' Schedule property and items 2 and 3 of 'C' Schedule and rendition of accounts for all schedules from 1975-76 onwards. Though there is no specific recital regarding the dismissal of the suit on other reliefs, evidently the claim for delivery of possession of 'A' and 'B' Schedule and item 1 of 'C' Schedule properties has been negatived. And the plaintiffs have not preferred any cross appeal before the lower appellate court on this aspect. And the findings of the trial court on these items have become final. While so, the order of the lower appellate court in directing the retrial of the entire case is clearly unsustainable.

7. The respondent denied his liability to render accounts for all the items of the suit properties on the ground that he was not an agent under the appellants herein. He pleaded that he was a cultivating tenant. The trial court found that the tenancy set up by the respondent was not proved and instead he was functioning only as an agent of the appellants and accordingly he was bound to render accounts from 1975-76 in respect of A, B, C and D Schedule properties. One of the points formulated for consideration by the lower

appellate court was regarding the agency. It is argument of learned counsel for the appellants that the lower appellate court has committed an error in remanding the case for fresh trial without giving any finding on this point. A perusal of the judgment of learned Subordinate Judge discloses that after stating the respective contentions of the parties he has narrated how certain documents available in court were omitted to be marked during trial by the present respondent. He took the view that in the interest of justice an opportunity should be given to the respondent herein to prove his contentions by marking those documents and accordingly he set aside the judgment and decree of trial court and remanded back the suit to the trial court for fresh disposal after giving an opportunity for both parties to adduce oral and documentary evidence in proof of their respective contentions.

8. We find from the records that the present respondent has not marked any document before the trial court in proof of his contentions. It appears that as many as 11 documents were marked as Exs.B-1 to B-11 on the side of the present respondent during the enquiry, on the injunction application and these documents were omitted to be exhibited in evidence at the time of trial. As we have already seen, in order to enable the present respondent to place all his evidence before the court learned Subordinate Judge has remitted back the matter for fresh trial.

9. Let us now extract the relevant provisions of the Code of Civil Procedure. O.41, Rule 23, states:

“Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal or where the appellate court in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, the appellate court may, by order remand the case and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.”

O.41, Rule 23-A, states:

“Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.”

O.41, Rule 27, runs as under:

“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if,

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the party seeking to adduce additional evidence satisfies the appellate court that such evidence notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at or before the time when the decree under appeal was passed, or

(c) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.”

Under O.41, Rule 28,

“Wherever additional evidence is allowed to be produced, the appellate court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court.”

10. Learned counsel for the appellants submits that under the abovesaid provisions of the Code, additional evidence could be produced in appeal only, (i) when the trial court has erroneously refused to admit evidence, (ii) the evidence sought

to be produced, was not within the reach of the appellants during trial, (iii) the appellate court itself requires any evidence to render a judgment and (iv) for any other substantial cause. The plea of the present respondent does not come under any of the said four categories. He did not take any steps before the trial court for exhibiting the documents which were available in the records of the trial court at any time before the judgment was delivered. Even in the lower appellate court there was no application by him to file those documents as additional evidence. He did not raise in the grounds of appeal that he was not given an opportunity to exhibit his documents. Nor he sought for any such opportunity before the lower appellate court. Even pending this C.M.A., no application was made by him to mark those documents as additional evidence. Learned Subordinate Judge has erred in assuming that on account of oversight, documents were failed to be marked in the trial court. Further, reception of additional evidence cannot be a ground for remand. A remand cannot be ordered to enable the parties to fill up lacunae in a case. The discretion of the court should not be exercised in an arbitrary manner but should be exercised by sound principles. The impugned order of remand in the absence of any application under O.41, Rule 27, C.P.C., to let in additional evidence is erroneous.

11. In *Kannu Naicker v. Kalaimani*, 100 L.W. 922, cited by learned counsel for the appellants the respondents filed the suit for declaration and permanent injunction in respect of 12 items of the suit properties. The trial court decreed the suit in its entirety as prayed for. On appeal the Subordinate Judge while confirming the conclusions of the trial court with regard to items 1 to 8, held so far as items 9 to 12 are concerned that they have not let in any evidence to establish the rights and there is no evidence to prove the specific share of the plaintiffs. Hence learned Subordinate Judge considered it as expedient to remit the matter to the trial court to consider whether or not the plaintiffs have any share in items 9 to 12. Accordingly, the judgment and decree of the trial court so far as the findings regarding items 9 to 12 are concerned were set aside and the matter was remitted to the trial court. The parties were also given opportunity to adduce fresh evidence in respect of items 9 to 12. Aggrieved by the remit order passed, the defendants took up the matter in appeal

before this Court. Natarajan, J. took the view that the common case of the parties being that they were not prevented from adducing any evidence, the only test that should be applied by the lower appellate court is, whether the appellate court itself requires any document to be produced or any witness to be examined to enable it to pronounce a judgment or for any other substantial cause. As has been pointed out in a number of decisions, the appellate court should come to a finding on that question and this finding could only be after considering the entire evidence already on record. And he held that the order of remand in that case was unsustainable, as learned Subordinate Judge had remanded the matter only for the purpose of giving an opportunity to the plaintiffs to adduce further evidence to establish their case with regard to items 9 to 12. The lower appellate court was directed to restore the appeal on its file, give opportunity to both parties to adduce further evidence in respect of items 9 to 12 before that court itself and to dispose of the appeal on merits and according to law.

12. In *Visalakshi Ammal v. Dhanalakshmi Ammal* (1989) 2 L.W. 414, a Division Bench of this Court in a Letters Patent Appeal had occasion to consider the order of remand of a single Judge of this Court on the ground that the discussion relating to the various aspects of the case had not been properly approached by the trial court and that additional evidence had to be let in by both sides in order to appreciate the issues involved in accordance with law. The Division Bench, while deciding the question as to whether the order of remand ought not to have been made or the *lis* ought to have been decided on merits by learned single Judge himself, held: "The unsatisfactory consideration of an issue by the first court and the non-advertence to the judicial precedents by the first court while deciding an issue and the need to take additional evidence should not always be counted in favour of making an order of remand. These lacunae, if in fact they are present, can be rectified by the appellate court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course on the above grounds. The power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate court itself, when the commissions and omissions made by the first court

could be corrected by the appellate court. It is not claimed by either side that there is a total dearth of evidence to decide the concerned questions. Maybe the parties were and are anxious to place additional evidence, but even that question can be thrashed out and settled by the appellate court itself. All the questions require comprehensive consideration on merits and decisions thereon by the learned single Judge himself and we are not able to sustain the order of remand made on the grounds expressed by the learned single Judge on the facts of the present case."

13. In *Natarajan Chettiar v. Balachandran*, (1990) 2 L.W. 394, the appellate court had admitted the survey plan as additional evidence. No ground has been raised in the memorandum of appeal challenging the order admitting additional evidence. On the basis of the additional evidence and on the basis of certain other factors which are referred by the lower appellate court in its judgment, it found that the trial court has not taken into account several relevant matters and the trial court had to reconsider the matter. When this order of remand was challenged before this Court, it was argued by the appellants that it was the duty of the appellate court to consider the evidence by itself and decide the case on merits. Srinivasan, J., has held that no doubt that it is so. When the lower appellate court has held that on the basis of additional evidence admitted, the matter should be reconsidered and certain facts should be ascertained by taking the measurements of the properties, a remand is justified. And the provisions of O.41, Rule 23 of the C.P.C., have been satisfied and so there was no justification for interfering with the order of the lower appellate court.

14. It is true that the provisions of O.41, Rule 27, C.P.C. should be strictly complied with by the lower appellate court. However, it cannot be gainsaid that only by inadvertence, the documents available in court were omitted to be marked during trial by the present respondent. At the most, it can reflect only on the carelessness of the counsel concerned in conducting the case. It is unfortunate that even in the lower appellate court, the advocate appearing for the present respondent had not cared to file an application seeking permission to let in additional evidence. However, the party need not be penalised for the mistake of the counsel. Under O.13, Rule 2, C.P.C. additional evidence could be received at any

subsequent stage of the proceedings if good cause is shown to the satisfaction of the court for the non-production thereof. While so, interest of justice as contemplated under O.41, Rule 23 requires that the respondent herein is given an opportunity to mark the documents already available in court as additional evidence and have a decision on consideration of the entire materials on record in respect of his liability to render accounts in case he has functioned as an agent under the present appellants.

15. We have already seen that the order of remand directing the fresh trial of the entirety of the case is unsustainable since the decision of the trial court in respect of relief of recovery of possession of A and B Schedule and item 1 of 'C' Schedule properties has become final. During arguments before this Court both sides conceded that possession of items 2 and 3 of 'C' Schedule properties has also been taken through court in execution proceedings. So on the remaining issues of controversy the appellate court itself can finally dispose of the appeal after taking the additional evidence as provided under O.41, Rule 28, C.P.C. There cannot be any remand merely for the purpose of affording an opportunity to a party to let in additional evidence. The expression 'interest of justice' occurring in O.41, Rule 23 does not widen the powers of the appellate court to remand a suit in the sense that irrespective of the fact whether it comes to the conclusion that the judgment and decree of the trial court are liable to be reversed or set aside or not, if the appellate court is of the opinion that the interests of justice require that there should be a fresh trial, it can remand the suit for fresh disposal. There is no principle or authority to support such a contention. It is clear from the scheme of the rules that generally speaking, only where it is not possible to apply O.41, Rules 24 to 27, C.P.C., a remand should be resorted to under O.41, Rule 23, C.P.C. And in view of the ratio laid down in the decisions referred to above the order of remand in this case by the lower appellate court is unsustainable.

16. In the result, the appeal is allowed and the judgment and decree of the lower appellate court are set aside. The lower appellate court is directed to restore A.S.No.123 of 1983 on its file, give opportunity to both parties to adduce further evidence, oral and documentary, in respect of the points still in controversy before the lower

appellate court itself and to dispose of the appeal on merits and according to law. In the circumstances, there will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.57 of 1993 18th January, 1993.

K.R.Murugesan ...Petitioner
v.

The Chairman, Ex-Servicemen Welfare, represented by the Collector, N.A.A.District, Vellore and another ...Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(2)(ii)(b) - Building leased for cycle shop business - Business not abandoned - Substantial quantity of liquor found stored in building - Building if can be said to be used for a purpose other than that for which it was leased.

From the fact that a very substantial quantity liquor bottles had been stored in the demised building, it is not difficult to infer that at least a substantial part of the building was used by the petitioner for the liquor trade. Therefore, even assuming that the original cycle business was not altogether abandoned, the relevant clause in Sec.10 would be satisfied. [Para. 5]

Cases referred to:

Rathnam Naicker v. Mani Naicker, (1955)1 M.L.J. 2 (S.N.). [Paras. 2, 4]

Gopal Stores v. Arunachala Naicker, (1958)2 M.L.J. 617. [Paras. 3, 4]

Abdul Razack v. Umapathy, (1965)2 M.L.J. 41 (S.N.). [Para. 3]

E.A.E.Kamal Pasha v. V.A.Tajuddin, 1974 T.L.N.J. 180. [Para. 3]

Dr.N.R.Rao v. Premier Auto Electric Private Limited, (1980)1 M.L.J. 1 (F.B.). [Para. 6]

Palaniappa Chettiar v. Ponnuswami Pillai, (1970)1 S.C.W.R. 487. [Para. 6]

K.A.Anthappai v. Ahammed, (1992)2 L.W. 735 (S.C.). [Para. 6A]

K.R.Ramabhadran, for Petitioner.

The Court made the following

ORDER: Having failed before both the Authorities below, the tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, has preferred this civil revision petition.

2. The respondents/landlord herein filed the eviction petition R.C.O.P.No.74 of 1990 on the file of the Rent Controller, Vellore on the ground that the petitioner-tenant used the demised building for a purpose other than that for which it was leased. The petition was filed under Sec.10(2)(ii)(b) of the said Act. Both, the Rent Controller and the Appellate Authority, Vellore in R.C.A.No.6 of 1992 have concurrently held that the petitioner has so used the said building. Admittedly, the petitioner was an ex-servicemen and so the respondents leased out the demised building for running cycle business. There was a raid by the prohibition wing of the police of the abovesaid building on 24.8.1989 and 173 bottles of Indian made foreign liquor were seized from the building and in the subsequent police proceedings, the petitioner admitted his guilt in having stored the liquor bottles in the abovesaid building. A fine was levied on him and he paid the same. That is borne out by Ex.A-3 document dated 25.8.1989. That apart by Ex.A-2 letter dated 25.9.1989 by the petitioner to the 2nd respondent he has admitted the above facts and pleaded thus:

“எனவே இம்முறை மேற்கண்ட செயல் களுக்காக என்னை மன்னித்து மேல்கண்ட சைக்கிள் கடையை தொடர்ந்து நடத்த அனுமதி வழங்குமாறு தாழ்மையுடன் கேட்டுக் கொள்கிறேன்.”

Primarily based on these two documents Exs.A-3 and A-2 the Authorities below have come to the conclusion that the abovesaid liquor bottles were stored in the petition-building. Further, the explanation offered by the petitioner that the abovesaid liquor bottles were temporarily kept in the said building on behalf of ex-servicemen who come to purchase such liquor from the adjacent godown, was not believed by the Authorities below. As per the relevant rules, each ex-serviceman was allowed to have supply of only five bottles and there is no scope in that context for the petitioner to have stored as many as 173 bottles, even as per the explanation. This explanation was not accepted also because the petitioner did not

examine any of such ex-servicemen, who allegedly left liquor bottles in the custody of the petitioner. Further, even before the Authorities below, the argument of the petitioners was that the abovesaid raid was only a solitary instance wherein the petitioner was found to possess the abovesaid liquor bottles and that on that footing, it could not be held that the building was used for liquor trade. For this argument *Rathnam Naicker v. Mani Naicker*, (1955)1 M.L.J. 2 (S.N.), was also relied on. This argument was also considered and the Authorities below have negatived the said contention on the footing that the facts in the said case were different.

3. Now, before me, the learned counsel for the petitioner advances the same argument along with the other argument that at any rate, the cycle business, for which the original lease was given, has not been abandoned at all. In connection with this latter argument the learned counsel relies on *Gopal Stores v. Arunachala Naicker*, (1958)2 M.L.J. 617. With reference to the former argument certain other decisions like, *Abdul Razack v. Umappathy*, (1965)2 M.L.J. 41 (S.N.) and *E.A.E. Kamal Pasha v. V.A. Tajuddin and others*, 1974 T.L.N.J. 180, were also relied on.

4. So far as *Rathnam Naicker v. Mani Naicker*, (1955)1 M.L.J. 2 (S.N.), is concerned, I find that the said case held that merely because a tenant played cards for stake in the demised building on a solitary occasion and was convicted under the City Police Act, it could be held that the building was used for a different purpose. But playing cards on one single occasion cannot be equated with storing as many as 173 liquor bottles, particularly in the light of the other finding by the Authorities below that the petitioner's only explanation that the said liquor bottles were kept in custody only at the request of the other ex-servicemen is not acceptable. Therefore, the Appellate Authority is right in not applying *Rathnam Naicker v. Mani Naicker*, (1955)1 M.L.J. 2 (S.N.), to the present case. *Abdul Razack v. Umappathy*, (1965)2 M.L.J. 41 (S.N.), only says that a fugitive and sporadic user of the lease premises for a limited period ought not to be taken as the test of conversion to some other use. In the said case, the tenant of a building leased as a shop, for a limited period, conducted some cooking and also stayed there, though he had his residence elsewhere. Only in the context of those facts, the said decision was given

and I do not think that decision could be applied to the present facts, in view of the above referred to features in the present case. In *E.A.E. Kamal Pasha v. V.A. Tajuddin and others*, 1974 T.L.N.J. 180, the court held that the landlord impliedly consented to the different use to which the landlord put the building. After holding so, no doubt, the learned Judge also observes that only a small room in the total demised building was put to such a different use and that in order to bring the case within the relevant sub-section, it is necessary to prove that a substantial part of the building was put to a different use. In the present case, the Authorities below, taking into consideration all the features in the case, have come to the factual inference that the building was used for liquor business, and so, this decision also is not applicable to the present case.

5. The second contention of the learned counsel is that it is nobody's case that he has abandoned the cycle business for which the building was leased and that hence eviction could not be ordered under the abovesaid relevant clause in Sec.10 of the abovesaid Act. In the abovesaid case, viz. *Gopal Stores v. Arunachala Naicker*, (1958)2 M.L.J. 617, in the building which was let out for selling betel leaves, a small portion was used for selling crackers during a particular season like Deepavali, in addition to the main business. In that context, it was no doubt held that such use for selling crackers would not amount to using the building for a different purpose, since the original business was not abandoned. But, in the present case, from the fact that a very substantial quantity of liquor bottles had been stored in the demised building, it is not difficult to infer that atleast a substantial part of the building was used by the petitioner for the liquor trade. Therefore, even assuming that the original cycle business was not altogether abandoned, the relevant clause in Sec.10 would be satisfied.

6. In fact, it has been held by a Full Bench of this Court in *Dr. N.R. Rao v. Premier Auto Electric Private Limited*, (1980)1 M.L.J. 1 (F.B.), that where it was found that a third party has been using a portion of the demised building contrary to the purpose for which the building was leased out, it was held that Sec.10(2)(ii)(b) is satisfied. Further, there it has also been held thus:

"Sec.2(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960)

defines, building to include part of the building also. In Sec.10(2)(ii)(b), the expression is "used the building for a purpose other than that for which it was leased..." Such a reference to "building" will include part of the building also. Therefore, the occupation of R.W.1 of a part of the building will definitely attract the mischief of Sec.10(2)(ii)(b). As contended by Mr.Rao, the occupation of a portion of the building by a third party will squarely come within the meaning of occupation of "substantial part" of the building, as contemplated by the Supreme Court in *Palaniappa Chettiar v. Ponnuswami Pillai*, (1970)1 S.C.W.R. 487 and such an expression "substantial part" has been used in contract to a minimal or trivial portion of the building. This argument is fortified by the definition given to "building" in the Act and also the expression "building" occurring in Sec.10(2)(ii)(b) of the Act."

Thus, this Full Bench decision also explains the term "substantial part" used by the Supreme Court *Palaniappa Chettiar v. Ponnuswami Pillai*, (1970)1 S.C.W.R. 487, which was relied on in the above referred to *E.A.E.Kamal Pasha v. V.A.Tajuddin and others*, 1974 T.L.N.J. 180.

6A. Further, in view of *K.A.Anthappai v. Ahammed*, (1992)2 L.W. 735 (S.C.), as to the limited scope of the present revisionary power, I do not think, I will be justified in interfering with the conclusion reached by the authorities below.

7. Therefore, there is no merit in this civil revision petition and hence, it is not admitted, but dismissed. Time for vacating three months.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Bellie, J.*

A.S.No.328 of 1982

8th February, 1993.

Steel Authority of India Ltd. Madras-6

...Appellant

v.

The Union of India, owning South Eastern Railway, Calcutta and others

...Respondents.

(A) *Torts - Damages for short delivery of goods - Railway receipt showing 51.660 M.T., was consigned - 48.300, M.T. alone delivered - Endorsement of consignee that contents received in tact fully - It will absolve Railways from liability.*

As per Ex.B-1 railway receipt, the weight of the consignment was 51.660 M.T., This being the case, the Railways are bound by that weight and it is not open to them to contend that the medicals consigned were not of that weight. It has to be held that while loading, the consignment was of the weight of 51.660 M.T. That being the case, if, on arrival at the destination any storage is found, only the defendants are responsible for that shortage. Ex.B-3 endorsement 'Received (8) in tact fully' for whatever reason it was made by the plaintiff, will not absolve the defendants from their liability.

[Para. 8]

(B) *Torts - Damages for short delivery of goods - Consignment partly carried by Railways and partly by Railways belonging to the Madras Port Trust - Liability for shortage.*

It is not the case of defendants 1 and 2 that the shortage has occurred while the consignment was in transit in the Railways of the third defendant Port Trust or it was in their (Port Trust's) Custody and it is not the case of the third defendant that the storage occurred when the consignment was to transit in the first and second defendant's railway. In this position, it would be quite reasonable and lawful to hold that both the defendants 1 and 2 as well as the third defendant are jointly and severally liable to make good the shortage. [Para. 10]

Cases referred to:

Jugalkishore Devideen v. Sri Murugan Ghree Supply Company, 86 L.W. 135: A.I.R. 1973 Mad. 331. [Para. 8]

Steel Authority of India Limited v. The Union of

India, etc., (1981) 1 M.L.J. 126. [Para. 11]

B.Rajagopalan, for Appellant.

R.G.Rajan and P.S.Srisailam, for Respondents.

The Court delivered the following

JUDGMENT: The unsuccessful plaintiff, Steel Authority of India Limited, which filed the suit for recovery of a sum of Rs.16,324.90 against the three defendants as damages for short delivery of goods, is the appellant.

2. The plaintiff booked 51.660 metric tonnes of G.C.Sheets in 8 bundles in the first defendant Railways at Rourkela to be delivered to the plaintiff at Madras Harbour. The consignment was booked under Railway Risk. The materials arrived at Madras Harbour on 10.8.1975. The plaintiff found the packing conditions disturbed. Therefore, the plaintiff requested the third defendant Port Trust to re-weigh the materials. Accordingly, the materials were re-weighed on 11.8.1975. It weighed only 48.300 M.T. Thus, there was a shortage of 3.360 M.T. It is not in dispute that the value of this shortage is Rs.16,324.90. The materials were then delivered to the plaintiff on 12.8.1975. The plaintiff has filed the suit for recovery of the said sum of Rs.16,324.90 for short delivery alleging that it was only due to the negligence of the defendants the shortage had occurred and the defendants 1 to 3 are jointly and severally liable.

3. Defendants 1 and 2 filed a written statement while the third defendant filed a separate written statement. Both of them denied negligence on their part. Defendants 1 and 2 contending *inter alia* denied that the plaintiff loaded eight bundles of steel sheets weighing 51.660 M.T. and it further denied that there was any shortage. It further contended that the consignment was safely carried and handed over to Madras Port Trust on 8.8.1975 in a sound condition and the Madras Port Trust did not make any remarks.

4. The third defendant Port Trust contended that on 12.8.1975 the consignment was delivered to the plaintiff's men with an endorsement in the delivery note "Received 8 bundles in tact in full". Therefore, this defendant or its employees are not liable for any shortage. They further contended that the suit is barred by limitation.

5. The trial court on consideration of the evidence held that the plaintiff has made an endorsement Ex.B-3 "Received in tact fully". While taking delivery and therefore the plaintiff's case cannot be believed that there was shortage. The trial

court held that the suit is not barred by limitation. In the result, the trial court dismissed the suit. Hence, this appeal by the plaintiff.

6. The point for decision is whether the trial court was not correct in holding that there was no shortage and that the plaintiff is not entitled to the amount claimed.

7. It is the case of the third defendant itself that the consignment arrived at the Port on 10-8-1975, it was reweighed on 11-8-1975 and as against the weight mentioned in the Railway Receipt there was a shortage of 3.360 M.T., and the consignment was delivered to the plaintiff on 12.8.1975. Thus, admittedly there was a shortage as against the weight mentioned in the Railway Receipt before the consignment was delivered to the plaintiff.

8. It is, however, contended that the plaintiff must prove that actually 51.660 M.T., was consigned. Now, as per Ex.B-1 Railway receipt the weight of the consignment was 51.660 M.T. This being the case the Railways are bound by that weight and it is not open to them to contend that the materials consigned were not of that weight. If any authority is required for this, refer to *Jugalkishore Devideen v. Sri Murugan Ghree Supply Company and others*, 86 L.W. 135; A.I.R. 1973 Mad. 331. Therefore, it has to be held that while loading the consignment was of the weight 51.660 M.T. That being the case if on arrival at the destination if any shortage is found only the defendants are responsible for that shortage. Ex.B-3 endorsement "received (8) in tact fully", for whatever reason it was made by the plaintiff, will not absolve the defendants of their liability.

9. The goods consigned by the plaintiff had been carried by the defendants 1 and 2 railways and also the Railways belonging to the third defendant in the Port before unloading. It is not in evidence as to how and when the shortage occurred. In these circumstances, the question arises as to whether all the three defendants are liable jointly and severally or defendants 1 and 2 alone are liable or the third defendant alone is liable.

10. As far as the plaintiff is concerned, according to it, all the three defendants are liable jointly and severally. It is not the case of defendants 1 and 2 that the shortage has occurred while the consignment was in transit in the Railways of the third defendant Port Trust or it was in their (Port Trust) custody and it is not the case of the third defendant that the shortage occurred when the consignment

was in transit in the first and second defendant's railways. In this position, it would be quite reasonable and lawful to hold that both the defendants 1 and 2 as well as the third defendant are jointly and severally liable to make good the shortage. True, when the consignment was handed over to the Port Trust no remarks were made by the Port Trust. But this will not disentitle the plaintiff to make a claim against defendants 1 and 2 because it is to the first defendant the plaintiff gave the consignment. It would appear, as to between the defendants 1 and 2 on the one hand and the third defendant on the other hand who is liable, it is a matter to be settled as between themselves.

11. However, it was brought to my notice that in a similiary case in *Steel Authority of India Limited v. The Union of India, etc.*, (1981)1 M.L.J. 126, a Division Bench of this Court has held that the Port Trust Railways being the destination Railways, it (Port Trust) alone is liable. But on going through the judgment I find that the said finding was not rendered while considering a question of law, but it was held so merely stating that the Port Trust Railways is the destination Railways. Therefore, that finding is not a *stare decisis* binding on me.

12. In the result, the appeal is allowed and the judgment and decree of the trial court are set aside and the suit is decreed as prayed for against all the three defendants. The defendants shall pay costs to the plaintiff throughout.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: Janarthanam, J.

W.P.Nos.7333 and 7334 of 1984 21st January, 1993.

Raja Devaputhran Cunniah ...Petitioner
v.

The Regional Transport Officer, Salem.

...Respondent.

Motor Vehicles Act (IV of 1939), Sec.2(3) and (29) - Vehicle not picking up passengers en route - Conductor collecting separate fares from passengers - Vehicle whether can be said to have been used as a stage carriage and not as a contract carriage.

Held: As could be seen from the definition of 'contract carriage' by the collection of separate fares from the passengers, it would not lead to the deduction that the vehicle has been used as a stage carriage and not as a contract carriage. The court is, therefore of the view that there are no materials on the basis of which the impugned orders could be sustained.

[Para. 9]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent in R.No.69173/B4/83 and R.No.17390/B4/83 respectively and quash the demand dated 27.5.1984 respectively made thereon in respect of Bus KRV.7270 (in both the petitions) demanding a tax of Rs.3,267 and Rs.2,683 respectively in respect of petitioner's All India permit contract carriage KRV. 7270.

Cases referred to:

Roshanlal v. State of U.P., A.I.R. 1965 S.C. 991: (1965)2 S.C.J. 721: (1965)1 S.C.R. 841. [Para. 8]
Krishnasami Chetty v. The Licensing Officer, 100 L.W. 654. [Para. 9]

Mrs.Bagirathi Narayanan, for Petitioner
B.Radhakrishnan, Government Advocate, for Respondent.

The Court made the following

ORDER: One Raja Devaputhran Cunniah, a resident of Trivandrum, holds a permit for the vehicle KRV 7270 granted by the State Transport Authority, Kerala, to use the vehicle as an All

India Tourist Vehicle. It can operate throughout India without any endorsement from any other State. Its liability to pay tax is only to the parent State viz. the Kerala Government. This had been paid and the vehicle had been used as a contract carriage.

2. The vehicle was checked by the Motor Vehicles Inspector, Grade II, Salem on 27.6.1983. A check report was issued alleging that the vehicle was coming from Trichy to Bangalore along with 35 adult passengers, collecting Rs.40 for the journey as individual fare. Based on the check report, the Regional Transport Officer, Salem, issued a show cause notice stating that the vehicle was being used as a stage carriage and hence the permit holder is liable to pay proportionate tax of Rs.3,267 for the month of June, 1983 to the Government of Tamil Nadu. On 3.8.1983, the petitioner submitted an explanation that the vehicle had been hired to a travel agency as a contract carriage for a specified purpose and, therefore, no liability arises for payment of any tax whatever, especially when tax had already been paid to the Government of Kerala. This was not accepted by the respondent who passed an order in R.No.69173/B4/83, dated 27.5.1984, confirming the proposal and demanding a sum of Rs.3,267. It is this order that is challenged in W.P.No.7333 of 1984.

3. Similarly, the vehicle was previously stated to have been checked by the Motor Vehicles Inspector, Grade II, Salem on 21.2.1983. A check report was issued alleging that the vehicle was coming from Salem to Bangalore with 37 adult passengers collecting Rs.20 per individual. Based on the check report, the respondent issued a show cause notice on 17.3.1983 stating that the vehicle was being used as a stage carriage and demanding Rs.2,683 as proportionate tax for February, 1983, to the Government of Tamil Nadu. On 4.6.1983, the petitioner gave an explanation that the vehicle was not used as a stage carriage and that no individual fare was collected. The explanation was not accepted by the respondent who passed an order in R.No.17390/B4/83, dated 27.5.1984, confirming the proposal and demanding a tax of Rs.2,683. It is this order that is challenged in W.P.No.7334 of 1984.

4. It could be seen from the above facts that the petitioner, respondent, the vehicle demand etc., are one and the same and the difference is only with regard to the month and amount demanded.

In this background and setting up of facts, the two writ petitions had been taken up for disposal together.

5. What the petitioner contended before the respondent in his explanation and equally so here with all vigour and vehemence, is that his vehicle had been hired to travel agents as a whole for fixed sums of money and if the agents collected individual fare from each passenger, the petitioner could not be made liable for the same. The further contention is that the collection of separate fares is not prohibited under Sec.2(3) of the Motor Vehicles Act, 1939 (hereinafter referred to as 'the Act'), when it defines 'contract carriage' and his vehicle plied between points without stopping to pick up or set down along the line of the routes, passengers not included in the contract. These contentions were, however, repelled by the respondents.

6. The tenability or otherwise of the rival submissions made may now fall for consideration. The tangle posed in these writ petitions is capable of solution, with ease and grace, if the distinction between a contract carriage and a stage carriage is understood properly. Sec.2(3) defines 'contract carriage' as follows:

" 'contract carriage' means a motor vehicle which carries a passenger or passengers for hire or reward under a contract, expressed or implied for the use of the vehicle as whole at or for a fixed or agreed rate or sum--

(i) on a time basis whether or not with reference to any route or distances, or

(ii) from one point to another and in either case without stopping to pick up, or set down along the line of route passengers not included in the contract and includes a motor cab notwithstanding that the passengers may pay separate fares."

7. Sec.2(29) defines 'stage carriage' as follows"

" 'stage carriage' means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers either for the whole journey or for stages of the journey."

8. The criteria to be adopted to distinguish a contract carriage from a stage carriage as set down in the pronouncement of the Supreme Court in *Roshanlal v. State of U.P.*, A.I.R. 1965 S.C. 991: (1965)2 S.C.J. 721: (1965)1 S.C.R. 841, may be

usefully referred to here:

"By Sec.2(3) a contract carriage is defined as a motor vehicle which carries a passenger or passengers for hire or reward under a contract from one point to another without stopping to pick up or set down along with the line of that route passengers not included in the contract. A stage carriage is defined as a motor vehicle carrying or adapted to carry passengers for hire or reward at separate fares paid for the whole journey or for stages of the journey. The distinction between the two is this: the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it, but it has not the right to pick up other passengers en route. The stage carriage, on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel."

9. It is not at all the case of the respondent, that the vehicle was picking up other passengers en route, so as to come within the mischief of the above ratio. As we could see from the definition of 'contract carriage' by the collection of separate fares from the passengers, it would not lead to the deduction that the vehicle has been used as a stage carriage and not as a contract carriage. I am, therefore of the view that there are no materials on the basis of which the impugned orders could be sustained. In similar circumstances this Court in *Krishnasami Chetty v. The Licensing Officer*, 100 L.W. 654, has taken the view that collection of separate fares from passengers would not lead to the conclusion that the vehicle was being used as a stage carriage and not a contract carriage.

10. For the abovestated reasons, I am unable to uphold the impugned orders and accordingly, these writ petitions are allowed as prayed for. No costs.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

S.A.No.736 of 1982

25th November, 1992

K.Raju

...Appellant

v.

M.Raju and another

...Respondents.

(A) *Transfer of Property Act (IV of 1882), Sec.107 - Lease of land for 5 years not by registered deed - It bars 9 findings of a monthly tenancy in favour of the tenant.*

Even though the lease for five years would be certainly invalid, since there is no registered lease deed, that cannot be a bar in holding that there was atleast a monthly tenancy in favour of the plaintiff in the present case. In the present case, it is clear from the written statement of the first defendant, that atleast upto a period, viz. six months prior to January, 1978. The first defendant was accepting rents from the plaintiff. So, there can be no difficulty in holding that the plaintiff was at least under a monthly tenancy of the suit site. Even according to law, there is atleast a monthly tenancy in the present case. [Paras. 8 & 9]

(B) *Transfer of Property Act (IV of 1882), Sec.106 - Tenancy lawfully terminated by notice - Tenant unlawfully dispossessed from demised property - Tenant, if can seek redelivery.*

Can it be said that though there is unlawful dispossession of the plaintiff from the demised property, the plaintiff cannot seek redelivery since there is lawful termination of the tenancy? The answer to this question should only be in the negative. In other words, even in such a situation, the plaintiff can seek redelivery. [Para. 12]

Cases referred to:

Biswabani Private Limited v. Santosh Kumar Dutta, (1980)1 S.C.C. 185 [Para. 9]

Arif v. Jadunath, 60 M.L.J. 588: 131 I.C. 762: 58 I.A. 91: 1931 M.W.N. 480: A.I.R. 1931 P.C. 79. [Para. 9]

Ram Kumar Das case, 1951 S.C.J. 813: 1952 S.C.R. 269: 1952 M.N.W. 120: A.I.R. 1952 S.C. 23.

[Para. 9]

Ramakrishnan, M.R.S. v. The Assistant Director of E.S.W., etc., Board, 95 L.W. 450. [Para. 10]

K.K.Verma v. Union of India, A.I.R. 1954 Bom. 358. [Paras. 12, 14]

Yeshwant Singh v. Jagdish Singh, (1968)2 S.C.J. 244: (1968)2 S.C.R. 208: A.I.R. 1968 S.C. 620. [Para. 13]

W.B.State v. Birendra Nath, A.I.R. 1955 Cal. 601. [Para. 14]

M/s.Chandra and Company v. State, A.I.R. 1981 Raj. 217. [Para. 14]

S.Radhakrishnan, for Appellant.

P.Shanmugham, for Respondents.

The Court delivered the following

JUDGMENT: The plaintiff is the appellant in this second appeal against the reversing judgment in A.S.No. 13 of 1981 on the file of the Subordinate Judge, Tiruppur. According to the plaintiff, he was the tenant for five years from 20.1.1974 under the 1st defendant-1st respondent, of the suit land and has put up the superstructure thereon and the 2nd defendant-2nd respondent was looking after the tea stall run by the plaintiff therein, but the 1st defendant unlawfully dispossessed him by getting back possession from the 2nd defendant on 21.3.1978. Hence he sought for re-delivery in the suit O.S.No.185 of 1978.

2. According to the 1st defendant, there was no lease for five years, the plaintiff was only a monthly tenant, and since the plaintiff had sub-leased the premises to the 2nd defendant, the plaintiff ceased to be a tenant and the 2nd defendant had voluntarily delivered possession to the 1st defendant. According to the 2nd defendant, he was lessee under the plaintiff, on 21.3.1978 when he returned from his native place, he found that the 1st defendant had locked the premises and subsequently the 1st defendant refused to open it.

3. The trial Court found that the 2nd defendant was the sub-lessee and that he did not voluntarily surrender possession to the 1st defendant. So holding, the trial Court, decreed the suit and granted redelivery of the suit property "in the same condition in which it was at the time when he was unlawfully dispossessed along with the articles kept therein".

4. But, on appeal by the 1st defendant, the lower appellate Court has held that the alleged lease for five years, being not registered and consequently hit by Sec.107 of the Transfer of Property Act, was not valid and that the plaintiff cannot claim any right of possession and that hence the relief prayed for cannot be granted. It was also held that though the 1st defendant had not taken possession from the proper person, viz., the plaintiff, his taking

possession should be taken as peaceful and not wrongful. So holding, the lower appellate Court dismissed the suit. Hence, the second appeal by the plaintiff.

5. The submissions of the learned Counsel for the appellant are: Though the lease for five years may be invalid in view of Sec.107 of the Transfer of Property, there is at least a monthly tenancy. The lower appellate Court erred in holding that the taking of possession by the 1st defendant from the 2nd defendant was not wrongful, particularly when it has also held that forcible possession was taken.

6. The 2nd respondent-2nd defendant remains unrepresented.

7. The learned Counsel for the 1st respondent reiterates that the reasoning of the lower appellate Court is right.

8. I have considered the rival submissions. It is quite clear that the lower appellate court grossly erred; even though the lease for five years would be certainly invalid since there is no registered lease deed, that cannot be a bar in holding that there was at least a monthly tenancy in favour of the plaintiff in the present case. In fact, even according to the written statement of the 1st defendant, the plaintiff was his lessee. His written statement pleaded only thus:

"The plaintiff has taken the premises for rent at Rs.40 per mensem payable on every English calendar month... The plaintiff is not entitled to sub lease the premises to the 2nd defendant, which had been leased out to him. The plaintiff ceases to be a tenant immediately when he had sub-let the same to the 2nd defendant... Rent is due for 6 months amounting to Rs.240 due upto January, 1978."

Thus, once it is pleaded that the rent is due upto January, 1978, it is clear that the plaintiff was tenant at least upto January, 1978, right from 20.1.1974. In Ex.A-7 dated 29.1.1978, the notice issued by the 1st defendant's counsel to the plaintiff and the 2nd defendant also it is stated that the plaintiff became the tenant from 20.1.1974, of the suit site.

9. Even according to law, there is at least a monthly tenancy in the present case. The Supreme Court has also held thus in *Biswabani Private Limited v. Santosh Kumar Dutta*, (1980)1 S.C.C. 185:

"The Privy Council in *Arif v. Jadunath*, 60 M.L.J. 588: 131 I.C. 762: 58 I.A. 91: 1931 M.W.N. 480: A.I.R. 1931 P.C. 79. in terms held that if an

indenture of lease is compulsorily registrable under Sec.107 of the Transfer of Property Act, such a lease can only be made by a registered instrument and if not so made, is void altogether. However, if from such a person in possession under a void lease the landlord accepts rent as held in *Ram Kumar Das case*, 1951 S.C.J. 813: 1952 S.C.R. 269: 1952 M.W.N. 120: A.I.R. 1952 S.C. 23. an inference of tenancy would follow. Mulla in 'Transfer of Property Act', 6th Edn., at P.680 has observed that an oral agreement accompanied by delivery of possession, if for more than one year is valid, by delivery of possession, for the first year, and thereafter, the lessee continuing in possession with the assent of the lessor becomes a tenant by holding over under Sec.116 of the Transfer of Property Act. Such a lease being created by operation of law is binding even though the provisions of Sec.107 have not been complied with. It is also noted in P.681, that though an un-registered lease is void as a permanent lease, it can be deemed to be a monthly lease terminable by 15 days' notice."

In the present case, it is clear from the above extracted averment in the written statement of the 1st defendant that at least upto the period, viz., six months prior to January, 1978, the 1st defendant was accepting rents from the plaintiff. So, there can be no difficulty in holding that the plaintiff was at least under a monthly tenancy of the suit site. If so, the possession taken by the 1st defendant from the 2nd defendant, a sub-lessee, with whom the 1st defendant has no privity of contract, cannot be taken as lawful, particularly when the lower appellate Court has also held that the 1st defendant took possession forcibly from the 2nd defendant, though it has strangely held that such possession taken was peaceful. The 1st defendant can take possession only from the plaintiff and that too by recourse to law, if the plaintiff is not willing to give possession. So, if the possession taken by the 1st defendant is unlawful, he has to redeliver possession to the plaintiff.

10. The learned counsel for the appellant also relies on the decision of Ramanujam, J. in *Ramakrishnan, M.R.S. v. The Assistant Director of E.S.W., Etc., Board*, 95 L.W. 450. There it has been held thus:

"Thus, the preponderance of the Judicial opinion is that the tenant in possession of the

leasehold property after the termination of the lease cannot be dispossessed by force except under due authority of law and the position is not different in the case of a tenancy under the Government; that even if forcible possession had been taken by the Government as a quandom lessor, the quandom tenant is entitled to get back possession of the property under Sec.9 of the Specific Relief Act."

No doubt that was not a case where redelivery was actually sought. That was actually a case where, the remedy sought for by the lessee, was for restraining the respondents-lessors from taking possession of the premises. (No doubt the remedy was sought for under Art.226 of the Constitution of India seeking for a *mandamus* to the above effect.) In the said case, this Court found as a fact that possession was still with the lessee on the date of the writ petition, and so it granted the abovesaid *mandamus* sought for. But, it also observed as follows:

"It is no doubt true, if on the date of the filing of the petition the petitioner has been thrown out of the premises even by force, then the petitioner cannot seek restoration of possession in these proceedings by getting a writ of *mandamus* as prayed for by him and his remedy is only to claim damages or other reliefs in other appropriate forums."

Then, let me see whether this observation could be correct.

11. In the present case, admittedly, the plaintiff is out of possession and seeks the relief of redelivery of possession. Then, the question is whether redelivery could be ordered. No doubt, if the contractual lease has not come to an end, the plaintiff can certainly seek redelivery. Even as on the date when the suit was filed, viz., 28.4.1978, he cannot rely on the alleged five years lease from 20.1.1974 since admittedly there was no such registered lease deed for five years at all in the present case. I have already held that the plaintiff could be taken only as a monthly tenant. I also find that Ex.A-7, dated 29.1.1978, the lawyer notice, was sent by the 1st defendant to the plaintiff terminating the tenancy and demanding possession as on 1st April, 1978. Therefore, it has to be concluded that the tenancy has been lawfully terminated by the end of March, 1978.

12. Nevertheless, can it be said that though there is unlawful dispossession of the plaintiff from the

demised property, the plaintiff cannot seek redelivery since there is lawful termination of the tenancy? The answer to this question should only be in the negative. In other words, even in such a situation, the plaintiff can seek redelivery. In *K.K. Verma v. Union of India*, A.I.R. 1954. Bom. 358., Chagla, C.J. speaking for the Division Bench of the Bombay High Court observed as follows:

“Under the Indian Law, the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the protected by statute. Under Sec.9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Sec.9 and claim possession against the true owner. Therefore, our law makes a clear and sharp distinction between a trespasser and an erstwhile tenant. Whereas the trespasser's possession is never juridical and never protected by law, the possession of an erstwhile tenant is juridical and is protected by law. Therefore, as far as the Indian Law is concerned, an erstwhile tenant can never become a trespasser. It may or may not be that in English law in certain circumstances he can become a trespasser and it does seem that the landlord can enter the premises and deprive the erstwhile tenant of his possession, but in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment.”

13. This decision has also been affirmed by the Supreme Court in *Yeshwant Singh v. Jagdish Singh*, (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 208: A.I.R. 1968 S.C. 620, (*vide* paragraphs 10 and 15 therein).

14. The Supreme Court in the said decision has also overruled the decision in *W.B. State v. Birendra Nath*, A.I.R. 1955 Cal. 601, relied on by the lower appellate Court in the present case, thus:

“Our attention was invited to the decision of the Calcutta High Court in *W.B. State v. Birendra Nath*, A.I.R. 1955 Cal. 601. In that case the High Court refused to issue an order under Art.226 of the Constitution prohibiting the Government from forcibly taking possession of lands which had been validly resumed by Government. We are not concerned with that

question here. But we do not agree with the conclusion of the High Court that a lessor is entitled in India to use force to throw out his lessee.”

The abovesaid *K.K. Verma v. Union of India*, A.I.R. 1954 Bom. 358. *Yeshwant Singh v. Jagdish Singh*, (1968) 2 S.C.J. 244: (1968) 2 S.C.R. 208: A.I.R. 1955 S.C. 620. were also relied on in the abovesaid *Ramakrishnan, M.R.S. v. The Assistant Director of E.S.W., etc., Board*, 95. L.W. 450. by Ramanujam, J. In fact, Ramanujam, J. also relied on the decision in *M/s. Chandra and Company v. State*, A.I.R. 1981. Raj. 217. thus:

“In *M/s. Chandra and Company v. State*, A.I.R. 1981. Raj. 217, in more or less similar circumstances as in this case it was held that the State is not free to act in a high-handed manner as to dispossess a person in juridical possession, of a property otherwise than in due course of law, that a person is in peaceful possession of property cannot be deprived of the possession of the same by the State or its officers, except in accordance with law, that in a case where the State or its officers have dispossessed such a person of the property in his possession without any authority of law, it is open to him to seek redress against the aforesaid unlawful action of the State and its officers by invoking the jurisdiction of the High Court under Art.226 of the Constitution and that the State as owner of property does not enjoy any higher rights than the citizen in the matter of taking possession of its property.”

In the light of this observation of Rajasthan High Court, which is approved by Ramanujam, J., it can be safely said, with due respect, that the abovesaid other observation of Ramanujam, J. extracted above at Page 8 herein stating that if on the date of the petition, the petitioner had been dispossessed, the petitioner cannot seek restitution of possession by writ of *mandamus*, but can claim damages or other reliefs in other appropriate forums, may not be quite correct and, such a petitioner can seek restitution also.

15. In the result, the second appeal is allowed, the judgment and decree of the lower appellate Court are set aside. The judgment and decree of the trial Court are restored subject to the following modification: The expression, “in the same condition in which it was at the time when he was unlawfully dispossessed along with the articles kept therein “

shall be deleted in the decree since there is no clear proof as to in what condition the suit property was at the abovesaid time and about the abovesaid articles and since the trial Court has also not dealt with this question and given any finding thereon. The learned counsel for the appellant also did not advance any argument before me in this regard. In other respects, the decree of the trial Court shall stand. In the circumstances of the case, there will be no order as to costs.

16. No doubt, it is needless to add that it is open to the 1st defendant to take appropriate steps in accordance with law to take possession from the plaintiff after redelivery decreed herein.

B.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Pratap Singh, J.

C.R.P.No.3431 of 1992 17th February, 1993.

Kovilpatti Sri Dhandayuthapani Trust, through its Hugdar A.Scethalakshmi ...Petitioner v.

M.Tilakaraj ...Respondent.

Registration Act (XVI of 1908), Secs.17 and 49 - Lease for rent of Rs.700 per month - Unregistered document filed showing that lease was extinguished and also showing that possession of premises was handed over to the lessor - If can be admitted in evidence:

Held:- The prohibition against admissibility enacted by Sec.49 of the Registration Act is not an absolute one, but the section renders the unregistered document inadmissible only for the two limited purposes specified in clauses (a) and (c) and leaves it available to be used in evidence for other purposes. The last sentence of the document sought to be filed would amount to extinguishment of the lease. As such this is a document compulsorily registrable under Sec.17 of the Registration Act inasmuch as monthly rent was Rs.700. So to evidence extinguishment of the lease, this document cannot be received as evidence. But the penultimate sentence would indicate that possession was handed over by 'T' to 'S'. For the purpose of showing that possession was handed over, this document can be received in evidence since it is for a collateral purpose. If we apply the proposition of law which the court has deduced above, this document is made available to be used

in evidence for the other purpose viz., with regard to handing over possession. [Paras. 4 & 6]

Cases referred to:

M.S.Ram Singh v. B.S.Surana, A.I.R. 1972 Cal. 190. [Para. 4]

Neelakanda Rao v. State of Mysore, A.I.R. 1960 Mys. 87. [Para. 4]

Roshan Singh v. Zile Singh, (1989)2 M.L.J. 18. [Para. 4]

Muruga Mudaliar v. Subba Reddiar, (1950)2 M.L.J. 818 (F.B.). [Para. 4]

Mst.Kirpal Kaur v. Bachan Singh, 1958 S.C.R. 948. [Para. 4]

Petition under Sec.115 of Act V of 1908, praying the High Court to revise the Order of the Court of the District Munsif, Kovilpatti, dated 6.11.1992 and made in I.A.No.1610 of 1992 in O.S.No.330 of 1992.

K.Alagiriswamy, Senior Counsel, for *T.Ravikumar*, *P.T.S.Narendravasan* and *T.Muruganandan*, for Petitioner.

P.Peppin Fernando, for Respondent.

The Court made the following

ORDER: This revision is directed against the Order in I.A.No.1610 of 1992 in O.S.No.330 of 1992 on the file of the District Munsif, Kovilpatti, in which the learned District Munsif has passed an order, holding that the document dated 23.8.1992 is not admissible in evidence.

2. Short facts are: The respondent has filed the suit in O.S.No.330 of 1992 for permanent injunction against the petitioner herein. He also filed petition in I.A.No.1610 of 1992 under O.39, Rule 1 and Sec.151, C.P.C., praying for temporary injunction restraining the respondent from interfering with his possession. That was opposed by the revision petitioner herein who was the respondent in the trial court. In that enquiry, the revision petitioner herein had filed the document dated 23.8.1992 given by the respondent herein, duly attested by two witnesses. Objection was raised for receiving it in evidence. On that objection, the learned District Munsif has passed an order, holding that it is not admissible in evidence. Aggrieved by the same, this revision petition is filed.

3. Mr.K.Alagiriswamy, the learned senior counsel appearing for the revision petitioner would submit that this document does not extinguish any right in an immovable property and as such it may be received in evidence. *Inter alia* he submitted that at any rate the said document can be admitted in evidence for the collateral purpose of showing possession. *Per contra*, Mr.Peppin Fernando, would submit that according to the affidavit, the rent

payable by the tenant for this lease was Rs.700 and it was not disputed in the counter and as such it was a monthly tenancy with a rental over Rs.100 and as such extinguishment of the tenancy right can be only by a registered document and inasmuch as this document was not registered, it cannot be admitted in evidence. He would further submit that lower court has stated that it was not made out as to for what collateral it should be received as evidence and as such it cannot be received in evidence even for collateral purpose and in view of that reasoning, this document cannot be received in evidence either for any collateral purpose.

4. I have carefully considered the submissions made by learned counsels. At the outset, I shall refer to the rulings relied upon by the learned counsels: In *M.S.Ram Singh v. B.S.Surana, A.I.R. 1972 Cal. 190*, it was held that surrender of lease by an instrument in writing purporting to extinguish right of a tenant valued at over Rs.100 is compulsorily registrable. In *Neelakanda Rao v. State of Mysore, A.I.R. 1960 Mys. 87*, it was held that a surrender deed by a tenant in favour of the landlord in respect of the tenancy, the value of which exceeds Rs.100 is clearly an instrument which purports to extinguish the right of the tenant and as such comes within clause (b) of Sec.17(1) of the Registration Act and therefore is compulsorily registrable, and if such document is not registered, it cannot be received in evidence of the transaction of surrender, affecting the property in view of Sec.49 of the Registration Act. In *Muruga Mudaliar v. Subba Reddiar, (1950) 2 M.L.J. 818 (F.B.)*, it was held that Sec.49(c) of the Registration Act prohibits the use of an unregistered instrument in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immovable property. So long as the document is not sought to be relied on as evidence of any right, title or interest to or in immovable property, there is nothing to prevent the document being received in evidence. It was held that the prohibition against admissibility enacted by Sec.49 of the Registration Act is not an absolute one, but the section renders that unregistered document inadmissible only for the two limited purposes specified in clauses (a) and (c) and leaves it available to be used in evidence for other purposes. In *Roshan Singh v. Zile Singh, (1989) 2 M.L.J. 18*, the ratio of this ruling is that the document could always be looked into for the collateral purpose of proving the nature and character of possession of each item of property. In *Mst.Kirpal Kaur v. Bachan*

Singh, 1958 S.C.R. 948, it was held that the document concerned in that case was inadmissible in evidence in view of Sec.49 of the Indian Registration Act, 1908. From the above rulings, the following proposition of law can be deduced:

The prohibition against admissibility enacted by Sec.49 of the Registration Act is not an absolute one; but the section renders the unregistered document inadmissible only for the two limited purposes, specified in Clauses (a) and (c) and leaves it available to be used in evidence for other purposes.

5. Sec.49 of the Registration Act in so far as it is material for our purposes runs thus:

"No document required by Sec.17 or by any provision of the Transfer of Property Act, 1882, to be registered shall---

(a) affect any immovable property comprised therein, or....

(c) be received as evidence of any transaction affecting such property.....unless it has been registered."

6. Straightaway, I shall reproduce the document concerned in this case. It reads as follows:

கோவில்பட்டி
23-8-92

கோவில்பட்டி கஸ்பா இலேட் சொ. ஆவுண
நாயகம்பின்னை அவர்களின் மனைவி ஆ. சீதா
லக்ஷ்மி அவர்களுக்கு, கோவில்பட்டி கஸ்பா,
லேட் மொட்டயசாமி அவர்களின் குமாரரும்,
தங்களின் 595. நிர் சுட்டிடம் பஸ் ஸ்டான்டு
எதிர்புறம், மெயின் ரோட்டில் வியாபாரம்
செய்து வந்தவனுமாகிய திலகராஜ் ஆகிய நான்
எழுதி கொடுத்த ஒப்பந்தம் என்னவென்றால்
இதுவரை நான் செய்து வந்த வியாபாரத்தில்
சுபிட்சம் இல்லாத காரணத்தினாலும், மேலும்
பல எனது சொந்த இன்னல்களாலும் மேற்படி
வியாபாரம் செய்து வந்த தங்கள் கடை சுட்
ட்டித்தை காலி செய்து தங்களிடம் ஒப்பு
விக்கிறேன். அதன் தொடர்பாக எவ்வித பின்
தொடர்பும் இல்லை எனவும் இதன்மூலம்
உறுதி அளிக்கிறேன்.

இப்படிக்கு,
(ஒப்பம்)

எம். திலகராஜ்
23 - 8 - 92

சாட்சிகள்
வி- முருகேசன்
தபெ எஸ். வேலுசாமி
நார்த்திட்டாரகூனம் கோவில்பட்டி

எஸ். நாராயணன் த/பெ சுப்ரமணிய
சாஸ்திரிகள்
கோவில்பட்டி.

The last sentence would amount to extinguishment of the lease. As such this is a document compulsorily registrable under Sec.17 of the Registration Act, inasmuch as monthly rent was Rs.700. So to evidence extinguishment of the lease, this document cannot be received as evidence. But the penultimate sentence would indicate that possession was handed over by Thilakaraj to Seethalakshmi. For the purpose of showing that possession was handed over, this document can be received in evidence, since it is for a collateral purpose. If we apply the proposition of law, which I have deduced above, this document is made available to be used in evidence for the other purposes, viz. with regard to handing over possession. As such, the trial court is wrong in refusing to receive this document as evidence. Though not for the purpose of extinguishment of the leasehold rights, but for the purpose of handing over possession which is a relevant factor in a suit for injunction, the document can be received in evidence. The trial court has stated in the last portion of para.4 of its order that it is not clear as to for what collateral purpose this document was sought to be produced as evidence. Now, K. Alagiriswamy, the learned senior counsel, would submit that the revision petitioner is relying upon it for the purpose of showing that possession was no longer with the respondent herein. To that limited extent, the document ought to have been received in evidence.

7. Mr. Peppin Fernando, would submit that now plaint has been amended and now the relief sought for is for recovery of possession. In case this document was relied upon for extinguishment of the leasehold rights, definitely the trial court can reject such an argument. Suffice it for me to state at this juncture that the lower court is wrong in rejecting this document totally and ought to have received it in evidence for the collateral purpose of showing possession.

8. In view of the above, this civil revision petition is allowed, setting aside the order of the trial court refusing to receive this document in evidence. The document shall be received in evidence not for showing extinguishment of leasehold rights, but for the limited purpose of showing possession.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Bellie, J.*

A.S.No.644 of 1982

27th November, 1992

The Commissioner, Hindu Religious and Charitable Endowments (Admn.) Department, Madras and another

...Appellants

v.

G.Kuppasami Mudaliar and others ...Respondents

*Hindu Law - Adoption - Person dying before 1956
Having son born to him - If can adopt a son.*

In a petition under Sec.63(b) of the Tamil Nadu Hindu Religious and Charitable Endowments Act it was contended by the plaintiffs that he was a hereditary trustee of a certain temple. They averred that one 'T' was poojari-cum-trustee of the temple that his son 'P' succeeded as poojari-cum-trustee and functioned in that capacity till 1952 when he died and that he adopted his sister's son 'G', the father of the plaintiffs who was poojari-cum-trustee. The petition was dismissed. An appeal was also dismissed. A suit under Sec.70 was decreed by the trial court.

Held: 'P' having died in 1952, if at all there was any adoption, it could be only before then. At that time, the law prior to the Hindu Adoptions and Maintenance Act, 1956, will be applicable. As per that law, 'P' could not have validly adopted a son when he had a son born to him. [Para. 7]

P.M.Bhaskaran, Assistant Government Pleader for Appellants.

W.C.Thiruvengadam and *T.L.Ram Mohan*, for Respondents.

The Court delivered the following

JUDGMENT: The first two defendants viz. the Commissioner and the Assistant Commissioner of Hindu Religious and Charitable Endowments (Administration) Department are the appellants. The suit filed by the two plaintiffs under Sec.70 of the Hindu Religious and Charitable Endowments Act, hereinafter called 'the Act', has been decreed and hence this appeal.

2. The case of the plaintiff is that the temple dedicated to Sri Chenroya Perumal in Dhattimanipalli village, Gudiyatham Taluk, which is a small village temple is an ancient one and the origin of it is not traceable. The temple is

possessed of 1.60 acres in Survey No.211/1 and 0.22 cents with 8 mango trees in Survey No.74. The annual income from the properties would be Rs.120. The plaintiffs and their predecessors have been doing pooja in the temple and also were managing the temple affairs. They are thus poojaris-cum-trustees of the temple. Long ago one Thandavaraya Gounder was poojari-cum-trustee of the temple and after his death his son Ponnappa Gounder succeeded as poojari-cum-trustee. He functioned in that capacity till 1952 when he died. Since Ponnappa Gounder had no male issues he adopted his sister's son Govindappa Mudaliar as his son. The plaintiffs belong to Vellala Gounder and they are called both as Gounders and Mudaliars. Govindappa Mudaliar took over the Poojariship and the management of the affairs of the temple. He died on 21.1.1975, leaving behind the plaintiffs, his sons to succeed as poojaris-cum-hereditary trustees, and the office of the hereditary trusteeship of the temple had been vested in the plaintiffs' family from time immemorial. The plaintiffs filed a petition O.A.No.79 of 1972 before the Deputy Commissioner, Hindu Religious and Charitable Endowments (Administration) Department under Sec.63(b) of the Act to declare them as hereditary trustees of the suit temple but the petition was dismissed by the Deputy Commissioner. The plaintiffs preferred an appeal also to the Commissioner, A.P.35 of 1976 and the appeal also was dismissed. Since defendants 3 and 4 are objecting to the claim of the plaintiffs to the hereditary trusteeship they were impleaded as parties before the Commissioner. Therefore, the plaintiffs have filed the suit to set aside the order of the Commissioner and for declaration that the plaintiffs are the hereditary trustees.

3. Defendants 1 and 2 viz., the Commissioner and the Deputy Commissioner in their written statement denied that the plaintiffs and their ancestors have been hereditary trustees of the temple. They denied that the plaintiffs' father Govindappa Mudaliar was adopted as a son by Ponnappa Gounder. They also denied that excepting the members of the plaintiffs' family no other person acted as trustee of the temple. They contended that one Manickam, Duraisamy Naidu and Thambu Reddiar who are not members of the plaintiffs' family were trustees of the temple. Even the first plaintiff was appointed as non-hereditary trustee by the Assistant Commissioner in the year

1963 for a period of five years. The Fit Person appointed by the Department has taken possession of the temple and its properties. Therefore, the suit is liable to be dismissed.

4. Defendants 3 and 4 also filed a written statement wherein they denied that no one outside the family of the plaintiffs was trustee of the temple. They contended that one Kuppusamy Naidu, Manicka Naidu, Duraisamy Naidu and Thambu Chettiar and one Mohana Rangam were trustees of the temple having been appointed by the appropriate authorities. For the past more than two decades the Hindu Religious and Charitable Endowments Department has been in charge of the temple and its properties and appointing trustees on the merits of the applications made for such appointment.

5. The trial court on consideration of the evidence adduced in the case held that the plaintiffs are the hereditary trustees as claimed by them and consequently it set aside the order of the Commissioner and Deputy Commissioner and declared the plaintiffs as hereditary trustees.

6. The point for consideration in the appeal is:

"Whether the finding of the trial court that the plaintiffs are hereditary trustees of the temple is not correct?"

7. According to the plaintiffs Ponnappa Gounder was poojari-cum-hereditary trustee of the temple until his death in 1952 and then his adopted son Govindappa Mudaliar became trustee till his death on 21.1.1975 and thereafter his sons, the plaintiffs, are the trustees, and thus for three generations the plaintiffs and their family have been the trustees and therefore the plaintiffs are hereditary trustees. Ex.A-10 is a copy of 'A' Registrar which shows that Ponnappa Gounder was acting as trustee of the temple. Ex.A-11, dated 17.7.1948 is a registration copy of the sale deed executed by one Kichana Naidu in favour of Ponnappa Gounder wherein Ponnappa Gounder has been described as trustee (Dharmakarta) of the temple. From these two documents it would appear that Ponnappa Gounder was trustee (it may be noted that it is not mentioned that Ponnappa Gounder was a *hereditary* trustee).

If Ponnappa Gounder was a trustee and his adopted son Govindappa Mudaliar was also a trustee and then his sons-the plaintiffs are also trustees then of course for three generations the plaintiffs' family members having been trustees, the plaintiffs can

claim to be hereditary trustees. Now, as per the plaintiff allegations since Ponnappa Gounder had no son he adopted Govindappa Mudaliar, his sister's son, as his son. The defendants deny that there was any such adoption. Admittedly there is no adoption deed.

The plaintiffs have let in oral evidence to prove adoption by examining P.Ws. 2 to 5 besides the first plaintiff as P.W. 1. The question arises whether by mere oral evidence of P.Ws. 1 to 5, it can be held that in fact there was an adoption. However, that may be, from the evidence it would appear that Ponnappa Gounder was not competent to adopt a son because he had a son by name Chithira Gounder. To prove that Ponnappa Gounder had a son by name Chithira Gounder, the defendants have filed Ex.B-9, kist receipt and Ex.B-10 voters' list. The learned trial Judge seems to be of the view that these two documents show that Ponnappa Gounder had a son by name Chithira Gounder. During the course of arguments in the appeal also the defendants' case that Ponnappa Gounder had a son by name Chithira Gounder has not been seriously disputed. Therefore, it can be safely held that it is true that Ponnappa Gounder had a son by name Chithira Gounder.

However, the learned trial Judge would say that there is no evidence to prove that Chithira Gounder was acting as a trustee of the suit temple after the death of Ponnappa Gounder. That may be true. But the question is while Chithira Gounder was alive as a son of Ponnappa Gounder can Ponnappa Gounder adopt a son. In law, Ponnappa Gounder cannot do so. Ponnappa Gounder having died in 1952 if at all there was any adoption it could be only before then. At that time, the law prior to the Hindu Adoptions and Maintenance Act, 1956, will be applicable. As per that law, in Mulla's Hindu Law, Fifteenth Edition, at page 570, under Sec. 450, as to the competency of a male Hindu before the Act, it is stated thus:

"450. (1) Subject to the provisions of any law for the time being in force, every male Hindu, who is of sound mind, and has attained the age of discretion, even though he may be a minor, may lawfully take a son in adoption, provided he has no son, grandson, great grandson, natural or adopted, living at the time of adoption."

It is, therefore, clear that as per the law then existing Ponnappa Gounder could not have validly adopted a son when he had a son born to him.

In this position one thing is that it is difficult to believe that when the law is such Ponnappa Gounder had adopted Govindappa Mudaliar as his son and another thing is that even if some ceremonies of adoption had been gone through that will not give a valid adoption. Therefore, Govindappa Mudaliar cannot be regarded as the son of Ponnappa Gounder, and as such he cannot be a member of the family of Ponnappa Gounder. Therefore, even if Govindappa Mudaliar had been a trustee of the temple that will not help the plaintiffs to prove that the members of their family had been trustees for three generations and therefore they are hereditary trustees.

In Ex.A-17 audit report dated 3.8.1976 of the suit temple for faslis 1378 to 1383 submitted by the Inspector, Hindu Religious and Charitable Endowments (Administration) Department, it is stated that Govindappa Mudaliar-father of the plaintiffs, was acting as hereditary trustee of the suit temple from 1.7.1968 to 30.8.1974. Merely because Govindappa Mudaliar was acting as a trustee the Inspector was not competent to say that he was acting as a hereditary trustee. This may only show that for the said period Govindappa Mudaliar was a trustee. But, it will not show that he became a trustee hereditarily. Here it may be noted that it is in evidence that Ponnappa Gounder died in 1952 and as per Ex.A-17 Govindappa Mudaliar was trustee only from 1.7.1968 to 30.8.1974 and it is not known as to who was the trustee from 1952 to 30.6.1968. In this view of the matter the plaintiffs-sons of Govindappa Mudaliar cannot claim that they are hereditary trustees. Here it is worth noting that the first plaintiff himself has been appointed as a trustee for five years by the Deputy Commissioner as per his order Ex.B-15, dated 26.6.1963. In the normal course, this would not have happened if the first plaintiff was a hereditary trustee. It is argued that the first plaintiff has not applied for being appointed as a trustee and there is no evidence to show that there was such an application. But as per Sec. 114 of the Evidence Act, Official Acts must be presumed to have been regularly performed and there appears to be no reason as to why the first plaintiff should have been appointed as a trustee if there was no application made by him.

8. Considering the circumstances of the case discussed above it cannot be held that the plaintiffs are the hereditary trustees of the suit temple.

Therefore, the judgment of the trial court is not correct. Accordingly, the appeal is allowed, the judgment and decree of the trial court are set aside and the suit is dismissed. There will be no order as to costs.

B.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*].

Present: *Janarthanam, J.*

W.P.No.6918 of 1984 3rd February, 1993.

Sri Mahalingaswami Devasthanam, Thiruvidaimaruthur and another ...*Petitioners*
v.

The State of Tamil Nadu and another ...*Respondents.*

Tamil Nadu Levy of Ryotwari Assessment on Freehold Lands Act (XXXI of 1973) - Object of - Determination of issuance of rough patta to occupiers of lands - Permissibility.

Held: It is clear that the object of the Act is only to provide for the levy of ryotwari assessment as freehold land in the State of Tamil Nadu. It does not purport to affect or alter in any manner other rights in the freehold land. Ryotwari settlement of freehold land can be effected in accordance with the settlement notification framed and published by the Government for the purpose. The object of various notices now under challenge is not only to bring the lands in question on par with similarly situate ryotwari lands for the purpose of assessment, but also for the purpose of deciding the question as to the entitlement of rough patta of these lands by the occupiers. [Para. 18]

Case referred to:

Sri Velur Vaidyanathaswami Devasthanam v. State of Madras, (1967) 1 M.L.J. 43. [Para. 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of

certiorari calling for the records of the 2nd respondent connected with issuance of notices No.66, 75 and 79, dated 18.6.1984 under the Tamil Nadu Act 31 of 1973 of the second respondent and quash the same.

B.Kumar, for Petitioner.

V.Raghupathy, Additional Government Pleader, for Respondents.

The Court made the following

ORDER: Sri Mahalingaswami Devasthanam, Thiruvidaimaruthur and Sri Manokianathaswami Devasthanam, Thiruneelakudi, it is said are registered holders of the lands in villages going by the names Manjamalli, Thiruneelakkudi and Thiruvidaimaruthur in Thanjavur District. The Tamil Nadu Levy of Ryotwari Assessment on Freehold Lands Act, 1972 (Tamil Nadu Act XXXI of 1973- for short 'the Act') came into force with effect from 16.10.1979. The Assistant Settlement Officer, Thanjavur, pursuant to the salient provisions adumbrated in the said Act, issued notices Nos.66, 75 and 79, dated 18.6.1984 to the aforesaid Devasthanams, relatable to their holdings of the registered lands respectively in the villages of Manjamalli, Thiruvidaimaruthur, Thiruneelakkudi, as respects determination of the question of issuance of a rough patta and rates of assessment imposable on such holdings at a ryotwari settlement. The Devasthanams resorted to the present action under Art.226 of the Constitution impleading the State of Tamil Nadu represented by the Secretary to Government, Revenue Department, Fort St.George, Madras-9 and the Assistant Settlement Officer, Thanjavur as respondents praying for issue of writ of *certiorari* to quash those impugned notices.

2. Manifold grounds, though taken in the affidavit filed in support of the writ petition, inclusive of the grounds relatable to the constitutional vires of the Act XXXI of 1973, yet during the course of arguments, learned counsel appearing for the petitioners thought fit to abandon all those grounds- specifically the grounds relatable to the challenge made as to the constitutional vires of the Act XXXI of 1973 and the right of the Government to determine the question of rates and assessments imposable on the holdings of the petitioners at a ryotwari settlement- and was rest content to vehemently put forth his submission revolving on the question of determination of the issuance of rough patta to the occupier of the lands by stating that

such a question is beyond the pale of the provisions of the said Act and consequently, any action taken therefor by the Government is without jurisdiction and therefore, it goes without saying that the impugned notices deserve to be quashed, in so far as they relate to determination of the question of issuance of a rough patta to the occupier of the lands.

3. Learned Additional Government Pleader appearing for the respondents would, however, repel such a submission.

4. There is no pale of controversy whatever that the registered land holdings of the petitioners-Devasthanams are relatable to holdings of grants traceable to Mohini allowance.

5. A Division Bench of this Court consisting of K. Veeraswami, J. (as he then was) and Natesan, J., in *Sri Velur Vaidyanathaswami Devasthanam v. State of Madras*, (1967) 1 M.L.J. 43, referring to *Secretary of State for India in Council v. Vaithilinga Pandara Sannadhi Avargal*, (Appeal Nos. 40, 41, 42, etc. of 1936), which traced the history of Mohini grants, expressed that Mohini inam grants were only assignment to temples of the right of the Government revenue over specified lands, the Government retaining the right to future increments to revenue and the right to impose assessment on lands within the villages not covered by the specific terms of assignment. The grant of land revenue is not in respect of inam land but on lands which were held on ryotwari tenure. These assignment of revenue, in lieu of existing cash allowances, which in turn, were being made as compensation for temple lands resumed by East India Company. The so-called Mohini inam grants are not therefore 'minor inams' within the meaning of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (Act XXXI of 1964) and as such, do not fall within the purview of that Act.

6. In the backdrop and setting of the history of Mohini inam grants, it is thus clear that registered holdings of the petitioners-Devasthanams, which were traceable to Mohini inam grants are not inam lands, but only lands held on ryotwari tenure.

7. Having understood the nature and character of Mohini inam holdings of the petitioners-Devasthanams, the question that now falls for consideration is whether the Government under the Act XXXI of 1973 is entitled to determine the question of issuance of rough patta to occupier of lands.

8. In finding an answer to the question so posed, a

survey of certain salient provisions adumbrated under the Act (XXXI of 1973), is necessary and as such an exercise may now be resorted to.

9. Sec.2(d) defines 'freehold land' and it is as under:

" 'freehold land' means any land held-

(i) free from demand of land revenue, or

(ii) subject to the payment of concessional land revenue and specified in Part I of the Schedule to this Act, and includes any land--
(i) in respect of which land revenue or other tax in respect of such land has been assigned in favour of any religious institution or charitable endowment in lieu of cash allowance known as mohini allowance, and

(ii) which is specified in Part II of the Schedule to this Act."

10. Sec.2(h) defines 'ryotwari assessment' by way of 'means' definition and it reads thus:

" 'ryotwari assessment' means the assessment payable to the Government under Sub-sec.(1) of Sec.9"

11. Sec.8 dealing with 'manner of effecting ryotwari settlement' is couched in the following terms:

"8. *Manner of effecting ryotwari settlement:* (1) The Settlement Officer shall, as soon as may be, after the publication of this Act, effect ryotwari settlement of every freehold land in accordance with a settlement notification framed and published by the Government for the purpose.

2. The said notification shall embody the principles adopted in making ryotwari settlement in ryotwari areas and shall adopt-

(a) the rates of assessment as set out in the settlement or re-settlement notification in force on the date of the publication of this Act in the district in which the freehold land is situated; or

(b) if more than one such notification is in force in that district, the rates set out in one of those notifications which the Government consider to be most appropriate to the case.

(3) All rates of assessment imposed at a ryotwari settlement under this section shall be liable to revision from time to time as laid down in the settlement or re-settlement notification referred to in Sub-secs.(1) and (2).

(4) Any settlement notification published under Sub-sec.(1) shall have effect in supersession of any settlement or re-settlement notification, if

any, already, in force in respect of the freehold land concerned.

(5) Neither such settlement notification nor any order passed in pursuance thereof shall be liable to be questioned in any court of law."

12. Sec.9 prescribing 'owner of freehold land liable to pay land revenue to Government' runs as under:

"9. *Owner of freehold land liable to pay land revenue to Government:* (1) Every owner of freehold land shall, for the fasli year commencing on the 1st day of July, 1972 and for each subsequent fasli year, be liable to pay to Government in respect of his freehold land the assessment under the ryotwari settlement effected under this Act.

(2) The ryotwari assessment payable under Sub-sec.(1) shall be deemed to be public revenue due on land within the meaning of the Tamil Nadu Revenue Recovery Act, 1864 (Tamil Nadu Act II of 1864) and shall be recoverable under the provisions of that Act."

13. Sec.10 provides for machinery for 'decision of certain disputes' relating to liability to pay ryotwari assessment. It reads:

"10. *Decision of certain disputes:* (1) If any person disputes--

(i) his liability to pay the ryotwari assessment under this Act; or

(ii) the application in respect of his land, of a particular rate of ryotwari assessment imposed as a ryotwari settlement under Sec.8, the Settlement Officer shall decide such dispute.

(2) From every decision of the Settlement Officer under Sub-sec.(1) an appeal shall, within such time as may be prescribed lie to the Director.

Explanation: Nothing in this section shall be construed as conferring any right on any person to dispute the rates of ryotwari assessment imposed at a ryotwari settlement under Sec.8."

14. Sec 11 deals with 'power of revision by Board of Revenue'. It is couched in the following terms:

"11. *Power of revision by Board of Revenue:* (1) The Board of Revenue may,

(i) on its own motion call for and examine the records of any proceeding under this Act; or

(ii) on application made by the owner of freehold land in this behalf, call for and examine the records of any proceeding under this Act (not being a proceeding in respect of which an

appeal lies to the Director under Sub-sec.(2) of Sec.10), to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein, and if, in any case, it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly;

Provided that the Board of Revenue shall not pass any order under this section prejudicial to any party unless he has had a reasonable opportunity of making his representation.

(2) The Board of Revenue may stay the execution of any such decision or order pending the exercise of its powers under Sub-sec.(1) in respect thereof.

(3) Every application to the Board of Revenue for the exercise of its powers under this section shall be preferred within the prescribed period;

Provided that the Board of Revenue may in its discretion allow further time not exceeding one month for the filing of any such application if it is satisfied that the appellant had sufficient cause for not preferring the application within the prescribed period."

15. Sec.23 dealing with 'Act to override contract, grant, etc.', provides:

"23. *Act to override contract, grant, etc.:* The provisions of this Act shall have effect notwithstanding anything contained in any engagement, contract, grant, order or any law for the time being in force and any provision in any such engagement, contract, grant, order or law, by virtue of which the owner of freehold is not liable to pay to the Government any land revenue or other tax shall be deemed to have become inoperative with effect from the 1st of July, 1972."

16. From the very conspectus of various provisions, as extracted above, it is thus clear that the object of the Act is only to provide for the levy of ryotwari assessment on freehold land in the State of Tamil Nadu. It does not purport to affect or alter in any manner other rights in the freehold land. Ryotwari settlement of freehold land can be effected in accordance with the settlement notification framed and published by the Government for the purpose. The notification shall embody the principles adopted in making ryotwari settlements

in ryotwari areas and it shall adopt the rates of assessment in force in the district, in which the freehold land is situate. All rates of assessments imposed at ryotwari settlement shall be liable to revision from time to time.

17. Any settlement notification published shall have effect in supersession of any settlement or re-settlement notification already in force in respect of the freehold land concerned. Neither such settlement notification nor any order passed in pursuance thereof shall be liable to be questioned in any court of law. Every owner of freehold land shall for the fasli year commencing from 1st July, 1972 and for subsequent fasli year, be liable to pay to Government in respect of freehold land the assessment under ryotwari settlement. If any dispute arises as to liability to pay ryotwari assessment, such a dispute shall be decided by the Settlement Officer. The order of the Settlement Officer is liable to be challenged in appeal before the Director. The order of the Director in appeal is challengeable by way of revision before the Board of Revenue. Top of all, the provisions of the Act shall override any contract, grant or order or any law for the time being in force with effect from 1st July, 1972, thereby indicating the Government's right to future increments to revenue in respect of freehold lands.

18. The object of various notices now under challenge is not only to bring the lands in question on par with similarly situated ryotwari lands for the purpose of assessment, but also for the purpose of deciding the question as to the entitlement of rough patta of those lands by the occupiers. It is, therefore, clear that the rights of the petitioners-Devasthanams in the lands in question are likely to be interfered with as a result of those notices under challenge and therefore, it goes without saying that any action taken therefor by the Government is without jurisdiction, as rightly contended by learned counsel for the petitioners-Devasthanams and in that view of the matter, the impugned notices deserve to be quashed in so far as they relate to deciding the question as to the entitlement of rough patta by the occupiers of those lands and the same are ordered accordingly.

19. The writ petition is thus disposed of on the above terms. No costs.

B.S.

---- Petition allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

S.A.No.717 of 1982

16th November, 1992.

Mangathaycc alias Kannammal ...Appellant
v.

Govindaraji Mudaliar and another ...Respondents.

Deed - Construction - Unborn child - Father executing a settlement - Mother to get absolute estate after the death of the father in case there is no issue - Condition that no property can be sold by one without the consent of the other - Nature of interest conferred.

Held. It is quite clear that the suit properties are not the joint family properties of the family of the plaintiff and her father under Ex.A-1 the plaintiff has got absolute interest in the properties after the lifetime of his parents. Therefore, it has to be held that these properties are her own exclusive properties and in such circumstances, the existence of family benefit or family necessity, even assuming cannot validate Exs.B-1 and B-6. Further pursuant to Sec.8 of the Hindu Minority and Guardianship Act, without the prior permission of the court, the minor's property cannot be sold away by the parents. [Para 7]

V.Subramani, for Appellant.

K.Venugopal, for Respondents.

The Court delivered the following

JUDGMENT: The plaintiff is the appellant. Though her suit O.S.No.9 of 1976 on the file of the District Munsif, Cheyyar was decreed, the decree was reversed by the Subordinate Judge, Vellore in A.S.No.40 of 1978, preferred by the defendants and the suit was dismissed.

2. The plaintiff claimed title to the suit properties basing on Ex.A-1, the registered settlement deed, dated 2.8.1951, executed by Munusamy Naidu, the father of the plaintiff, covering all the three items of the suit properties. No doubt, on the date of Ex.A-1, the plaintiff was not alive, she having been born on 28.8.1955. But the relevant recital in Ex.A-1 is as follows:

“என் மணப்பூர்வமாக அடியில் விவரித்த ரூபாய் 500 ஐந்நூறு பெருமான சொத்தை செட்டிமெண்ட் பத்திரம் மூலமாய் எழுதி வைத்திருக்கிறேன். மேற்படி சொத்தை நாம் இருவரும் ஏகோபித்து மாகுல்களை மட்டும் அடைந்து அனுபவித்து வர வேண்டியது அனுபவிக்கும் அளவில் நமக்கு சந்ததி ஏற்பட்டால் அவர்கள் நம் காலத்திற்குப் பிறகு அடைய வேண்டியது சந்ததி ஏற்படாவிட்டால் மேற்கண்ட நிபந்தனைப்படியே நிலத்தின் மாகுலை அனுபவித்து வந்து என் காலத்திற்கு பிறகு நீயே சர்வ சுதந்திரமாய் அடைய வேண்டியது. வை சொத்தை இன்றே உம் வசம் ஒப்படைத்து விட்டேன். பட்டா மாறுதலும் செய்து விட்டேன். நம்மில் ஒருவர்க்கொருவர் அனுமதியில்லாமல் மேற்படி சொத்தை எவ்வித பராதீனமும் செய்யக் கூடாது மேற்படி சொத்தின் பேரில் யாதொரு வில்லங்கமும் இல்லை”

(i.e. Munusamy Naidu and his wife)

So, according to the plaintiff under Ex.A-1 life interest in the suit properties has been given to the settlor's wife and the settlor himself and after their lifetime, their children to be born are to get the vested interest in those properties. No doubt, there was another elder brother of the plaintiff. But, it appears that he had died in the year 1953 itself. So, according to the plaintiff she is the only surviving child of her abovesaid parents and the said parents having already died the plaintiff alone is entitled to the suit properties. As per Ex.A-3, the mother of the plaintiff died on 3.11.1957 and it appears that subsequently, her father also died.

3. On the other hand, the case of the defendants is that the mother of the plaintiff had executed a registered sale deed under Ex.B-1, dated 17.8.1956, in favour of both the defendants, in respect of item Nos.1 and 2 of the suit properties that the father of the plaintiff had executed another sale deed Ex.B-6, dated 12.3.1959 in respect of the third item of the suit properties, in favour of the 2nd defendant and that thus the defendants derived their respective title to the suit items. In both Exs.B-1 and B-6, the plaintiff who was a minor on the relevant dates of the execution of these documents, also figured as one of the executants and it is also recited in Exs.B-1 and B-6 that the respective sales under these documents had been made because of the family necessity and for family benefit. So, according to the defendants, Exs.B-1 and B-6 are valid. Further, the father and mother of the plain-

tiff had also earlier executed two mortgage deeds, Exs.B-2 and B-3 in the years 1953 and 1954 and, according to the defendants, in order to discharge the said mortgage debts, they had executed Exs.B-1 and B-6.

4. Learned counsel for the appellant made two submissions attacking the judgment of the lower appellate court. Initially he submitted that the lower appellate court had erred, while interpreting the abovesaid recital found in Ex.A-1 in holding that the plaintiff's parents had right to alienate the property under Ex.A-1. According to the said learned counsel, only life interest has been given to the plaintiff's parents under Ex.A-1 in respect of the suit properties. Secondly, the learned counsel for the appellant contended that the lower appellate court has unnecessarily taken into consideration the question of family benefit or family necessity to uphold the abovesaid Exs.B-1 and B-6 sale deeds. According to him, the suit properties were the exclusive properties of the plaintiff and they were not the family properties of the family of the plaintiff and her father. Only in the case of alienation of family properties the question of family benefit or family necessity would arise and, therefore, the learned counsel contends that the lower appellate court has taken an extraneous consideration to decide the matter. Further, he would also contend that there is a specific provision under Sec.8 of the Hindu Minority and Guardians Act, wherein it is stated that a minor's property has to be alienated only with the previous permission of the Court.

5. On the other hand, learned counsel appearing for the respondents contended that the interpretation made by the lower appellate court on the abovesaid recitals in Ex.A-1 is perfectly correct and the parents of the plaintiff have been given right to alienate the properties under Ex.A-1. Further, according to the learned counsel, the plaintiff, who was a minor at the time of execution of Exs.B-1 and B-6 has also been a party in these documents and only because the power of alienation has been given under Exs.B-1 and B-6, the parents of the plaintiff had together executed the abovesaid Exs.B-2 and B-3 mortgage deeds.

6. I have considered the rival submissions. I shall first take up the question of interpretation of the abovesaid recitals found in Ex.A-1. The initial portion of the abovesaid recitals specifically says as follows:

‘மேற்படி சொத்தை நாம் இருவரும் ஏகோபித்து மாகுல்களை மட்டும் அடைந்து அனுபவித்து வர வேண்டியது.’

This shows that the parents of the plaintiff could only enjoy the usufructs from the suit properties and that they do not get any other right in the properties. Particularly when the settlor has stated that they should enjoy only the usufructs of the properties and after their lifetime the properties shall go to their children, it is clear that no power of alienation has been given to the parents of the plaintiff under Ex.A-1. Even assuming that such power has been given under Ex.A-1 it is clear according to the recitals referred to above that only with the consent of each other they could alienate the properties. Admittedly, in the present case, Ex.B-1 has been executed only by the mother of the plaintiff and not by her father. Likewise, Ex.B-6 has been executed by the father of the plaintiff and not by her mother. The learned counsel appearing for the respondents also could not bring to my notice any evidence showing that the mother of the plaintiff obtained her husbands consent to alienate the properties under Ex.B-1 and *vice versa* in the case of Ex.B-6. Therefore, both Exs.B-1 and B-6 in my view, are not valid.

7. Further, on the second question, it is quite clear that the suit properties are not the joint family properties of the family of the plaintiff and her father. Under Ex.A-1, the plaintiff has got absolute interest in the properties, after the lifetime of her parents. Therefore, it has to be held that these properties are her own exclusive properties and in such circumstances the existence of family benefit or family necessity, even assuming cannot validate Exs.B-1 and B-6. Further, pursuant to Sec.8 of the Hindu Minority and Guardianship Act, without the prior permission of the court, the minor's property cannot be sold away by the parents.

8. Therefore, for all these reasons, it is clear that the judgment and decree of the lower appellate court suffer from substantial error of law and therefore they are set aside and the decree and judgment of the trial court and restored. This second appeal is accordingly allowed. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Somasundaram, J.

W.P.No.2577 of 1984

13th November, 1992.

M.V.Balu

...Petitioner

v.

The Chairman, Tamilnadu Housing Board and another

...Respondents.

(A) Disciplinary proceedings - Petitioner employed of the Tamil Nadu Housing Board - Two separate charges levelled against him - Two separate incidents - Two separate enquiries - Show cause notice issued referring to both the memos - Report of the enquiry officer not served on the petitioner - Petitioner removed from service - Procedure adopted illegal.

The impugned order is clearly illegal because the said order is passed clubbing the charges mentioned in the two separate charge memos dated 8.2.1981 and 5.8.1982 in respect of two separate incidents which took place on 22.8.1980 and 31.7.1982 respectively. The materials on record go to show that there are two different incidents. With regard to the two different incidents, charge-memos were issued to the petitioner. The materials on records also go to show that two separate enquiries were also held with regard to the alleged misconduct referred to in the two separate charge-memos. Though the incidents were different separate charge-memos were issued to the petitioner relating to the two incidents and separate enquiries were held with regard to the misconduct alleged in the two charge-memos, strangely the first respondent issued the show-cause notice dated 18.8.1983 referring both the charge-memos, incidents and enquiries held in respect of those charges and proposed to impose a punishment of removal from service which ultimately led to the passing of the impugned order removing the petitioner from service. Thus, the impugned order is clearly illegal and, therefore, the impugned order is liable to be quashed. [Para. 3]

(B) Civil Services Disciplinary Proceedings - Copy of order of enquiry officer not served - Second show cause notice proposing punishment - Order if vitiated.

The impugned order does not show that the copy of the report of the enquiry officer either with regard to the first charge memo or with regard to the second charge memo was ever served on the petitioner along with the second show cause notice proposing the punishment. Even in the counter affidavit, there is no averment that the copy of the report of the enquiry officer was supplied to the petitioner along with the second show cause notice proposing the punishment. The Court is inclined to hold that the infirmity is a serious one which would render the entire disciplinary proceedings initiated against the petitioner culminating in the order challenged in the writ petition illegal.

[Paras. 4 & 5]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to the proceedings Ref.No.DC3/74352/80, dated 27.12.1983, on the file of the first respondent and quash the same and direct the first respondent to reinstate the petitioner in service. *M.Venkatachalapathy* for *S.M.Loganathan* and *K.R.Pandian*, for Petitioner.

S.Doraisamy, for Respondents.

The Court made the following

ORDER: This writ petition has been filed for the issue of a writ of *certiorarified mandamus* to quash the order of the first respondent dated 27.12.1983 in his proceedings Ref.No.DC3/74352/80 and to direct the 1st respondent to reinstate the petitioner in service.

2. On 22.8.1980, at about 3.30 p.m., Thiru L.Vinayagam, Building Inspector of Madurai Special Division accompanied by the Assistant Engineer Thiru Jayachandran, complained to the Executive Engineer and Administrative Officer, Madurai that he was beaten up by chappal by the Watchman Thiru V.Gurusamy and that he was threatened with a knife by the petitioner, while he was engaged in unloading steel rods at Ellis Nagar store-yard. The Executive Engineer immediately went to the spot with two Assistant Executive Engineers Thiru R.Sundaram and Thiru S.Elango. When they entered the scheme area, they found the petitioner lying on the ground fully drunk and in a unconscious state. In the above circumstances, the following charges were framed against the petitioner:

"1. That he was in drunken mood and threatened with knife Thiru L.Vinayagam, building inspector, while he was performing his official duties;

2. That he allowed himself under alcoholic influence and thus failed in his official duties of watching storeyard and scheme area."

The petitioner was directed to submit his explanation for the above charges and to return the questionnaire form duly filled in. The petitioner submitted a reply to the charge memo denying the charges levelled against him. Thereafter, an enquiry was conducted by the Executive Engineer and Administrative Officer, Madurai Special Division. The Executive Engineer and Administrative Officer found that the charges framed against the petitioner have been proved. By the memo dated 3.8.1981, the first respondent issued a show cause notice to the petitioner asking him to show cause within 15 days from the date of receipt of the memo as to why his increment should not be stopped for a period of one year without cumulative effect and to treat the period of suspension as leave to which he is eligible. On 24.10.1981, the petitioner submitted his reply to the show-cause notice dated 3.8.1981. Thereafter, another complaint was received against the petitioner to the effect that he entered the room of the Assistant Executive Engineer-I, at 12.30 p.m. of 31.7.1982 and uttered unparliamentary words and also tried to assault the Executive Engineer under the influence of alcohol. In respect of the said complaint, the petitioner was placed under suspension with effect from 4.8.1982. Then on 18.8.1983, the first respondent issued another show cause notice to the petitioner and the other watchman Gurusamy asking them to show cause within 15 days from the date of receipt of the notice as to why they should not be removed from service for the charges proved against them. To the said show cause notice dated 18.8.1983, the petitioner submitted his reply on 6.9.1983. On 27.12.1983, the respondent passed an order removing the petitioner and the other watchman Gurusamy from service, pursuant to the show-cause notice issued earlier on 18.8.1983. The said order dated 27.12.1983 is challenged in this writ petition.

3. Mr.S.M.Loganathan, the learned counsel for the petitioner submitted that the respondent ought to have dealt with the two charge memos namely, the charge memo dated 5.2.1981 relating to the

incident dated 22.8.1980 and the charge memo dated 5.8.1982 relating to the second incident dated 31.7.1982 separately and passed separate orders on the basis of the independent enquiries conducted pursuant to the two charge memos referred to above. The learned counsel further contended that the impugned order is illegal and liable to be quashed because the respondents have clubbed the two charge memos issued with regard to two separate incidents which took place on two different dates and the two enquiry reports and passed the order challenged in this writ petition in respect of the misconduct alleged in both the charge memos. There is no merit in the contention of the learned counsel for the petitioner. In respect of the incident that took place on 22.8.1980, the charge memo dated 5.2.1981 was served on the petitioner. According to the respondents after enquiry into the charges contained in the charge memo dated 5.2.1981, a show-cause notice was issued to the petitioner on 3.8.1981 proposing to impose the punishment of stopping the increment for a period of one year without cumulative effect and to treat the period of suspension as leave to which the petitioner is eligible. The petitioner submitted his explanation to the show-cause notice dated 3.8.1981 on 24.10.1981. Further, the first respondent did not pass any final order pursuant to the show-cause notice dated 3.8.1981 proposing the punishment of stoppage of increment. Thereafter, on 18.8.1983, the first respondent issued another show-cause notice to the petitioner. In the said show-cause notice dated 18.8.1983, a reference is made only to the charge memo dated 5.2.1981, the reply of the petitioner dated 16.3.1981, the earlier show-cause notice dated 3.8.1981 and the reply of the petitioner dated 24.10.1981. However, in the body of the show cause notice dated 18.8.1983, the first respondent refers to the second incident that took place on 31.7.1982, the charge memo issued dated 5.8.1982 to the petitioner with regard to the incident that took place on 31.7.1982, the oral enquiry said to have been conducted by the Executive Engineer and Administrative Officer on 3.10.1982, the resolution of the Board dated 3.11.1982 and thereupon called upon the petitioner and the other watchman Gurusamy to the show-cause within 15 days from the date of receipt of the notice as to why they should not be removed from the services for the charges proved against them. Thus, it is clear from

the proceedings referred to above that the first respondent clubbed the two enquiries at the stage of issuing the second show-cause notice and issued a common show-cause notice dated 18.8.1983 with regard to the misconduct alleged in both the charge memos. Thereupon, after receiving the reply from the petitioner, the first respondent passed the impugned order removing the petitioner and another watchman Gurusamy from service. On a perusal of the show-cause notice dated 18.8.1983 and the impugned order it is clear that the punishment imposed by the first respondent on the petitioner by the impugned order is in respect of the misconduct alleged against the petitioner in both the charge memos dated 5.2.1981 and 5.8.1982. The impugned order is clearly illegal because the said order is passed clubbing the charges mentioned in the two separate charge memos dated 5.2.1981 and 5.8.1982 in respect of two separate incidents which took place on 22.8.1980 and 31.7.1982 respectively. The materials on record go to show that there are two different incidents. With regard to the two different incidents, two separate charge-memos were issued to the petitioner. The materials on records also go to show that two separate enquiries were also held with regard to the alleged misconduct referred to in the two separate charge-memos. Though the incidents were different separate charge memos were issued to the petitioner relating to the two incidents and separate enquiries were held with regard to the misconduct alleged in the two charge-memos, strangely the first respondent issued the show-cause notice dated 18.8.1983 referring both the charge-memos, incidents and enquiries held in respect of those charges and proposed to impose a punishment of removal from service which ultimately led to the passing of the impugned order removing the petitioner from service. Thus, the procedure adopted by the respondent in passing the impugned order is clearly illegal and, therefore, the impugned order is liable to be quashed. 4. Another infirmity in the impugned order is that it was passed removing the petitioner from service ignoring the earlier show-cause notice issued on 3.8.1981 proposing to impose the punishment of stoppage of increment for a period of one year without cumulative effect and to treat the period of suspension as leave to which the petitioner is eligible. Yet another infirmity in the order challenged in this writ petition pointed out by the

learned counsel for the petitioner in this. The impugned order proceeds on the basis that during the enquiry conducted by the Superintending Engineer, Madurai Circle on 30.6.1983, the petitioner has admitted the charge that he has misbehaved and used abusive words against the superior officers. But, the report of the Superintending Engineer dated 14.7.1983 does not support the above conclusion of the first respondent. Further, the impugned order does not show that the copy of the report of the enquiry officer either with regard to the first charge memo or with regard to the second charge memo was ever served on the petitioner along with the second show cause notice proposing the punishment. Even in the counter affidavit, there is no averment that the copy of the report of the enquiry officer was supplied to the petitioner along with the second show cause notice proposing the punishment.

5. For all the reasons stated above, I am inclined to hold that the infirmities in the impugned order noticed above are serious infirmities which would render the entire disciplinary proceedings initiated against the petitioner culminating in the order challenged in the writ petition illegal. Therefore, the impugned order is liable to be set aside. Accordingly, the writ petition is allowed, the order challenged in this writ petition is set aside and the respondents are directed to reinstate the petitioner in service. No costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Padmini Jesudurai, JJ.*

L.P.A.No.43 of 1991

16th October, 1992.

Chidambaram Pillai and others ...Appellants
v.

Muthammal and others ...Respondents.

(A) *Evidence Act (I of 1872), Secs.101 and 102 - Burden of proof - Rule of non est factum - Special cloak of Protection applied to Pardanashin women, whether can be extended to Illiterate Woman - Illiterate Woman - Alleging that settlement deed was executed without knowing its character and contents - Whether asked for further pleadings or proof of undue influence and fraud.*

(B) *Indian Contract Act - Sec.16 - Allegations of fraud and undue influence - Burden of proof.*

Held:- A rule of *non est factum* which in full reads *non est factum, scriptum, predictum non est factum* rule has existed as a rule of law in England as well as in India and there has been a good deal of improvement in this behalf, while applying the rule of burden of proof in evidence to women in India. A section of womenfolk, in view of the social conditions of the times are presumed to have imperfect knowledge of the world. It is thus imperfection of the knowledge of the world that the law throws round such Women, a special cloak of protection which demands that the burden of proof shall, in such a case, rest not with those who attack but with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to and was really understood by the grantor. In such case, it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. A pardanashin may not be illiterate but she still may be ignorant in the sense that she has an imperfect knowledge of the World and she is practically excluded from social intercourse and communion with the outside world. If, it is so for this reason that they are taken at persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate Women who, for the reason of social compulsion are required to

move out the work in the field and elsewhere for livelihood cannot be said to be less disabled and deprived. The Court finds itself in complete agreement with the view that the special cloak of protection applied to Pardanashin Women has to be applied to illiterate Woman as well. The distinction as to the law of burden of proof in the case of pardanashin and Illiterate Women or the case where the rule of *non est factum* is applied and a case otherwise falling in the category of cases of undue influence and fraud in which initial burden has to be discharged by the person making the allegations before the *onus probandi*; is applied has to be kept. In the former case, there is no burden of proof upon a Woman who alleges that she was ignorant of the character and contents of the documents for the reason of illiteracy or she being a pardanashin woman. It has to be presumed in such a case that she could have transferred her rights to the other only for the reason of fraud or undue influence. In the latter case, the burden shall be upon the person alleging undue influence and fraud. The onus will shift only when there is a clear pleading in this behalf with necessary particulars and the initial onus is discharged. Adverting to the facts of the case, it is a case of an Illiterate Woman thus seeking the protection of 'س' as she executed. The document without knowing its true character and contents. Learned single Judge has fallen in error seeking any further pleadings and/or proof of undue influence fraud from her. The burden in this behalf is upon the defendants.

[Paras. 4, 16, 19 & 20]

Cases referred:-

Madhavakrishnan v. Sami, (1980)2 M.L.J. 398. [Para. 4]
KVaradhan v. Pattammal, (1992)2 L.W. 209. [Para. 4]
Farid-Un-Nisa v. Mukhtar Ahmad, 52 I.A. 342: A.I.R. 1925 P.C. 204: 49 M.L.J. 758: 89 I.C. 649: 1925 M.W.N. 918. [Paras. 5, 14]
Mst.Kharbuja Kuer v. Kangbahadur Rai, A.I.R. 1963 S.C. 1203: (1963)2 S.C.J. 382., [Paras. 5, 13]
Fayyazud-Din v. Kuab-ud-Din, A.I.R. 1939 Lah.309. [Paras. 6, 16]
Buzloor Raheem v. Shumsoonnissa Begum, 8 W.R. 3. [Para. 6]
Sajjad Hussain v. Wazir Ali Khan, 39 I.A. 156. [Para. 6]
Hodges v. Dellu and London Bank Limited, 27 I.A. 168. [Paras. 9, 10]

Smt.Patal Bala Debi v. Santimoy Majumdar, A.I.R. 1956 Cal. 575. [Para. 10]
Smt Sonia Parshini v. Sheikh Moula Baksha, A.I.R. 1955 Cal. 17. [Paras. 6, 7, 10]
Kanwarani Madna Vati v. Raghunath Singh, A.I.R. 1976 H.P.41 [Para. 10]
Bank of Khulna Limited v. Jyoti Prakash Mitra, A.I.R. 1940 P.C. 147. [Para. 10]
Parasnath Rai v. Tileshra Khauar, 1965 All.L.J. 1080. [Para. 11]
Manoharlal v. Rajeswari Devi, A.I.R. 1977 All. 36 [Para. 11]
Bhukary Ram v. S.Hedait Mohammed Sahaji, A.I.R. 1958 Ori. 62. [Para. 12]
Kali Baksh Singh v. Ram Gopal Singh, 41 I.A. 23 P.C. [Para. 12]
Sadhabi Debi v. Parmananda Misra, 4 Cut.L.T. 6. [Para. 12]
Brundaban Misra v. Iswar Swain, A.I.R. 1982 Ori. 172 [Para. 13]
Satyadeo Prasad v. Smt.Chanderjoti Debi, A.I.R. 1966 Pat. 110. [Para. 13]
Agadei Mahkani v. Abhimanyu Mallik, (1968)34 Cut.L.T. 874 [Para. 13]
Mirja Sajjid Hussain v. Nawab Wazir Ali Khan, 23 M.L.J. 210. [Para. 14]
Hemchandra v. Suradhani Debya, A.I.R. 1940 P.C. 134. [Para. 15]
Omanhene Kwamin Bassavin v. Omanhene Bendentu, A.I.R. 1937 P.C. 274: 170 I.C. 423. [Para. 17]
Ramaswami Jadaya Gounder v. V.T.Elaiya Pillai, A.I.R. 1972 Mad. 336. [Para. 17]
Ladli Prasad Jaiswal v. Karnal Distillery Company Limited, A.I.R. 1963 S.C. 1279. [Para. 18]
Subbhas Chandra v. Ganga Prasad, A.I.R. 1967 S.C. 878. [Para. 18]
P.Saraswathi v. Lakshmi, (1977)2 M.L.J.179: A.I.R. 1978 Mad. 361. [Para. 18]
Raghunath Prasad v. Sarju Prasad, 46 M.L.J. 610 [Para. 18]
Poosathurai v Kannappa Chettiar, 38 M.L.J. 349. [Para. 18]
T.R.Rajagopalan for P.Peppin Fernando, for Appellants.
T.R.Mani, Senior Counsel, for Respondents.
 The Judgment of the Court was delivered by *Mishra, J.*:- Thirumalai Vadivu Ammal filed a suit in the Sub Court, Tirunelveli in O.S.No.447 of 1979 to set aside a registered deed of settlement dated 23.1.1975 which she herself had executed in

favour of her brother's daughter, the 1st defendant in the suit. The 2nd defendant, 2nd respondent is the husband of the 1st defendant, 1st respondent. She sought cancellation of the said deed on the ground that the respondents misrepresented that she was executing only a power of attorney for collecting the arrears of rent from the tenants. According to her, thus, the respondents exercised undue influence and fraudulently got the said document executed on the above misrepresentation.

2. The defendants/respondents denied the plea of misrepresentation, undue influence and fraud, denied that there were any arrears due from the tenants and stated that there was no necessity to execute a power deed. They came out with a positive case that the 1st defendant/1st respondent was brought up by the plaintiff, that the plaintiff gave her in marriage to the 2nd defendant/2nd respondent and met the marriage expenses. She, according to the defendants/respondents, executed the settlement deed knowing fully that she was transferring her interest in the property to her brother's daughter *i.e.*, to say, 1st defendant/ 1st respondent, V has since died. Her heirs and legal representatives are on record as per order of Court dated 15.4.1987 in C.M.P. 14184 of 1987 in A.S.231 of 1981.

3. The trial Court held that there was no misrepresentation, fraud or undue influence in the execution of deed of settlement as alleged by the plaintiff. A learned single Judge of this Court has affirmed the judgment of the Trial Court. He has taken up the plea of undue influence and fraud separately and said in respect of undue influence that there was no such allegation in the suit notice and that the necessary ingredients of undue influence have not been pleaded at all and in respect of misrepresentation or fraud that he did not think that there was anything in the case which would make him to come to a different conclusion from that of the Trial Court.

4. Before we proceed further, we may recapitulate that in the plaint, it was stated by the plaintiff that her husband died on 16.11.1973 without any issue and without any will. She was very old, but possessed nanja land, which was leased to one A., who did not pay to her the lease of two crops (rent in kind). She felt that she needed a male or female helper to collect paddy from the lessee and to look after her other affairs. She had no other relative

except her brother who was not in good terms with her and "the 1st defendant, the daughter of her brother who had no connection with her father, was close to her (the plaintiff) from 1974-75 onwards and helping her." The defendants told her to give a registered power of attorney to collect the arrears of paddy from A. She suspected nothing foul and agreed to execute the power of attorney. The plaint also contains a statement that the 2nd defendant took her signature in the document which was made ready. The contents of the document were not read over to her. The 2nd defendant/respondent took her to the office of the Sub Registrar and instructed her that she needed to talk to none and say before the Sub Registrar that she had no heir other than the 1st defendant. The plaintiff, it is said in the plaint, then put her thumb impression in the presence of the Sub Registrar. The Sub Registrar did not ask anything from her. She did not purchase any stamp paper or pay any money for the registration charges. The 2nd defendant undertook to get the said document from the Sub Registrar's office and the plaintiff believed the same. Two years after the registration of the said document, *i.e.*, sometime in January, 1977, the defendants came and lived with the plaintiff. Even at that time, the plaintiff did not suspect the defendants. The plaintiff informed the lessee A. that she had executed a power of attorney in favour of the defendants and that the leasehold paddy in question could be given to the defendants in future. The defendants stayed with the plaintiff for about 6 1/2 months. The plaintiff did not suspect anything at that time. Later on, the defendants went and lived in some other house. Subsequently the defendants stopped visiting the plaintiff. The plaintiff came to know that the defendants did not collect the lease paddy from the said A. and they did not supervise the land in question. She for the said reason went and asked the defendants to hand over the power of attorney stating that she would collect the lease paddy directly. The defendants refused to give the same and informed that she had executed a settlement deed in their favour on 23.1.1975 and that they had got the power to drive her out of the house. Thereafter, according to the plaintiff, she with the help of one M. got a copy of the document and came to know that the plaintiffs had played a fraud on her. Both the trial Court as well as the learned single Judge have entered into the question whether the

settlement deed executed by the plaintiff was vitiated due to fraud and undue influence by placing reliance upon a judgment of this Court in the case of *Madhavakrishnan v. Sami*, (1980)2 M.L.J. 398. wherein it is laid down as follows:

"The general rule of law is that a party of full age and understanding is normally bound by his signature to a document whether he reads it or understands it or not. Equity does not save people from the consequences of their own folly but will save them from being victimised by other people.

Whenever a person of full age and understanding puts his signatures to a legal document without taking the trouble of reading it or without asking the document to be read and explained to him but signs it relying on the word of another as to its character, content or effect, he cannot be heard to say that it is not his document.

It is settled law that a vague and general plea of undue influence will not be sufficient when the plaintiff comes forward with an action to set aside a contract on that ground or for fraud. It is the duty of the Court to scrutinise the pleadings to find out that a plea has been made and full particulars thereof have been given before considering whether undue influence has been made out or not".

This statement of the general rule of law however has got several exceptions and it is said to record that such exceptions were not brought to the notice of either the Trial Court or the Court of Appeal below. A rule of *non est factum* which in full reads *non est factum, scriptum, predictum non est factum* sum has existed as a rule of law in England as well as in India and there has been a good deal of improvement in this behalf, while applying the rule of burden of proof in evidence to Women in India. While affirming a judgment by Mohan, J., in *K. Varadhan v. Pattammal*, (1992)2 L.W. 209, a Division Bench of this Court of which one of us was a member, has stated as follows:

"Courts in India have on the rule of evidence enshrined in Secs. 101 and 102 in Chapter VII of the Evidence Act, particularly in cases of women in India who in some parts and some communities are *pardanashin* and in most parts of the country illiterate for the reason that they transact their business generally through male-folk only, men always dominated women and

women lived a life dominated by men, this being the curse that always surrounded womenfolk even though law recognised their independent rights, accepted that onus lies upon the defendants to show that there has been no fraud, undue influence or coercion in the transaction. One could easily, since the plaintiff alleged misrepresentation and fraud, ask her to prove the misrepresentation and fraud. But not in a case where she being an illiterate and unaware of the contents signed the document. Unless fully and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case. Learned single Judge, in our opinion, is right in holding that the Court will not ask the plaintiff to prove the allegation, but demand from the defendant to disprove the allegation of misrepresentation and fraud. The learned single Judge, in our opinion, has taken the correct view of the law on the face that the 1st plaintiff is an illiterate women who merely affixed her thumb impression. She is a women who possibly could not act without help.

We would have faithfully followed the above principle and interfered with the impugned judgment on the sole ground that the courts below have not taken notice of this exception, but for the reason that even though we find that a serious error of law has been committed in not taking notice of the rule of burden of proof that is invariably applied by the Courts in India in the cases of ignorant and illiterate women, since there is a little misapprehension for the reason of the use of the expression, "onus lies on the defendant to show that there has been no fraud, undue influence or coercion in the transaction," in the above judgment we decided to give a full length hearing to all the parties to state the law in full in this behalf.

5. In the case of *Madhavakrishnan v. Sami*, (1980)2 M.L.J. 398, a reference has been made to the doctrine of *non est factum* also. But this has been explained after a statement of the general rule of law that a party of full age and understanding is normally bound by his signature to a document whether he reads it or understands it or not. Because, equity does not save people from the consequence of their own folly but will save them from being victimised by other people. The learned Judge who has delivered the judgment in the Court has stated:-

".....Sir Raymond Evershed, M.R. has observed in *Tufton v. Sperni*, as follows:

"Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief".

But if, however, a party has been misled in executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead *non est factum* in an action against him and the deed or writing is completely void in whomsoever hands it may come. As Byles, J., said in *Foster v. Mackinnon*:

"It is invalid not merely, on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law never did sign the contract to which his name is appended".

"The doctrine of *non est factum* does not apply unless there is a misrepresentation in inducing a mistaken belief as to the class of character of the supposed document and not a misrepresentation simply as to its contents. On the other hand, a mistake as to the contents of a deed of document is not sufficient.

In a recent case in *Saunders v. Anglia Building Society*, the House of Lords had to consider the scope of the doctrine of *non est factum* in the following circumstances. G, a widow aged 78, who had a leasehold interest in a house, gave the deeds to her trusted nephew, intending to make a gift to him to take effect immediately. She knew that her nephew wished to raise money on the house and that L, her nephew's business associate was to collaborate with the nephew in raising money on the house. In June, 1962, L, asked her to sign a document. She had broken her spectacles and could not read it. She asked what it was and L. told her that it was a deed of gift of the house of her nephew. She..... "executed it in that belief, and the nephew witnessed the execution, it being part of his arrangement with L., that L. should raise money on the house and repay it to the nephew by instalments. The document signed was in fact an assignment of the house by her to L. for Pound 3,000. The 3,000 pounds was never paid nor intended to be paid to her. L. having obtained the deed and a reference as to his reliability from the nephew, mortgaged the

house for 2,000 pounds to a building Society, but used the money so raised to pay his debts and defaulted on the mortgage instalments. The building society sought to obtain possession of the house, G., at the nephew's instigation began an action, in which she pleaded *non est factum*, against L., and the building society and asked for a declaration that the assignment was void and that the title deeds should be delivered to her. The trial Judge found that G., did not read the document, that L., represented it to her as a deed of gift to the nephew; that she executed it in that belief; and that a sale or gift to L., was something which she did not and would not ever have contemplated; and he held that the plea of..... "*non est factum*" was established and granted the declaration asked for. The Court of Appeal reversed the decision. An appeal to the House of Lords the following propositions were laid down: (1) The plea of *non est factum* can only rarely be established by a person of full capacity; and, although it is not confined to blind or illiterate persons, any extension in the scope of the plea will be kept within narrow limits. (2) The burden of establishing the plea falls on the signatory seeking to disown the documents; and he must show that, in signing the document he acted with reasonable care. Carelessness which would preclude him from pleading *non est factum* is based on the principle that no man can take advantage of his own wrong and is not an instance of negligence operating by way of estoppel. (3) In relation to the extent and nature of the mistake relied upon to set up the plea, the distinction formerly drawn between the character and class and the contents of a document is unsatisfactory. For the plea to succeed, it is essential to show that there is as regards the transaction a radical or "fundamental distinction between what the person seeking to set up the plea actually signed and what he thought was signing. The decision of the House of Lords in this case is particularly significant in so far as it has held that a person who signs a document may not be permitted to raise the defence of *non est factum* where he has been guilty of carelessness in appending his signature. It was formerly held in *Carlisle and Cumberland Banking Co. v. Bragg*, and other cases that negligence was only material

where the document actually signed was a negotiable instrument, for there was not otherwise any duty of care owed by the person executing the document to an innocent third party who acted in reliance on it. The House of Lords in *Saunders v. Anglia Building Society*, has overruled *Carlisle and Cumberland Banking Co. v. Bragg*, and has held that no matter what class of document would exclude the defence of "*non est factum*."

Akin to the doctrine of *non est factum*, Indian courts as well as the Privy Council evolved the doctrine as to burden of proof in cases of the documents executed by a class of women in India who were identified as Pardanashin Ladies. This has been best stated in a judgment by the Privy Council in the case of *Farid-Un-Nisa v. Mukhtar Ahmad*, 52 I.A. 342; A.I.R. 1925 P.C. 204; 49 M.L.J. 758; 89 I.C. 649; 1925 M.W.N. 918, which has been extracted by the Supreme Court in its judgment in the case of *Mst. Kharbuja Kuer v. Jangbahadur Rai and others*, A.I.R. 1963 S.C. 1203; (1963) 2 S.C.J. 382. Lord Sumner traced the origin of the custom and stated the Principle in these words:

"In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord has also pointed out:

"Of course fraud, duress and actual undue influence are separate matters."

The Supreme Court has, in *Mst. Kharbuja Kuer v. Jangbahadur Rai and others*, A.I.R. 1963 S.C. 1203; (1963) 2 S.C.J. 382, observed:

"It is therefore, manifest that the rule evolved for the protection of pardanashin ladies shall not be confused with other doctrines, such as "fraud, duress and actual undue influence, which apply to all persons whether they be pardanashin ladies or not."

There has been, however, some confusion in the Courts as to who a Pardanashin lady, is and even if she is identified as a Pardanashin lady, what is the scope and extent of the protection of this rule.

6. A Lahore Bench, in the case of *Fayyazud-Din v.*

Kutab-ud-Din, A.I.R. 1939 Lah. 309, declared that a woman belonging to a family of barbers, keeping a hamam in the town of Delhi, whose females did not live in a state of seclusion is not pardanashin, for, it thought that a pardanashin is a 'woman of rank' who lives in seclusion, shut in the "Zenana" having "no communication except from behind the parda, or screen with any male persons save a few privileged relations or dependants". The Lahore Bench was not alone in holding this view, for, in its Judgment, it relied on what it thought was stated by the Privy Council in the case of *Buzloor Raheem v. Shumsoonnissa Begum*, 8 W.R. 3. In the words of Tak Chand, J., who delivered the Judgment, "as pointed out in the leading case of *Buzloor Raheem v. Shumsoonnissa Begum*, 8 W.R. 3, a pardanashin is a 'woman of rank' who lives in seclusion, shut in the 'zenana' having "no communication....."

"except from behind the parda, or screen with any male persons save a few privileged relations of dependants; see also *Nanavati v. Digbijai Singh* and *Sajjad Hussain v. Wazir Ali Khan*, 39 I.A. 156 and the exhaustive review of the case law on the subject by Mukerjee, J., in *Mirian Bibi v. Mohammed Ibrahim*, *Chandra Ghose v. Kali Dasi*. This description does not obviously apply to a woman belonging to a family of barbers, keeping a hamam in the town of Delhi, whose females do not live in a state of seclusion."

There are, however, many stages of development of law on the subject, and it will not be futile if the consensus of Judicial opinion is taken out for the purpose of understanding the meaning of the expression 'Pardanashin lady' and the scope and extent of this special provision for them. But, skipping over a plethora of decisions on this subject, if we refer to a Bench decision of the Calcutta High Court in *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17 and the Judgments of the courts thereafter, we shall not be losing much, rather we shall be saved of the repetition of what has been already done by the Courts.

7. In the Calcutta case *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17, as they have stated in the judgment, 'the real question between the parties was whether the plaintiff appellant was entitled to any kind of protection under the law by reason of the helplessness of her state on account of illiteracy and ignorance and secondly if she was so entitled what corresponding burden was cast on

the respondent who dealt with her'.

8. Debabrata Mukerjee, J., speaking for the Court, has said:

"....The issues framed in the case raised in substance these questions though they appear to have been raised in a somewhat confused manner. The rule of law governing transactions entered into by a pardanashin woman properly so-called is in no unsettled state. It has been the subject of judicial pronouncements of the highest eminence and authority. Such a woman has been held to be entitled to protection because of the disabilities peculiar to the class to which she belongs which make her dependent upon or subject to the will of others.

In the case of *Kali Baksh Singh v. Ram Gopal Singh*, 41 I.A. 23. (P.C.) (A), Lord Shaw in delivering the judgment of the Judicial Committee observed:

"The law throws around her a special cloak of protection. It demands that..... the burden of proof shall in such case rest not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to and was really understood by the grantor. In such cases, it must also, of course, be established that the deed was not signed under duress but arose from the free and independent will of the grantor."

These observations were in essence an extension of the principle affirmed in an earlier decision of the Board in the case of *Sajjad Hussain v. Wazir Ali Khan*, 39 I.A. 156 (P.C.) (B), that it rested upon those founding upon a deed executed by a pardanashin woman to affirmatively establish that she understood its effect and the deed was intelligently and properly executed by her.

After the above, the Calcutta judgment proceeds:

"The substantial question here is whether in the facts and circumstances proved by the plaintiff appellant could be held to be entitled to this protection. This would require examination of the reasons behind the rule protecting transactions in which pardanashin women are concerned. The inhibitions imposed by Social conditions upon women of a certain well-defined class bring in their train disabilities which have compelled reversal of the rule that

ordinarily a person is to be held to his contract. These disabilities are due largely to illiteracy and ignorance which superadded to restrictions on free movement and contract with the world outside induce a condition of helplessness requiring the utmost vigilance to prevent unfairness in a deal in which she is concerned. The parties to the transaction not being evenly placed, courts called upon to pronounce on such transactions have always jealously guarded against possible unfairness. It has therefore come to be recognised as a rule of law that a party founding on a deed executed in such circumstances has to establish intelligent understanding of the deed and the burden is not discharged by mere proof of the execution of the document. Question of fraud or undue influence apart, the plain requirement of the law in such cases is clear proof of comprehension of the contents of the document executed by her.

Such protection cannot plainly be the exclusive privilege of the class commonly known as pardanashin. The parda with its inhibitions may be an additional feature or element in the case but the real reason behind the rule is lack of understanding and appreciation of what an illiterate woman without independent advice, is about. Where ignorance and illiteracy are proved exposing the woman concerned to the danger and the risk of an unfair deal it would, we think, be a perversion of the rule to deny in such case the protection, despite the helplessness of her state, merely on the ground that she is not strictly pardanashin. It is quite conceivable that a woman belonging to the pardanashin class properly so-called may be in spite of the restraints of the parda have sufficient understanding and appreciation of the contents of a document to which she is a party. In such case there can be no question of the protective cloak being thrown around her and she cannot be heard to plead her pardah in avoidance of the transaction. The criterion cannot be the social status implied in the pardah class but the ability to comprehend the contents of the document in question and the means or opportunities of such comprehension. The emphasis must be on the factual understanding of the document with reference to the individual concerned, and not upon presumptive

disability incidental to mere status.”

9. The Calcutta Court, for the above, found support in the observations of the Judicial Committee in the case of *Hodges v. Delhi and London Bank Limited*, 27 I.A. 168 (P.C.), that indicated the cases of women who were outside the well known class of pardanashin women. The observation of the Judicial Committee in this behalf is as follows:

“It must depend in such case on the character and position of the individual women whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary and to prove that it was so in case of dispute.”

Mainly on this, the Calcutta Court has said:

“It would therefore be wrong to suppose that a women outside the parda class is not entitled to the protection despite the disability of illiteracy and ignorance and absence of independent advice where her pardanashin counterpart is readily admitted to it.”

10. In the case of *Smt. Patal Bala Debi v. Santimoy Majumdar*, A.I.R. 1956 Cal. 575, once again the case of an illiterate woman executing a deed under the impression that she was executing a deed authorising her distant nephew to manage her lands, but, in reality a deed of gift, came up for consideration. The appellant relied upon the judgment of the Calcutta Court in the case of *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17 and urged that even though the appellant was not a Pardanashin strictly speaking, she was an illiterate woman and since she had questioned the validity of the deed, the privileges and protection given to a Pardanashin woman should have been extended to her and the party relying upon the deed should have been asked to prove that her action was intelligent and voluntary. The Court held on facts that the appellant was an illiterate woman for all practical purposes and thereafter notified the opposite arguments in these words:

“Mr. Lala appearing on behalf of the respondent contended, on the other hand, that a woman who is not a pardanashin is not entitled to get the protection given by law to a pardanashin woman by reason of her illiteracy alone, but she must prove before the protection can be made available to her that she had no capacity for business or that she was incapable of managing her own affairs. Mr. Lala

submitted that mere illiteracy in a man or woman does not necessarily connote an incapacity for business on his or her part. In support of his above contention, he relied on the case of *Hodges v. Delhi and London Bank Limited*, 27 I.A. 168 (P.C.) and he submitted that if the decision reported in *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17 (A) meant to lay down the broad proposition that an illiterate woman who is not a pardanashin, is entitled, by reason of her illiteracy alone, to all the protections afforded by law to a pardanashin women, then it must be held that that decision has some measure of conflict with the Privy Council case reported in *Hodges v. Delhi and London Bank Limited*, 27 I.A. 168 (P.C.).”

The Court, however, did not proceed to examine the worth of this argument, for in its opinion:

“In the present case, however, it would not be necessary for us to enter into and decide this controversial question of law in view of our finding on the question whether the deed of gift was the outcome of any fraud or malpractice practised by the respondent on the appellant.”

The variation in the judgment of the Calcutta Court in the case of *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17, which was to some extent questioned in the case of *Bala Debi v. Santimoy*, A.I.R. 1956 Cal. 575, but not answered, has received, in our opinion, an adequate explanation by a Bench of the Himachal Pradesh High Court in the case of *Kanwarani Madna Vati v. Raghunath Singh*, A.I.R. 1976 H.P. 41. The Himachal Pradesh High Court considered the case of a woman who never pleaded that she was a Pardanashin lady but raised the plea that she was an illiterate woman. She had pleaded that she remained almost constantly sick and her mind had been enfeebled by physical and mental distress. She had also stated that she had none to look after or advice her. Her two brothers were addicts to intoxicants. The Court upon that said:

“On these facts it cannot be presumed that she was a Pardanashin lady. If the appellant had raised that plea in the pleadings the respondents would have had an opportunity to challenge the same and evidence could have been produced not only in support of the allegation but it could have been shown also that even if she was outside that class the circumstances

were such that a person dealing with her was bound to take special precautions and to prove that she had done so. See: *Bank of Khulna Limited v. Jyoti Prakash Mirra*, A.I.R. 1940 P.C. 147."

The court thereafter noticed the argument that the protection given to a Pardanashin lady can also be extended to other women of that class and observed as follows:

"The learned counsel contends that this protection which is given to Pardanashin ladies can also be extended to other women of that class and for this he placed reliance on *Smt. Sonia Parshini v. Sheikh Moula Baksha*, A.I.R. 1955 Cal. 17. It has been stated in this authority that the protection given by the rule relating to Pardanashin women cannot plainly be the exclusive privilege of the class commonly known as Pardanashin. The Parda with its inhibitions may be an additional feature or element in the case but the real reason behind the rule is lack of understanding and appreciation of what an illiterate woman without independent advice, is about. Where ignorance and illiteracy are proved exposing the woman concerned to the danger and the risk of an unfair deal, it would be a perversion of the rule to deny protection in such case, despite the helplessness of her state, merely on the ground that she is not strictly Pardanashin. The emphasis must be on the factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status. Therefore, what follows from this authority is that the persons who base their case on the deed executed by any woman must show that the executant, although an illiterate woman, was capable of understanding what she was doing. Mere ignorance or illiteracy will not be sufficient, but it must be shown that she was fully aware or understood what she was going to do."

After taking notice of the evidence in the case, the Himachal Pradesh High Court observed:

"Therefore, the only thing the Court has to see is whether a lady although not a Pardanashin, had the capacity, when executing a document, of knowing what she was doing without any advice from any quarter."

11. The Allahabad High Court has ruled in several cases on the same lines and in the case of *Par-*

asnath Rai v. Tileshra Khauar, 1965 All.L.J. 1080, the law is stated in these words:

"Rules regarding transactions by Pardanashin lady are equally applicable to an illiterate and ignorant woman though she may not be a pardanashin. It is not by reason of the Pardah itself that the law throws its protection round a Pardanashin lady but by reason of those disabilities which a life of seclusion lived by a Pardanashin lady gives rise to, and which are consequently presumed to exist in the case of such a lady. But the disabilities which make the protection necessary may arise from other causes as well as old age, infirmity, ignorance, illiteracy, ailing mental deficiency, inexperience and dependence upon others may by themselves create disabilities that may render the protection equally necessary. It is, therefore, proved that a woman, who is not a Pardanashin lady, suffers from disabilities to which a Pardanashin lady is presumed to be subject, the validity and the binding nature of a deed executed by her have to be judged in the light of those very principles which are applied to a deed by a Pardanashin lady."

The Allahabad High Court reiterated the above view in another judgment in *Manoharlal v. Rajeswari Devi*, A.I.R. 1977 All. 36, and a learned single Judge of that High Court stated thus:

"The rule regarding transaction by Pardanashin lady apply equally to illiterate widow though she may not be in strict sense a pardanashin lady."

12. A Bench of the Orissa High Court in *Bhikary Ram v. S. Hedait Mohammed Sahaji and another*, A.I.R. 1958 Ori. 62, has taken notice of the fact of the case that the woman who was alleged to have executed a document was an illiterate for all practical purposes except that she knew to sign her name in Oriya and stated the law in these words:

"The law dealing with alienation made by illiterate Pardanashin ladies is too well known and need not be described at length. There are several decisions of the Privy Council, on the subject which have been summarised by Rowland, J. In *Sadhavi Debi v. Parmananda Misra*, 4 Cut.L.T. 6, as follows:

"In the case of a deed executed by a pardanashin lady the law protects her by demanding that the burden of proof shall in such cases rest not with those who attack, but with those

who rely on the deed; and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to and really understood by, the grantor. Ordinarily the Courts insist on proof that the lady had independent legal advice, and though this is not an absolute and invariable rule although there may be exceptions where the lady was shown to have business capacity and strength of will and where the deed is shown to be in the circumstances not an unnatural disposition of her property as in *Kali Baksh Singh v. Ram Gopal Singh*, 41 I.A. 23 (P.C.), the general rule is that save in such exceptional cases the courts will demand affirmative proof of the subject of the lady's intelligent understanding and execution of a deed and will not readily hold this onus to have been discharged where it is not shown that the lady had any independent advice."

"Thus burden is therefore heavily on the plaintiffs to establish affirmatively (1) that the mortgage bond was explained to and really understood by defendant No.3 and (2) that defendant No.3 had independent advice or else that she had so much business capacity and strength of will as to dispense with the necessity of independent advice."

13. In *Brundaban Misra v. Iswar Swain*, A.I.R. 1982 Ori. 172, a learned single Judge of the Orissa High Court has referred to the judgment of the Supreme Court in the case of *Mst. Kharbujia Kuer v. Kangbahadur Rai and others*, A.I.R. 1963 S.C. 1203: (1963) 2 S.C.J. 382., and that of the Patna High Court in the case of *Satyadeo Prasad v. Smt. Chanderjoti Devi*, A.I.R. 1966 Pat. 110, and has stated the law on the subject in these words:

"As regards execution of documents by Pardanashin Ladies, in *Mst. Kharbujia Kuer v. Jangbahadur Rai and others*, A.I.R. 1963 S.C. 1203: (1963) 2 S.C.J. 382., it was held:

"...The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by

other evidence, direct and circumstantial."

In *Satyadeo Prasad v. Smt. Chanderjoti Devi*, A.I.R. 1966 Pat. 110, it was held:

"...It is the well-established principle of law that those who want to take advantage of a document executed by a pardanashin lady must prove that she knew its contents and executed it with full knowledge of its effects and consequences, and that she had independent advice in the matter. In such a case the burden is always, in the first instance, on the person founding on that document to show that the grantor intelligently understood the deed, and if they fail to establish that point, when the document is not binding on the executant or anyone else and is void *ab initio*...."

And decided:

"Also I respectfully agree with the view expressed in *Agadei Mahkani v. Abhimanyu Mallik*, (1968) 34 Cut.L.T. 874, that the principles which govern proof of execution of documents taken from Pardanashin women are equally applicable to documents taken from illiterate Women."

14. It is not necessary to add many more Authorities, but we think we may take notice of a pronouncement of the Judicial Committee of the Privy Council in the case of *Mirja Sajjid Hussain v. Nawab Wazir Ali Khan*, 23 M.L.J. 210. In that case, one Madad Ali had appointed by a deed of endowment, one Mehadi Begam as a co-trustee with another, of a wakf. After the death of her co-trustee, she continued to manage the property alone. Later, she executed a document whereby she intended to add to the endowment, and she appointed certain persons as Trustees besides herself. The Privy Council noticed the facts as follows:

"Mehadi Begam was a pardanashin woman, she was separated from her husband, she was unable to read or write, and she was possessed, at the date of the deed which is questioned, of a fortune of about Rs.50,000. It is not disputed that in the ordinary case of a deed granted by a pardanashin lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her."

After the above, the Privy Council in this judgment said:

"The document may be described shortly as an

intervivous conveyance, taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs.40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of pardanashin women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributive to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved power of management of all the affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment."

"According to the principles which have always guided the courts in dealing with sales or gifts made by ladies in such a position (pardanashin ladies) the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bona fide* one and fully understood by the lady whose property is dealt with."

This is the language of Sir Montagu Smith in *Tacoorden Jewerry v. Nawab Syed Ali Hussain Khan* and is still the law. In the words of Sir Andrew Scoble in *Shambati Koeri v. Jago Bibi*:

"It is a well-known rule of the Committee that in the case of deeds and powers executed by Pardanashin ladies, it is requisite that those who rely upon them should satisfy the court that they have been explained to and understood by those who executed them."

15. A section of womenfolk in view of the social conditions of the times are presumed to have imperfect knowledge of the world, as the Supreme Court has said in the case of *Mst. Kharbuja Kuer* (*supra*). They are presumed to have imperfect knowledge of the world, as, by the pardah system, they are practically excluded from social intercourse and communion with the outside world. The origin is traced to the Indian Social usages and the general rules of English Law, which protect persons whose disabilities make them dependent upon or subject them to the influence of others even though nothing in the nature of deception or

coercion may have occurred, are made applicable to such section of women. In the words of Lord Sumner, which have been quoted with approval by the Supreme Court in the case of *Mst. Kharbuja Kuer* (*supra*):

"This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

It is this imperfection of the knowledge of the world that the law throws round such women a special cloak of protection which demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such case, it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. That is what the Privy Council said first in its judgment in the case of *Farid-un-Nisa v. Mukhtar Ahmad*, A.I.R. 1925 P.C. 204, and in the case of *Hemchandra v. Suradhani Debya*, A.I.R. 1940 P.C. 134, and summed up by the Supreme Court in the case of *Ms. Kharbuja Kuer* (*supra*), in the following words:

"Shortly it may be stated thus; The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a Pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

16. The pardah system as understood by the Courts in India is not the system of keeping a woman under a veil indoors in zenana, but in seclusion, away from the knowledge of the world, in the sense that they are not ordinarily allowed to interact with the malefolk and are kept away from social intercourse and communion with the outside world. The view of the Lahore Court in the case of *Farid-ud-din*, A.I.R. 1939 Lah. 309, had almost worked as an alarm for the courts to develop a sense that any strict meaning to pardah was going to exclude a greatly deprived section of the society from the protection cloak of the law, namely, the illiterate

women and other women having such infirmities that they practically live without any social intercourse and communion with the outside world. The Judicial consensus, as we have already noticed, has been expressed thus:

"The rules regarding transaction by the Pardanashin apply equally to illiterate women though they may not be in a strict sense Pardanashin."

A Pardanashin may not be illiterate, but she still may be ignorant in the sense that she has an imperfect knowledge of the world, and she is practically excluded from social intercourse and communion with the outside world. Her ignorance is the course of a social usage that womenfolk depend upon malefolk for transaction of their business with the outside world. Thus, not all women, but only those who are practically excluded from social intercourse and communion with the outside world fall in this category. If it is for this reason that they are taken as persons suffering from disabilities which make them dependent upon or subject to the influence of others, the illiterate women who, for the reason of social compulsion are required to move out to work in the fields and elsewhere for livelihood, cannot be said to be less disabled and deprived. Even if they are intelligent to know where to go and how to earn their livelihood, yet they cannot read anything nor write anything, and unless told about the contents by others, will not know what the document contains. To the extent the character, content and the effect of the document are concerned, she has to be presumed to be ignorant by sheer illiteracy, the curse which is still pervading the ancient society, particularly the women living in this part of the country, a fact about which, we think, we are competent to take judicial notice. We find ourselves in complete agreement with the view that the special cloak of protection applied to Pardanashin women has to be applied to illiterate women as well.

17. When we have said as above, we should not be understood to say that in a given case, a male cannot be protected by such a rule. In *Omanhele Kwanin Bassavin v. Omanhele Bendentu*, A.I.R. 1937 P.C. 274: 170 I.C. 423, the Privy Council applied such a rule of burden of proof upon the defendant in the case of a person who was illiterate and who pleaded that the contents of the document were not read over and explained to him. A

learned Judge of this court in *Ramaswami Jadaya Gounderv. V.T.Elaiya Pillai*, A.I.R. 1972 Mad. 336, has dealt with a case of a person who knew to sign his name, but said, he had no knowledge of the contents of the document to which his signatures were taken, and he was not informed of the contents of the documents as the documents were not read over or explained to him. The learned Judge has said:

"In this case, the plea of the plaintiff is that he is illiterate and that apart from putting his signature he does not know how to read or write. In the circumstances, the burden is on the plaintiff to prove that the defendant had executed the document."

It is possible to say that the special protection cloak, as the Courts have described this rule, is a modification of the rule of *non est factum* property women and wherever needed chiselled to suit the Indian conditions. Since, in the instant case, we are concerned with a woman who is an illiterate, we are in no need to say anything further.

We have seen that on occasions courts have used the word 'onus' in lieu of 'burden', and in certain circumstances, it is made to appear as if the courts treated this rule of burden of proof only as a rule of onus of proof. This impression one gets only when he views the Authorities superficially. The distinction in this behalf we shall indicate a bit later. Before doing so we propose to clear ourselves through the language of Sec.16 of the Indian Contract Act which particularly deals with the requirement of evidence and the onus in a case in which undue influence is alleged. Sec.16 of the Contract Act reads as follows:

"16.(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses the position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another--

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or

mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of Sec.111 of the Indian Evidence Act, 1872."

It can be seen from the language of this section of the Contract Act that the court has to ask the person who has founded his claim upon a document to prove that the grant was not obtained by undue influence only when the initial onus is discharged by the person who alleges undue influence, and that there has been such relations existing between the parties that one of the parties was in a position to dominate the will of the other and could use the position to obtain an unfair advantage.

18. We have a plethora of decisions dealing with this aspect of the law that court must scrutinise pleadings to find out that a plea of undue influence has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not and that the court trying a case of undue influence must consider two things to start with, viz., (i) are the relations between the donor and donee such that the donee is in a position to dominate the will of the donor, and (ii) has the donee used that position to obtain an unfair advantage over the donor. Upon the determination of these issues, a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then, the burden of proof that the contract was not induced by undue influence, is to lie upon the person, who was in a position to dominate the will of the other. We can pick up from the lot some land marked judgments as are in *Ladi Prasad Jaiswal v. Karnal Distillery Company Limited*, A.I.R. 1963 S.C. 1279 and *Subbhas Chandra v. Ganga Prasad*, A.I.R. 1967 S.C. 878. In this context, one must note that a vague and general plea can never serve the purpose and satisfy the requirements of pleadings as to undue influence, for which purpose, the party pleading must plead the precise nature of the influence exercised, the manner of

the use of the influence and unfair advantage obtained by the other. Certain observations in this behalf found in Halsbury's Laws of England, Third Edition, Volume 17, page 673 Art.1298, have been cited in the judgment of the Supreme Court in the case of *Subbhas Chandra v. Ganga Prasad*, A.I.R. 1967 S.C. 878, which reads,

"where there is no relationship is shown to exist from which undue influence is presumed, that influence must be proved."

and Art.1299, at page 674,

"There is no presumption of imposition or fraud merely because a donor is old or of weak character."

The Supreme Court has also noted what is stated at pages 678 to 681 and particularly pointed out notes on page 679 which say,

"There is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law, although made during the donor's illness and a few days before his death."

A Bench of this Court in the case of *P.Saraswathi v. Lakshmi*, (1977) 2 M.L.J. 179: A.I.R. 1978 Mad. 361, has stated this part of the law on the subject in these words:

"In a case where a litigant intends to overlook and by pass a registered document under which *prima facie* certain rights have become vested and under which third parties have acquired indefeasible rights, then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of her complaint. The primary ground on which the plea of undue influence is founded is based on relationship. It is axiomatic that mere proof of relationship however near it may be, is not sufficient for a court to assume that one relation was in a position to dominate the will of the other. Such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that the kinsman could unduly influence the other in the circuit of such bondage. Even if any advice is given, it may be influence, but not undue influence. The tie of relationship need not necessarily be used unwisely, injudiciously and unhelpfully so as to gain an unfair advantage by the relation who is advising the other relation. Particularly in a Hindu family a widowed mother who would rather be fairly and affectionately inclined to an unmarried daughter would not

make undue preferences in favour of a married one who has already been provided for and who was well set in life. The sentiment, the traditional features of a Hindu Home., the love and affection of a mother towards her natural and last child which is always in one way unless there are very extraneous circumstances to assume otherwise should always prompt a Court to raise the reasonable presumption that any advice or influence which a parent brought to bear on his own child is not to gain an advantage for herself or to see that an unfair advantage is gained by another child of hers in preference to the challenging child. There is also one other important and salient feature which ought to be established on materials pleaded and acts established that the 'bargain is tainted by undue influence,' and it is unconscionable that it could reasonably be said that the person to obtain unfair advantage for himself and so as to cause injury to the person sought relying upon his authority or aid. It is only after such particulars are made available and a reasonable proof thereof has been given, the *onus probandi* would shift on the so-called 'person of domination.' Until then the burden is on the complainant to establish it is so."

In a scholarly exposition of this aspect of law, a Bench of this Court has deliberated on the doctrine of undue influence and fraud in some details in the case of *Madhavakrishnan v. Sami*, (1980)2 *M.L.J.* 398. The Bench after quoting from Halsbury's Laws of England, 4th Edition, page 174 on the subject has said about the law in our country in these words:

"In India, the law as to undue influence is embodied in Sec.16 of the contract Act. In order to satisfy the terms of Sec.16 and thereby render a contract voidable because of undue influence the following two conditions must be established by the person seeking to avoid the transaction: (1) the other party to the transaction must have been in a position to dominate his will; (2) the other party should have obtained an unfair advantage by using the position. Clause (2) of Sec.16 lays down a special rule of presumption as to when a person may be deemed to be in a position to dominate the will of another. They are among others: (1) where he holds a real or apparent

authority over the other; (2) where he stands in a fiduciary relation to the other; (3) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Clause (3) of Sec.16 provides that where a person who is in a position to dominate the will of another, enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. It is necessary to state that the rule in clause (3) of Sec.16 will only be attracted when it is established that one person is in a position to dominate the will of the other and that the transaction was on the face of it unconscionable."

The above position has been made clear in *Ladli Prasad Jaiswal v. Karna Distillery Co., Ltd.* *A.I.R.* 1963 *S.C.* 1279, and in *Subhas Chandra v. Ganga Prasad*, *A.I.R.* 1967 *S.C.* 878. The test has been laid down as follows in the latter decision; "The three stages for consideration of a case of undue influence were expounded in the case of *Raghunath Prasad v. Sarju Prasad*, 46 *M.L.J.* 610, in the following words:

"In the first place relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage had been reached namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of providing that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of those propositions be changed. The unconscionableness of the bargains is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?"

The learned Judge of the Supreme Court has extracted the following passage from the judgment of the Privy Council in *Poosathurai v Kan-*

nappa Chettiar, 38 M.L.J. 349.

"It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Upto that point, 'influence' alone has been made out. Such influence may be used wisely, judiciously, helpfully. But whether by the law of India or the Law of England, more than mere influence must be proved so as to render influence, in the language of the law 'undue.'"

19. We have dilated to the rule of initial burden of proof in the case where allegations of undue influence and fraud are made and the principles that are borne in mind before the rule of *onus probandi* is applied. We have adverted to this aspect of the law for the purpose of keeping the distinction as to the law of burden of proof in the case of *Pardanashin* and illiterate woman or the case where the rule of *non est factum* is applied and a case otherwise falling in the category of cases of undue influence and fraud, in which the initial burden has to be discharged by the person making the allegations before the *onus probandi* is applied. In the former case, there is no burden of proof upon a woman, who alleges that she was ignorant of the character and the contents of the documents for the reason of illiteracy or she being a *Pardanashin* woman. It has to be presumed in such a case that she could have transferred her rights to the other only for the reason of fraud or undue influence. In the latter case, the burden shall be upon the person alleging undue influence and fraud. The onus will shift only when there is a clear pleading in this behalf with necessary particulars and the initial onus is discharged.

20. Adverting to the facts of this case, we notice that the plaintiff after the death of her husband needed a male or female helper to collect paddy from the lessee and to look after her other affairs and that in the plaint, she has alleged, she had no other relative except her brother, who was not in fact on good terms with her and "the 1st defendant, the daughter of her brother who had no connection with her father, was close to her (plaintiff) from 1974-75 onwards and helping her. The defendants told her to give her a registered power of attorney to collect the arrears of paddy from

Arumugam. She suspected nothing foul and agreed to execute the power of attorney. The plaint also contains a statement that the 2nd defendant took her signature in the document which was made ready, the contents of the document were not read over to her, the 2nd defendant/respondent had taken her to the Office of the sub Registrar and instructed her that she need not talk before the Sub Registrar and asked her to state that she had no heir other than the 1st defendant. The plaintiff, it is said in the plaint, then put her thumb impression in the presence of the Sub Registrar. The Sub Registrar did not ask her anything from her. She did not purchase any stamp paper or pay any money for the registration charges. The 2nd defendant undertook to get the said document from the Sub Registrar's Office and the plaintiff believed the same. Two years after the registration of the said document, i.e., to say somewhere in January, 1977, the defendants came and lived with the plaintiff. Even at that time, the plaintiff did not suspect the defendants. The plaintiff informed the lessee Arumugam that she had executed a power of attorney in favour of the defendants and that the leasehold paddy in question could be given to the defendants in future. The defendants stayed with the plaintiff about 6 1/2 months. The plaintiff did not suspect anything at that time. Later on, the defendants went and lived in some other house. The defendants stopped visiting the plaintiff after some time. The plaintiff came to know that the defendants did not collect the lease paddy from the said Arumugam and they did not supervise the land in question. She for the said reason went and asked the defendants to hand over the power of attorney stating that she would collect the lease paddy directly. The defendants at that stage only informed that she had executed a settlement deed in their favour on 23.01.1975 and that they had got the power to drive her out of the house. It is a case, in our opinion, of an illiterate woman moving the Court alleging that she acted only on the basis of the representation of the defendants when she put her thumb impression on the document in the impugned settlement deed in the presence of the Sub Registrar. It is a case of an illiterate woman thus seeking the protection of law as she executed the document without knowing its true character and contents. Learned single Judge has fallen in error seeking any further pleadings and/or proof of undue influence and fraud from her. The

burden in this behalf is upon the defendants. The impugned judgment for the said reason has to be set aside. Since both the courts below have fallen in error in this behalf and have not approached the case in the light of the correct law on the subject, unless evidence of the case is analysed afresh, it will not be possible to give any final verdict. It is a fit case, in our opinion, although the proceedings have taken quite a few years, for remand to the Court of Appeal below for a hearing and adjudication in accordance with law on the basis of the evidence already on the record.

21. In the result, the appeal is allowed. The judgment and decree is A.S.No.231 of 1981 on the file of the High Court, Madras, are set aside. The case is remitted to the Court of Appeal below for a hearing a disposal in accordance with law. On the facts of this case, however, we make no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.Nos.14858 and 15703 of 1992

30th November, 1992.

Mina Parikh Petitioner
v.
Pondicherry Planning Authority, Anna Nagar, Pondicherry represented by its Member-Secretary and others Respondents.

Constitution of India (1950), Art.226 - Alternative remedy - Existence of - If bars petition under Article - Pondicherry Town and Country Planning Rules.
Just because the Rules provide an appeal against an order, the petitioner cannot be prevented from invoking the jurisdiction of this Court under Art.226 of the Constitution of India. The existence of an alternative remedy could only be availed for the

purpose of exercising discretion of this Court and it is not a bar to the filing of the petition. [Para 10]
Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* and *mandamus* calling for the records of the first respondent in its (i) Order dated 10.1.1991 No.690/RA/PPA/90-91 and quash the same and consequently forbear the respondents from demolishing the petitioner's superstructure construction in (1) R.S.No.86/1, 384 at Manaveli Village, Ariyankuppam, Pondicherry, etc.

P.S.Raman, for Petitioner.

K.S.Ahamed, Government Pleader, for Pondicherry, for Respondents.

The Court made the following

ORDER: The parties in both the cases are the same. The petitioner's husband is the Chairman of a Public Limited Company by name East Coast Steel Limited having factory at Pondicherry. The petitioner applied for planning permission to build a farm house in the outskirts of Pondicherry. The application was made to the first respondent on 23.7.1990. A receipt was issued on the same date for acknowledging the receipt of charges, by the first respondent. On 10.1.1991, the petitioner received an order passed by the first respondent that the Pondicherry Tourism and Development Corporation had clarified that the land is situated in an area earmarked for Tourism Development and the application of the petitioner could not be considered. Immediately, the petitioner sent a reply on 17.1.1991, bringing to the notice of the authority that the building had almost been completed and it would not in any manner obstruct the scenery in the area and it has adequate drainage facilities. He also said that the building was to be used as a farm house where Horticulture operations had commenced and it would not hinder any proposed tourism activity. He completed the building thereafter and was writing to the Pondicherry Tourism Development authority to consider the grant of 'no objection'. The first respondent issued a notice to the petitioner on 2.9.1991 to the effect that the petitioner's construction was unauthorised and contrary to Sec.47(3) of the Pondicherry Town and Country Planning Act and that she should dismantle the same within one month from the date of receipt of the notice caused under Sec.44 of the Act. The petitioner

sent a reply on 7.9.1991 informing the first respondent that the construction was not unauthorised as the application for permit was deemed to have been sanctioned because of the relevant Rules. As the petitioner was threatened with another order dated 11.9.1992 by the first respondent under Sec.44 of the Act that the building would be demolished, the petitioner filed W.P.No.14858 of 1992. She prayed for the quashing of the earlier order dated 10.1.1991 made by the first respondent in No.690/RA/PPA/90-91 and also to issue a writ forbearing the demolition of superstructure.

2. The first respondent filed a counter affidavit and contended that the Rule relating to the deemed sanction of the permit would not apply to this case. According to the respondents, a reply was sent to the petitioner on 10.8.1990, calling upon her to accompany the authorities for a joint inspection of the premises, and for attending to some correction in the plan submitted by the petitioner. It is also stated in the counter affidavit that another letter was issued on 30.10.1990 to make some corrections in that plan, in response to which the petitioner had collected the plans from the respondent's office on 2.11.1990. It is specifically alleged in the counter-affidavit that the plans taken back by the petitioner's representative were not represented after making the corrections. Several other objections are raised by the respondents in the counter affidavit. It is not necessary to refer to all of them at this stage.

3. The petitioner was obliged to file the second W.P.No.15703 of 1992 on 13.10.1992, on receipt of a notice issued by the first respondent dated 8.10.1992 in No.690/PDA/RA-II/EC/92-93. In that notice, the first respondent purported to act under Sec.45(1) of the Pondicherry Town and Country Planning Act and called upon the petitioner to discontinue the construction of the premises and threatened the petitioner that if she did not comply with the same, the first respondent would with the aid of Police, remove all the persons and the materials from the land. It is the contention of the petitioner that the construction had already been completed and only flooring, painting and compound wall work remained.

4. The first question to be considered is whether the petitioner's application for permit is deemed to have been sanctioned by virtue of Rule 13(2) of the relevant Rules. The said Rule represents the

old Rule which was numbered as 15(2). But the language in both the Rules is the same.

5. As per the said Rule, if the planning authority/local authority fails to intimate in writing to the persons, who have given the notice, within 30 days of the receipt of the application of its refusal or sanction the application, plan and specifications shall be deemed to have been sanctioned. However, there is a proviso to the effect that nothing shall be construed to authorise any person to do anything on contravention or against the terms of lease or title of the land or against any other by-laws or Act operative on the site of the work.

6. It is the contention of the first respondent that on 10.8.1990, a communication was sent to the petitioner herein. The petitioner has categorically denied receipt of any such communication. Admittedly, the said communication was sent by Ordinary Post. In order to prove the issue of such communication learned counsel for the first respondent has produced a 'thapal' register. The relevant entry relied on by the first respondent in the Register gives the reference number of the communication as No.690/RA/PPA/90-91. But the copy of communication said to have been issued by the first respondent is a printed card. It bears reference No.690/Z/RA/90. There is no explanation whatever by the first respondent as to how the difference in the reference number occurred between the copy of the postal register and the copy of the communication. There is absolutely no evidence on record to show that such a communication was issued by the first respondent excepting the card which is printed and which is produced by the first respondent themselves. Apart from that, the next communication which is said to have been issued by the first respondent is 10.1.1991. That letter does not make any reference to the alleged communication of 10.8.1990. If really, the first respondent had issued a communication on 10.8.1990, the first respondent would certainly have referred to the same in the letter dated 10.1.1991. It is not the case of the first respondent that pursuant to the letter dated 10.8.1990, the petitioner attended the first respondent-office for the purpose of joint inspection on making corrections. On the other hand, the stand taken by the first respondent in the communication dated 30.10.1990 is that the petitioner was directed to attend the office of the first respondent to make certain corrections in the plan. The receipt of that

communication has been admitted by the petitioner and it is stated by the petitioner that her representative attended the office of the first respondent and rectified the defects pointed out by the first respondent. It is now clearly stated in the reply affidavit filed by the petitioner that the plans which were taken back by the petitioner for rectification were represented in the office of the first respondent on 5.11.1991.

7. The first respondent disputes the representation of the plans. It is stated in the counter affidavit that the plans which were taken by the petitioner's representative were never represented. The said statement is not correct for the following reasons. If the plans had not been represented by the petitioner, there was no necessity for the first respondent to send a communication dated 10.1.1991 that objections had been taken to the application by the Pondicherry Tourism Development Corporation. The first respondent would have simply kept quiet without sending any communication whatever to the petitioner if the latter had not represented the plans. If the petitioner had made any enquiry thereafter it would have been informed that the plan not having been represented there was no valid application to be considered by the first respondent. On the other hand, the communication dated 10.1.1991 proceeds as if the application for permit was very much alive which had to be considered by the first respondent. Apart from that, the communication dated 10.1.1991 did not refer to the return of the plans to the petitioner and the failure of the petitioner to represent the same. If the petitioner had not represented the plans, the first respondent would have definitely stated in the communication dated 10.1.1991 that the plans had not been represented by the petitioner. Hence, I do not accept the contention of the first respondent that the plans had been taken back by the petitioner's representative and not represented.

8. It is very unfortunate that a statutory authority should rely upon certain documents and claims that communications were sent to the petitioner and, therefore, the petitioner will not be entitled to the benefit of Rule 13(2) of the Rules. In the absence of any proof of such communication having been issued by the first respondent, I have to accept the statement of the petitioner that there was no communication whatever after the filing of the application of the petitioner within the period

set out in the Rule. Hence, the rule will apply to the petitioner's application and in law, the petitioner's application is deemed to have been granted. Once the statutory fiction is applied and the petitioner's plan is deemed to have been sanctioned, there is nothing which prevents the petitioner from proceeding with the construction. The only condition imposed by the Rule is that it shall not be in contravention of any terms of lease or title of the land or against any other bye-laws or Act operative on the site of the work. It is not the case of the first respondent that any other bye-laws or Act had been violated or that the terms of lease or title of the land had been violated.

9. It is contended by learned counsel for the first respondent that the petitioner had not applied for permission for development as required by the rules. According to learned counsel, even before applying for permission to build, it is the duty of the petitioner to apply for development, but for which there could not have been any application for erecting the building. There is no substance in the contention. It was never the case of the first respondent that the petitioner ought to have in the first instance applied for Development. In none of the communications the first respondent pointed out that in the absence of any communication, the petitioner's application for building permit could not be entertained. If really that was the position, the first respondent would have immediately returned the application stating that without the petitioner getting permission for development of the land, he could not maintain the application for building permit. Once the statutory fiction is applied and in the eye of law, the application for building permit is deemed to have been granted, it implies that all the prior requirements of law have been satisfied. There is no question of first defendant contending that there was no prior permission for development of the land and it is also implied in the grant of permission to erect the building. Hence, there is no substance in the contention.

10. It is next argued that the petitioner ought to have filed an appeal before the appellate authority as per the Rules against the order dated 10.1.1991 in which it was pointed out that the application could not be considered as the land fell within the area earmarked for development under tourism sector by the Pondicherry Tourism Development Corporation. The order dated 10.1.1991 has come

into existence long after the statutory fiction has come into force. Once the permit for building is sanctioned then there is no question of first respondent passing an order stating that the land falls within the area earmarked for development under tourism sector and, therefore, the permission cannot be granted. The permission having already been granted by the statutory fiction, it is not open to the first respondent thereafter to reject the application. Hence, the communication dated 10.1.1991 is, on the face of it unsustainable and it is not necessary for the petitioner to file an appeal in this case. Just because the Rules provide against such an order, the petitioner cannot be prevented from invoking the jurisdiction of this Court under Art.226 of the Constitution of India. The existence of the alternative remedy could only be availed for the purpose of exercising discretion of this Court and it is not a bar to the filing of the petition.

11. It is next contended that the petitioner ought to have filed an appeal against the order directing demolition based on the communication dated 2.9.1991 by the first respondent. Whatever has been stated above with regard to it, the order dated 10.1.1991 will apply to the communication dated 2.9.1991. The order is unsustainable on the face of it as there is statutory sanction under Rule 13(2) of the Act for the application filed by the petitioner.

12. The contention that the petitioner has satisfactorily established that the construction had been completed except for flooring, painting and compound wall work by the time the notice dated 8.10.1992 was issued was received by the petitioner on 10.10.1992 and the construction part of the building was already over. Hence, the notice dated 8.10.1992 is really infructuous. In fact, the first defendant is aware of the proceedings pending in W.P.No.14858 of 1992 when the notice dated 8.10.1992 was issued. The first respondent instead of issuing such a notice could have waited for the decision of this Court and issue of such a notice necessitated the filing of the second writ petition.

13. I am convinced that the petitioner has acted lawfully in erecting the superstructure and there is no warrant for notices issued by the first respondent directing demolition of the building. The writ petitions are allowed. The orders passed by the first respondent set out and referred to in

the petitions are quashed. There will be no order as to costs.

B.S. --- Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *V.Ratnam, Acting Chief Justice and Somasundaram, J.*

W.A.No.1008 of 1989 2nd February, 1993.

Managing Director, Repatriate Co-operative Finance and Development Bank Ltd., Madras.

...Appellant

v.

Deputy Commissioner of Labour-II, Labour Welfare Board Building, DMS Compound, Teynampet, Madras and another *...Respondents.*

(A) Appeal - Act conferring right of appeal - Repealed - Repealing enactment providing a new forum - Effect of.

The right of appeal is a substantive right and gets vested in a litigant no sooner the *lis* is commenced in a suit in a Court of first instance and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right. Unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. However, the forum where such an appeal can be lodged is a procedural matter and therefore if the repealing Act provides a new forum where the remedy by way of appeal or legal proceedings in respect of such vested right can be perused after the repeal, the forum must be as provided in the repealing Act. [Para. 10]

(B) Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Secs.6 and 41 - Tamil Nadu Co-operative Societies Act (LIII of 1961), Sec.11 - Appeal by the dismissed employee before Deputy Commissioner of Labour - Jurisdiction of the Deputy Commissioner.

When the special by-laws were registered before the Registrar under Sec.11 of the 1961 Act on 12.4.1978, by virtue of G.O.Ms.No.5780, the

appellant bank is exempted from the provisions of Sec.41 of the Act and only the new forum provided under the special by-laws namely the Central Registrar can hear and dispose of the appeal filed by the second respondent against the order of the appellant bank dismissing him from service. The second respondent was dismissed from service on 21.7.1975 and on that date, the second respondent had the right of appeal under Sec.41 of the Act and, as a matter of fact, the second respondent had filed an appeal before the first respondent on 25.8.1975 and the appeal was pending before the first respondent when the special by-laws were registered under Sec.11 of the 1961 Act on 12.4.1978. Therefore, from 12.4.1978, the appellant bank gets an exemption from the provisions of Sec.41 of the Act and thereafter, only the provisions of the special by-laws dealing with the dispensing with the services of the employees of the appellant bank, the right of appeal available to such employees whose services have been dispensed with and the forum of appeal will apply in the place of Sec.41 of the Act. Again clause 6(d) of the special by-laws provides the forum before which an appeal can be filed against the order of the appellant bank dispensing with the services of any employee of the bank. The vested right of appeal available to the employees of the appellant bank to prefer appeals against the orders of the appellant Bank dispensing with their services is not taken away by the incorporation of the model by-laws in the registered by-laws of the appellant Bank and by the registration of such by-laws under Sec.11 of the 1961 Act, but such right of appeal is preserved and kept in tact under Clause (d) of the special by-laws. On 12.4.1978 when the special by-laws were registered, they have repealed Sec.41 of the Act and the clause 6(d) of the Special by-laws provides a new forum of appeal before which an appeal can be filed against the order dispensing with the services of the employee of the appellant bank. The appeal filed by the second respondent and which was pending before the first respondent could be pursued after the registration of the special by-laws only before the new forum viz., the Central Registrar. After the registration of the Special by-laws under Sec.11 of the 1961 Act on 12.4.1978, the second respondent ought to have asked for the transfer of the appeal to the new forum provided under Clause 6(d) of the special by-laws or the first respondent himself

should have transferred the appeal in the Central Registrar. In these circumstances, it has to be held that after 12.4.1978, the first respondent had no jurisdiction to hear and dispose of the appeal filed by the second respondent under Sec.41 of the Act and which was pending on that day. [Para. 10]

Cases referred to:

Assistant General Manager v. R.S. Thiruvengadam, 1991 W.L.R. 699. [Para. 4]

A.K. Appaswamy v. The Pollachi Co-operative Marketing Societies by its Secretary, 1974 T.L.N.J. 37. [Para. 5]

Ittyavira Mathia v. Varkey Varkey, A.I.R. 1964 S.C. 907. [Paras. 7, 11]

Mohamed Meera v. Thirumalaya, (1966) 1 S.C.R. 574; A.I.R. 1966 S.C. 430. [Paras. 8, 11]

Radhakrishnan v. Shridhar, I.L.R. 1950 Nag. 532. [Para. 8]

Garikapatti Veeraya v. N. Subbaiah Choudhury, (1957) 1 M.L.J. (S.C.) 1; (1957) 1 An.W.R. (S.C.) 1; 1957 S.C.J. 439; 1957 S.C.C. 399; 1957 S.C.R. 488; A.I.R. 1957 S.C. 540. [Paras. 8, 9]

Maria Christine v. Maria Zurna, A.I.R. 1979 S.C. 1352. [Para. 9]

The Colonial Sugar Refining Company Limited v. Irving, 1905 A.C. 369. [Para. 9]

Appeal under Clause 15 of the Letters Patent against the Order of S. Ramalingam, J., dated 22.6.1989 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.5192 of 1982 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records pertaining to the impugned order dated 30.6.1981 of the first respondent herein and passed in T.S.E. Case No.43 of 1976 and quash the said order.

The Judgment of the Court was delivered by *Somasundaram, J.*: This writ appeal has been filed against the order allowing W.P.No.5192 of 1982 filed by the second respondent herein praying for the issue of a writ of *certiorari* to quash the order of the 1st respondent dated 30.6.1981 in T.S.E. Case No.43 of 1976.

2. The second respondent was working as a Junior Assistant/Cashier/Recovery Assistant in the Repatriate Co-operative Finance and Development Bank, the appellant, hereinafter referred to as the appellant bank. According to the second respondent, he was sick in the month of August, 1973 and he applied for 15 days leave from 14.8.1973 to 30.8.1973 by submitting a letter dated 16.8.1973

to the appellant bank. Thereafter, he sent a medical certificate dated 22.8.1973. However, the appellant bank treated the period from 14.8.1973 as absence without leave, suspended him from service and thereafter issued a charge memo dated 22.5.1974 containing the following three charges:

1. He was careless and negligent in the performance of his duty and this has caused financial loss to the Bank.
2. He was responsible for damaging the reputation of the Bank.
3. He stayed away from duty without any intimation.

The statement of allegation in respect of charge No.1 is that a cheque bearing No.942472 dated 10.3.1972 for Rs.3,000 was issued by the appellant bank to one Saibudeen of Indian Bank, Madras-28 and that the 2nd respondent had not ensured to obtain acknowledgment for the receipt of the said cheque from Saibudeen and the disbursement of the amount was also not entered in the loan ledger. It is further alleged that there are no records, viz., loan application, loan sanction order, etc., available in the office. It was also alleged that the issue of a cheque in favour of Saibudeen is a grave irregularity. The Statement of allegation in respect of charge No.3 is that the 2nd respondent stayed away from duty without giving prior intimation to the appellant bank and thus deserted duty. On receipt of the charge memo referred to above, the second respondent submitted his representations dated 5.6.1974 and 2.9.1974 denying all the charges. On 11.12.1974, the second respondent was called upon to give specimen writing in words and figures the value of the cheque viz., Rs.3,000 so as to compare with the writings in the cheque bearing No.942472 dated 10.3.1972. The second respondent gave his specimen writings and the same were sent to the handwriting expert. The handwriting expert gave a report stating that the writings in the cheque dated 10.3.1972 are those of the second respondent. The handwriting expert was thereafter produced as a witness and the second respondent cross-examined him. The handwriting expert in his evidence stated that that the handwritings of the name Saibudeen and the words and figures Rs.3,000 were made in the hand of the second respondent, both in the cheque and in the counter foil. Thiru Sadanandam who was appointed as enquiry officer for the purpose of conducting an enquiry into the charges framed against the

second respondent submitted a report to the appellant bank holding that the second respondent was guilty of the charges framed against him. On the basis of the report of the enquiry conducted by Mr. Sadanandam and on the basis of the evidence of the handwriting expert, a show cause notice dated 12.5.1975 was issued by the appellant bank to the 2nd respondent asking him to show cause against the proposed punishment of dismissal from service. The second respondent offered his explanation stating that he never admitted that he wrote the cheque dated 10.3.1972 and that since the release order issued by the Managing Director was not available it cannot be concluded that the cheque was issued without the release order. In report of charge No.3, the second respondent stated that he submitted a leave application supported by a medical certificate issued by a qualified doctor and therefore there was no deliberate or wilful absence by the second respondent from duty. The Managing Director of the appellant bank by his order dated 21.7.1975 dismissed the second respondent from service holding that he is guilty of charges 1 to 3. The second respondent preferred an appeal to the Chairman of the appellants bank and the Chairman rejected the appeal petition by his order dated 9.1.1976. Thereafter, the second respondent preferred an appeal in T.S.E. Case No.43 of 1976 under Sec.41(2) of the Tamil Nadu Shops and Establishments Act hereinafter referred to as the Act before the first respondent. By the order dated 30.6.1981, the Shop Act authority, the first respondent herein dismissed the appeal T.S.E. Case No.43 of 1976. Aggrieved by the order of the first respondent dated 30.6.1981 dismissing the appeal T.S.E. No.43 of 1976 the second respondent filed W.P. No.5192 of 1982 to quash the said order dated 30.6.1981 made in T.S.E. No.43 of 1976.

3. The learned single Judge who heard the writ petition took the view that the enquiry officer Sadanand had conducted the domestic enquiry and submitted a report holding that the second respondent is guilty of all the charges levelled against him without giving an opportunity to the second respondent to participate in the domestic enquiry and therefore, the domestic enquiry conducted against the second respondent was vitiated by non-observance of the principles of natural justice. The learned single Judge further held that on the basis of the evidence available on record, no

findings could be rendered that it is the responsibility of the 2nd respondent as cashier to issue cheque and obtain acknowledgment from the loanee. The learned single Judge also found that there was no evidence on the aspect of causing loss to the bank and the authorities have also not rendered any findings on that aspect. Consequently, the learned single Judge came to the conclusion that the charge No.1 had not been proved against the 2nd respondent. With regard to the charge No.3, the learned single Judge found that the conclusion of the first respondent that the absence of the 2nd respondent from duty from 16.8.1973 to 23.8.1973 was unauthorised can be sustained. However, the learned single Judge took the view that the punishment of dismissal from service on charge No.3 alone cannot be sustained, as it is disproportionate to the gravity of the allegations levelled against the second respondent. Ultimately, the learned single Judge allowed the writ petition. This writ appeal is directed against the order of the learned single Judge.

4. Mr. B. Kumar, the learned counsel appearing for the appellant in the first place contended that the appellant bank is an establishment under the Central/State Government and therefore, by reason of the Sec.4(1)(c) of the Act, the provisions of the said Act will not apply to the appellant bank. The learned counsel submitted that the appellant bank was set up by the Government of India and initial contribution as well as 90% of funds are brought by the Government of India and the Southern States, that the management of the appellant bank is wholly under the Government, that the functions of the appellant bank are Governmental in every sense that the appellant bank is an instrumentality of the State and therefore the appellant bank is exempted from the provisions of the Act under Sec.4(1)(c) of the Act. We are unable to accept the above contention of the learned counsel for the appellant. The said contention of the learned counsel for the appellant based on Sec.4(1)(c) of the Act was not raised on behalf of the appellant bank in the appeal T.S.E. Case No.43 of 1976, filed by the second respondent against the order of the appellant bank dismissing the second respondent from service, before the first respondent. Such a plea was also not raised in the counter affidavit filed by the appellant bank in W.P.No.5192 of 1982 nor it was raised during the arguments before the learned single Judge, who

heard the said writ petition. Again, the plea based on Sec.4(1)(c) of the Act was not even raised in the grounds of the writ appeal. In those circumstances, we are not inclined to permit the learned counsel for the appellant to raise the contention that by reason of Sec.4(1)(c) of the Act, the provisions of the Act will not apply to the appellant bank, for the first time, at this stage of the proceedings 17 years after the commencement of the proceedings before the first respondent. In *Indian Bank represented by its Assistant General Manager v. R.S. Thiruvengadam*, 1991 W.L.R. 699, a Division Bench of this Court has held that the plea of want of jurisdiction of the appellate authority under Sec.41 of the Act to entertain the appeal against the order dismissing the employee from service cannot be allowed to be raised for the first time after 17 years in the writ appeal. In view of the above legal and factual position, we have no hesitation in rejecting the first contention of the learned counsel for the appellant.

5. The second contention of the learned counsel for the appellant is that Sec.6 of the Act provides that the State Government may by notification exempt any establishment or caluse of establishments from all or any of the provisions of the Act subject to such conditions as the State Government may deem fit. By virtue of powers conferred by Sec.6, the State Government issued a notification in G.O.Ms.No.5780, Industries, Labour and Co-operation, dated 11.12.1963 exempting the co-operative societies from the provisions of the Act from the date on which the model by-laws were incorporated in the registered by-laws of these societies. The learned counsel further contended that in the present case, the model by-laws were incorporated in the registered by-laws of the appellant bank and they were registered under Sec.11 of the Co-operative Societies Act, 1961 on 12.4.1978 and therefore the appellant bank is permanently exempted from the provisions of Sec.41 of the Act from 12.4.1978 and consequently on the date when the first respondent heard and disposed of the appeal in T.S.E. Case No.43 of 1976 such appeal filed under Sec.41 of the Act would be incompetent and the order of the first respondent dismissing the appeal is liable to be confirmed on the ground that the appeal filed by the second respondent before the first respondent under Sec.41 of the Act would be incompetent after 12.4.1978. The learned counsel also contended that the learned

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single Judge ought to have confirmed the order of the first respondent dismissing the appeal in T.S.E. Case No.43 of 1976 holding that the said appeal is not maintainable under Sec.41 of the Act, after 12.4.1978 and that the order of the single Judge interfering with the order of the first respondent on merits cannot be sustained. *Per contra*, Mr. G. Venkataraman, the learned counsel for the 2nd respondent contended that the right of appeal available to the second respondent under Sec.41 of the Act is a vested right and such right is determined as on the date of the cause of action and this vested right cannot be taken away unless there are express words to that the learned counsel for the 2nd respondent further contended that G.O.No.5780 referred to above and the special bye-laws of the appellant bank relating to dispensing with the service of an employee of the appellant bank and filing of appeal against such order dispensing with the service of an employee are prospective in operation and not retrospective. In support of the above contention, the learned counsel relied on the decision in *A.K. Appaswamy v. The Pollachi Co-operative Marketing Societies by its Secretary and another*, 1974 T.L.N.J. 37. The learned counsel also contended that the appellant bank has not raised the above plea based on Sec.6 of the Act in the writ petition before the learned single Judge and therefore, the appellant should not be permitted to raise such plea in the writ appeal. No doubt, the plea based on the exemption granted under Sec.6 of the Act and G.O.Ms.No.5780, Industries, Labour and Co-operation, dated 11.12.1963 was not raised on behalf of the appellant bank in the counter filed in the writ petition and before the learned single Judge at the time of the hearing of the writ petition. However, in the supplemental counter affidavit filed by the appellant bank in T.S.E. Case No.43 of 1976 before the first respondent the appellant bank has specifically raised the plea that it is exempted from the provisions of the Act from 12.4.1978 in the following terms:

"This respondent states that the special bye-laws relating to service conditions of the employees of the bank was registered before the Registrar of Co-operative Societies on 12.4.1978 under Sec.11 of the Cooperative Societies Act, 1961. This respondent further submits that the said special bye-laws constitute a statutory contract governing the rural

relationship between this respondent and the appellant.

This respondent submits that this respondent is exempted under the Tamil Nadu Shops and Establishments Act, 1947, from 12.4.1978 (the date of Registration of Special bye-laws) by virtue of Notification dated 11.12.1963 in G.O.Ms.No.5780, Industries, Labour and Co-operation (Labour) published in Part II, Section I of the Fort St. George Gazette, dated 25.12.1963 at page 2999 issued under Sec.6 of the Tamil Nadu Shops and Establishments Act, 1961.

This respondent, therefore, prays that the above appeal may be dismissed."

As the appellant bank has raised the plea based on the exemption granted under Sec.6 of the Act at the earliest point of time in the supplemental counter affidavit filed in T.S.E.No.43 of 1976 before the 1st respondent as well as in the grounds of writ appeal and inasmuch as the plea relates to the jurisdiction of the first respondent to hear and dispose of the appeal we are inclined to consider the second contention of the learned counsel for the appellant on merits.

6. Sec.6 of the Act provides that the State Government may by notification exempt either permanently or for any specified period any establishment or class of establishments or person or persons from all or any of the provisions of the Act subject to such conditions as the State Government may deem fit. By virtue of powers conferred by Sec.6 of the Act, the Government issued a notification in G.O.Ms.No.5780, Industries, Labour and Co-operation, dated 11.12.1963 hereinafter referred to as the G.O., which reads thus:

"In exercise of the powers conferred by Sec.6 of the Madras Shops and Establishments Act, 1947 (Madras Act XXXVI of 1947), (hereinafter in this referred to as "the 1947 Act") the Governor of Madras hereby exempts permanently every society registered or deemed to be registered under the Madras Co-operative Societies Act, 1961 (Madras Act 53 of 1961); (hereinafter in this notification referred to as the "The 1961 Act") from--

(i) the provisions of clause (a) of sub-section (2) of Sec.34, Sec.35 and Sec.41 of the 1947 Act-

(a) on and from the 1st January, 1964, if the registered bye-laws for the time being in force

or the registered amendment of the bye-laws of such society contain the model bye-laws appended to this notification; and

(b) on and from the date on which the model by-law aforesaid are incorporated in the registered by-laws of the society and registered under Sec.11 of the 1961 Act if the registered by-laws of the society do not contain the model by-laws aforesaid; and

(ii) all the other provisions of the 1947 Act on and from the 1st January, 1964."

In the present case, it is not in dispute that the special by-laws relating to service conditions of the employees of the appellant bank was registered before the Registrar of Co-operative Societies on 12.4.1978 under Sec.11 of the Co-operative Societies Act, 1961. It is also admitted that the 2nd respondent was dismissed from service on 21.7.1975 with effect from 16.7.1975 and that the second respondent filed an appeal before the 1st respondent against the order of the appellant bank dismissing the second respondent from services on 24.8.1975 and that the first respondent dismissed the appeal on 30.6.1981. Clause 6(c) of the special by-laws relating to the service conditions of the employees of the appellant bank (hereinafter referred to 'the special by-laws') provides that the service of any member of the bank who is employed continuously for a period of not less than 6 months shall not be dispensed with except for a reasonable cause and without giving such member at least one month's notice or wages in lieu of such notice. The proviso to Clause 6(c) of the special by-laws says that such notice shall not be necessary where the services of such member are dispensed with on a charge on misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose. Clause 6(d) of the special by-laws provides that any member of the bank who has completed a continuous service of not less than 6 months in the establishment and whose services have been dispensed with may appeal to the Central Registrar either on the ground that there was no reasonable cause for dispensing with his services on the ground that he had not been guilty of misconduct, as held by the authority who imposed the penalty. By virtue of G.O.Ms.No.5780, the Co-operative Societies are permanently exempted from the provisions of Sec.41 of the Act on and from the date on which the model by-laws are incorporated in the registered

by-laws of the Co-operative Societies. After the special by-laws were registered before the Registrar of Co-operative Societies under Sec.11 of the 1961 Act on 12.4.1978, by virtue of clause 6(d), of the special by-laws, only the Central Registrar is competent to hear and dispose of the appeal filed by the second respondent against the order of the appellant bank dismissing him from service. G.O.Ms.No.5780 clearly states that on and from the date on which the model by-laws are incorporated in the registered by-laws of the society and registered under Sec.11 of the 1961 Act, the Co-operative Societies will be exempted from the provisions of Sec.41 of the Act. From the plain meaning of G.O.Ms.No.5780, it is clear that the operation of Sec.41 of the Act ceased to apply to the appellant bank when the model by-laws were incorporated in the registered by-laws of the appellant bank on 12.4.1978. The first respondent herein, the appellate authority under Sec.41 of the Act, though competent to entertain the appeal filed by the 2nd respondent against the order of the appellant bank dismissing him from service, after the model by-laws are incorporated in the registered by-laws and registered under Sec.11 of the 1961 Act on 12.4.1978, the first respondent, ceased to have jurisdiction to hear and dispose of the appeal pending before it, because by virtue of G.O.Ms.No.5780, after the registration of the special by-laws on 12.4.1978 the exemption had come into force and Sec.41 of the Act ceased to apply to the case of the appellant bank. Again it must be remembered that by virtue of clause 6(d) of the special by-laws an alternative forum is provided before whom appeals against the orders dispensing with the services of employees of the appellant bank, can be preferred. Therefore, it has to be held that on 30.6.1981, when the first respondent passed orders in T.S.E. Case No.43 of 1976 he was not competent to hear and dispose of the said appeal. 7. In *Ittyavira Mathia v. Varkey Varkey*, A.I.R. 1964 S.C. 907, in a suit instituted before the repeal of Travancore High Court Act 4 of 1909 an appeal was filed after the repeal of that Act by Act 5 of 1125. At the time of filing the appeal even Sec.24 of the latter Act, which provided that a Full Bench will hear and decide the appeal from the decrees of the District Courts in which the amount or value of the subject matter is in excess of Rs.5,000 stood repealed. The appellants contended before the Supreme Court that their appeal could be heard

only by a Bench of three Judges as provided by Sec.11(1) of the Travancore High Court Act 4 of 1099. The Supreme Court repelling the above contention of the appellants pointed out that the High Court of Travancore was itself abolished as the result of the merger and a new High Court came into being viz. the High Court of Travancore-Cochin. The Supreme Court further pointed out that the rights of the parties to prefer appeals to that High Court were governed initially by Ordinance II of 1124 and later by Act V of 1125. These provisions came into being subsequent to the institution of the suit and therefore, the rights of a person aggrieved by the decision of a suit instituted prior to the coming into force of Act V of 1125 were only those which were conferred by that Act. In the above decision, the Supreme Court has further held as follows:

"A litigant has no right to contend that a tribunal before whom he should have taken an appeal when he instituted the suit should not be abolished. The Legislature has full power to enact a law of that kind and it is not contended before us that the repeal of the Travancore High Court Act was unconstitutional. It would, therefore, follow that whatever rights may have vested in the party in the matter of filing an appeal were abrogated by competent legislature. New rights were conferred in place of those which were taken away and it is only the new rights which could be availed of."

8. In *Mohamed Meera v. Thirumalaya*, (1966)1 S.C.R. 574; A.I.R. 1966 S.C. 430, the appellants' suit for recovery of possession of property and mesne profits filed in 1950 was substantially decreed by the trial court. The appellant however filed an appeal before the Kerala High Court against the decree in so far as it went against him. The appeal was heard in 1960 after the Kerala High Court Act 5 of 1959 had been passed and under its provisions the appeal was heard by a single Judge. When the appellant had filed his suit, and later on his appeal, the Travancore-Cochin High Court Act of 1949 was in force and under that Act the appeal would have been heard by a Division Bench. On the judgment of the High Court going against him the appellant went to the Supreme Court by Special leave. Before the Supreme Court it was contended on his behalf on the basis of *Radhakrishna's case*, I.L.R. 1950 Nag. 532, that the Kerala High Court Act 5 of 1959

could not retrospectively take away his right to be heard by a Division Bench which he had under the law as it stood when he filed his suit and appeal. Reliance was also placed on *Grikapati Veeraya's case*, for the proposition that the institution of a suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The Supreme Court rejected the above contention raised on behalf of the appellant based on *Radhakrishnan v. Shridhar*, I.L.R. 1950 Nag. 532 and *Garikapatti Veeraya v. N.Subbaiah Choudhury*, (1957)1 M.L.J. (S.C.) 1; (1957)1 An.W.R. (S.C.) 1; 1957 S.C.J. 439; 1957 S.C.C. 399; 1957 S.C.R. 488; A.I.R. 1957 S.C. 540 and held that no party has a vested right to be heard by a specified number of Judges, that the Travancore-Cochin High Court Act of 1949 did not confer any right of appeal on the appellant which has been taken away by the later Act and that it only provided for procedural matters which are dealt with several High Courts under the Letters Patent.

9. In *Maria Christine v. Maria Zurna*, A.I.R. 1979 S.C. 1352, the Supreme Court has held that it is well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. The Supreme Court after pointing out that the above position has also been settled by the decisions of the Privy Council in *The Colonial Sugar Refining Company Limited v. Irving*, 1905 A.C. 369 and *Garikapatti Veeraya v. N.Subbaiah Choudhury*, (1957)1 M.L.J. (S.C.) 1; (1957)1 An.W.R. (S.C.) 1; 1957 S.C.J. 439; 1957 S.C.C. 399; 1957 S.C.R. 488; A.I.R. 1957 S.C. 540, held that the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act. In the above decision, the Supreme Court has observed as follows:

"If the repealing Act provides new forum where the remedy or the legal proceedings in respect of such vested right can be pursued after the repeal, the forum must be as provided in the

repealing Act.”

10. The position of law which emerges from the decisions of the Supreme Court referred to above is that the right of appeal is a substantive right and gets vested in a litigant no sooner the *lis* is commenced in a suit in a court of first instance and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. However, the forum where such an appeal can be lodged is a procedural matter and therefore if the repealing Act provides a new forum where the remedy by way of appeal or legal proceedings in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act. The above ratio of the decisions of the Supreme Court can be applied to the facts of the present case. If we so apply the ratio of the decisions of the Supreme Court referred above to the facts of the present case, it follows that when the special by-laws were registered before the Registrar under Sec.11 of the 1961 Act on 12.4.1978, by virtue of G.O.Ms.No.5780, the appellant bank is exempted from the provisions of Sec.41 of the Act and only the new forum provided under the special by-laws namely the Central Registrar can hear and dispose of the appeal filed by the second respondent against the order of the appellant bank dismissing him from service. As already pointed out, the second respondent was dismissed from service on 21.7.1975 and on that date, the second respondent had the right of appeal under Sec.41 of the Act and, as a matter of fact, the second respondent had filed an appeal before the first respondent on 25.8.1975 and the appeal was pending before the first respondent when the special by-laws were registered under Sec.11 of the 1961 Act on 12.4.1978. Therefore, from 12.4.1978, the appellant bank gets an exemption from the provisions of Sec.41 of the Act and thereafter, only the provisions of the special by-laws dealing with the dispensing with the services of the employees of the appellant bank, the right of appeal available to such employees whose services has been dispensed with and the forum of appeal will apply in the place of Sec.41 of the Act. Again clause 6(d) of the special by-laws provides the forum before which an appeal can be filed against the order of the appellant bank dispensing with the services of any

employee of the bank. The vested right of appeal available to the employees of the appellant bank to prefer appeals against the orders of the appellant Bank dispensing with their services is not taken away by the incorporation of the model by-laws in the registered by-laws of the appellant Bank and by the registration of such by-laws under Sec.11 of the 1961 Act, but such right of appeal is preserved and kept in tact under Clause 6(d) of the special by-laws. On 12.4.1978 when the special by-laws were registered, they have repealed Sec.41 of the Act and the clause 6(d) of the Special by-laws provides a new forum of appeal before which an appeal can be filed against the order dispensing with the services of the employee of the appellant bank. The appeal filed by the second respondent and which was pending before the first respondent could be pursued after the registration of the special by-laws only before the new forum *viz.*, the Central Registrar. After the registration of the Special by-laws under Sec.11 of the 1961 Act on 12.4.1978, the second respondent ought to have asked for the transfer of the appeal to the new forum provided under Clause 6(d) of the special by-laws or the first respondent himself should have transferred the appeal to the Central Registrar. In these circumstances, it has to be held that after 12.4.1978, the first respondent had no jurisdiction to hear and dispose of the appeal filed by the second respondent under Sec.41 of the Act and which was pending on that day. Therefore, we are inclined to hold that the order of the first respondent dated 30.6.1981 dismissing the appeal T.S.E. Case No.43 of 1976 filed by the 2nd respondent is correct, not for the reasons stated in the order of the 1st respondent, but on the ground that the appeal filed by the second respondent before the first respondent under Sec.41 of the Act would be incompetent after 12.4.1978.

11. In view of the principles laid down by the Supreme Court in *Ityavira Mathia v. Varkey Varkey*, A.I.R. 1964 S.C. 907. in *Mohamed Meera v. Thirumala*, (1966)1 S.C.R. 574: A.I.R. 1966 S.C. 430 and in *Maria Christine v. Maria Zurna*, A.I.R. 1979 S.C. 1352, referred above we are unable to accept the contention of the learned counsel for the second respondent based on the decision in *A.K. Appaswamy v. The Pollachi Co-operative Marketing Societies by its Secretary*, 1974 T.L.N.J. 37, that no retrospective effect can be given to G.O.Ms.No.5780 and that the said G.O.s will not apply to the appeals

pending before the appellate authority under Sec.41 of the Act, viz. the first respondent on the date when model by-laws were incorporated in the registered by-laws and registered under Sec.11 of the 1961 Act. It must be remembered that the special by-laws specifically provided for a forum for filing appeals against the order dispensing with the services of the employees of the appellant bank. In view of the decisions of the Supreme Court referred to above it has to be held that where the special by-laws provided a new forum, where the vested rights of appeal against the order dispensing with the services of an employee can be pursued by him, the forum of appeal must be as provided under the special by-laws and not the forum provided under Sec.41 of the Act the operation of which ceased to apply to the appellant bank when the special by-laws were registered on 12.4.1978. We are also not inclined to follow the decision in *A.K.Appaswamy v. The Pollachi Co-operative Marketing Societies by its Secretary*, 1974 T.L.N.J. 37, as the ratio of that decision runs counter to the principles laid down by the Supreme Court in *Ittyavira Mathia v. Varkey Varkey*, A.I.R. 1964 S.C. 907, *Mohamed Meera v. Thirumala*, (1966) 1 S.C.R. 574; A.I.R. 1966 S.C. 430 and *Maria Christine v. Maria Zurna*, A.I.R. 1979 S.C. 1352, which we are bound to follow.

12. For all the reasons stated above, we are inclined to hold that the first respondent had no jurisdiction to hear and dispose of the appeal T.S.E. Case No.43 of 1976 filed by the second respondent which was pending when the special by-laws were registered under Sec.11 of 1961 Act on 12.4.1978 and therefore, the order of the 1st respondent dated 30.6.1981 dismissing the appeal T.S.E. Case No.43 of 1976 is correct though not for the reasons given in the order of the first respondent dated 30.6.1981, but, for the reason given by us in this judgment viz. after 12.4.1978 the first respondent is not competent to hear and dispose of the T.S.E. Case No.43 of 1976. As we are upholding the order of the first respondent dismissing the appeal in T.S.E. Case No.43 of 1976 on the ground that it would be incompetent after 12.4.1978, the order of the learned single Judge in W.P.No.5192 of 1982 interfering with the order of the first respondent on merits cannot be sustained and therefore the order in W.P.No.5192 of 1982 is liable to be set aside. As we are inclined to allow the writ appeal and set aside the order of the

learned single Judge in W.P.No.5192 of 1982 for the reasons stated above, it is not necessary to deal with the order contentions urged by the learned counsel for the appellant.

13. In the result, we allow the writ appeal, set aside the order of the learned single Judge in W.P.No.5192 of 1982 and restore the order of the first respondent dated 30.6.1981 dismissing the appeal in T.S.E. Case No.43 of 1976. No costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No.10444 of 1992 13th November, 1992.

Rizwan International represented by M.Moosa,
Managing Partner.

...Petitioner

v.

The Union of India represented by its Secretary,
Department of Commerce, New Delhi and
another

...Respondents.

(A) *Evidence Act (I of 1872), Sec.115 - Doctrine of promissory estoppel - If available as against Governmental action in exercise of statutory power.*

(B) *Imports and Exports (Control) Act (XVIII of 1947), Sec.3 - Policy banning export of any product made out of red sanders wood framed for 5 years commencing from 1.4.1992 - If arbitrary and unreasonable.*

Held: The uniform view taken by all the High Courts and the Supreme Court is that the doctrine of promissory estoppel will be available as against Governmental action, though the said action has been taken in exercise of statutory power. There is also no doubt that the principle of estoppel is available against the subordinate legislature and delegated legislations which cannot be placed on the same pedestal as an enactment passed by the legislature in exercise of the plenary powers. In the present case, the petitioner has produced in

relevant records to show that it has acted in pursuance of the representation contained in the policy which was announced for the period from 1st April, 1990 to 31st March, 1993 and incurred detriment by borrowing loans from financial institutions. Apart from that, the petitioner has already prepared musical instrument parts by applying the necessary manufacturing process and made them ready for export. At that stage, the policy of the Government is changed and undoubtedly the principle of promissory estoppel would apply against the enforcement of new policy.

[Para 18]

There is also no doubt in this case that the policy is arbitrary and unreasonable in so far as the goods which are ready for export in the converted form are concerned. There is nothing on record to show that the cutting of red-sanders wood has been banned by the Government or any authority at any time. If that has not been done, the imposition of the new policy would be like cutting the trunk of a tree while sitting on the branch of the tree. If the cutting of the trees is not banned and the citizens are allowed to manufacture musical instrument parts out of the trees, there is no substance in the contention that the export of the instrument parts or the export of wood in any form has been banned after the trees are cut and converted into parts of musical instruments. In that case, there is no question of maintaining ecological balance or conserving ecological surroundings in the particular area. It is contended that it is open to the petitioner to sell the goods inside the country and they need not be exported to a foreign country. The said argument only cuts the nose of the respondents themselves. If the export of goods is banned for the purpose of conserving ecological measure, there is no substance in contending that the goods would be sold inside the country. The purpose for which the policy is alleged to have been brought into force will not be served in any manner by the sale of goods inside the country, if the trees are cut and converted into such goods. Thus, the new policy in so far as it prohibits export of goods which are ready for export is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy.

Cases referred to:

Bengal Exports (P) Limited v. Union of India, A.I.R. 1983 Del. 445. [Para. 5]
Union of India v. Anglo Afghan Agencies, A.I.R.

1968 S.C. 718. [Para. 5]

Motilal Padampat Sugar Mills Co. (P.) Ltd. v. State of U.P., (1979)2 S.C.C. 409: 44 S.T.C. 43: (1979)2 S.C.J. 185: A.I.R. 1979 S.C. 621. [Paras. 7, 8, 9]
State of Kerala v. Gwalior Rayon Silk Manufacturing (Weaving) Company Limited, (1974)1 S.C.R. 671: A.I.R. 1973 S.C. 2734. [Para. 7]

M/s. Jit Ram Shiv Kumar v. State of Haryana, A.I.R. 1980 S.C. 1285. [Para. 8]

Union of India v. Godfrey Philips India Limited, (1985)4 S.C.C. 369: (1986)1 Comp.L.J. 46: (1986)59 C.C. 536: A.I.R. 1986 S.C. 806. [Para. 9]

Indian Express Newspapers (Bombay) P. Limited v. Union of India, (1985)1 Comp.L.J. 115: (1985)1 S.C.C. 641: (1985)2 S.C.R. 287: A.I.R. 1986 S.C. 515. [Para. 10]

Pournami Oil Mills v. State of Kerala, A.I.R. 1987 S.C. 590. [Para. 11]

Delhi Cloth and General Mills Limited v. Union of India, A.I.R. 1987 S.C. 2414. [Para. 11]

M/s. Vij Resins Pvt. Ltd. v. State of Jammu and Kashmir, A.I.R. 1989 S.C. 1629. [Para. 12]

Tapti Oil Industries v. State of Maharashtra, A.I.R. 1984 Bom. 161 (F.B.). [Para. 13]

Union of India v. Hindustan Platinum Private Limited, (1989)44 E.L.T. 443 (Bom.). [Para. 14]

Union of India v. Chakra Tyres Limited, (1990)45 E.L.T. 3 (Mad.). [Para. 15]

Union of India v. J.K. Industries Limited, (1990)49 E.L.T. 511. [Para. 16]

Orissa Cement Limited v. Superintendent, Customs and Central Excise, (1992)61 E.L.T. 256. [Para. 17]

Vikrant Tyres Limited v. Union of India, (1992)61 E.L.T. 381. [Para. 17]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and *mandamus* calling for the records of the respondents culminating in the communication No.57/1/92/E.II/230, dated 14.5.1992 of the 2nd respondent and to direct the second respondent to grant the licence for the value of US \$ 75,000 against letter of credit No.41-24324-45031 made available to the petitioner for which the application is pending with the second respondent and for export of musical instrument parts and koto parts a value of US \$ 1,29,000 against pending application firm, contracts placed by overseas buyers for which ready and took is available.

R. Krishnamurthy, Senior Counsel, for *V. Soundararajan* and *T.S. Thiagarajan*, for Petitioner.

M. Kalyanasundaram, Additional Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER: Petitioner is a recognised exporter. The main product of export is musical instruments part made out of red-sanders wood. The petitioner is a partnership firm and it has installed the necessary infrastructures for carrying on its export business by setting up a production facility at No.1, Rizwan Road, Madhavaram, Red Sanders Wood is widely used by Japanese for making the musical instrument known as "Shamisen". It is used for accompaniment of two types of vocal music. Export of red-sanders musical instruments and chips and powder and koto parts had been taking place for the past several years from the Tamil Nadu and in the Import-Export Policy prevailing upto 31.3.1992. The export of the said product was on the basis of the licence issued by the Chief Controller of Imports and Exports, New Delhi. In fact the policy was for the period from April, 1990 to March, 1993. But in March, 1992 the policy was suddenly changed and a new policy was framed for five years commencing from 1.4.1992 ending with 31.3.1997. Under the new policy, a prohibition is introduced against export of red-sanders in any form. The petitioner made a representation to the authorities submitting that there is a confusion in understanding the new policy and the matter should be clarified as to whether musical instruments and other chips etc., which were being exported by the petitioner could be exported even after the coming into force of the new policy. Second respondent sent a reply on 14.5.1992 under reference No.57/1/92/E.11/230. The reply is to the effect that the export of red-sanders in any form is prohibited under the new policy and the petitioner will not be entitled to continue the export. A reference is made in the letter to Serial Number 7 of Part I, Serial No.44 of Part V of Negative List of Exports in the Export and Import Policy, 1992-97. Aggrieved thereby, the petitioner has filed this writ petition for quashing the said communication dated 14.5.1992 and for the issue of a *mandamus* directing the respondents to grant a licence for the value of U.S. \$ 75,000 against the letter of credit No.41-2432445-031. The petitioner on the basis of the earlier

policy had been entering into contracts with foreign buyers for sale of musical instruments parts. Under one such contract, a letter of credit was opened on 21.2.1992 by Sanwa Bank, Osaka, in favour of Indian Overseas Bank, Madras. It is an open irrevocable letter of credit and the amount mentioned is U.S. \$ 1,00,000. The date of expiry for negotiations was mentioned as July 31, 1992. But, it was subsequently extended upto the end of December, 1992. As per the said letter of credit, it covers musical instrument parts made of red-sanders as approved by buyer.

2. There is no dispute before me as to the genuineness of the letter of credit or the correctness of the claim made by the petitioner that it had entered into contracts with foreign buyers prior to the introduction of the new policy, 1992-97.

3. Item No.7 of Part I of Negative List of Exports reads thus:

"Wood and Wood products in the form of logs, timber, stumps, roots, barks, chips, powder, flakes, dust, pulp and char coal".

Item No.44 of Part V is in the following words:

"Processed timber of all species excluding sandalwood and redsanders wood". Though the petitioner attempted to make a distinction between "wood" and "timber" and contend before the authorities that there was a distinction between "wood" and "timber" and that the position was not clear with regard to export of parts of musical instruments made of red-sanders, such a contention is not urged before me and I do not think it necessary to go into the same. In so far as this case is concerned, it is contended by the petitioner that the Principle of promissory estoppel would apply and the petitioner having acted upon the representations made by the respondents in the earlier policy which was to be in force till 31.3.1993 and suffered detriment by availing loans from financial institutions for the purpose of purchasing red-sanders and manufacturing parts of musical instruments, it is not open to the respondents to change the policy all on a sudden and prevent the petitioner from fulfilling its contractual obligations. It is also contended that the new policy is unreasonable and arbitrary in so far as it relates to red-sanders already cut and converted into parts of musical instruments. Per contra, the contention of learned Central Government Standing Counsel is that the principle of promissory estoppel will not apply to a legislative action of the

respondents. According to him, the import and export policy is a result of a legislative function exercised by the Government under Sec.3 of the Imports and Exports (Control) Act 1947 (hereinafter referred to as 'the Act'). Learned counsel contends that inasmuch as the policy is legislative in character, the Court is not entitled to apply the doctrine of promissory estoppel or any kind of estoppel and prevent the respondents from enforcing the said policy during the period for which the policy is enacted.

4. Sec.3(1) of the Act empowers the Central Government to make provisions by publishing an order in the official gazette prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order.

(a) the import, export carriage costwise or shipment as ships stores of goods of any specified description.

It is not necessary to refer to the remaining parts of Sub-sec.(1) of Sec.3 of the Act, Sub-sec.(2) of Sec.3 refers to Sec.11 of the Customs Act and declares that all goods to which any order under Sub-sec.(1) applies shall be deemed to be goods of which the import or export has been prohibited under Sec.11 of the Customs Act and all the provisions of that Act shall have effect accordingly. Sub-sec.(3) of Sec.3 contains a *non obstante* clause and it reads.

"Notwithstanding anything contained in the aforesaid Act, the Central Government, may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into India."

5. Learned Central Government Standing Counsel contends that when the Central Government exercises its powers under Sec.3 of the Act, it is legislative in character and the import and export policy will be outside the doctrine of promissory estoppel. He placed reliance on the judgment of Full Bench of Delhi High Court in *Bengal Exports (P) Limited v. Union of India*, A.I.R. 1983 Del. 445. It was held that the doctrine of promissory estoppel can be invoked only against executive actions of the Government, but not against legislature. It was also held that the Export Control Orders issued under Sec.3 of the Act are examples of

delegated legislations and they can be amended from time to time and they being legislative in nature, promissory estoppel cannot be pleaded against the provisions of such orders. The Full Bench has referred to the earlier rulings of the Supreme Court and proceeded on the footing that the Supreme Court had held categorically in *Union of India v. Anglo Afghan Agencies*, A.I.R. 1968 S.C. 718, that the Export Control Orders were Legislative in character.

6. In *Union of India v. Anglo Afghan Agencies*, A.I.R. 1968 S.C. 718, the Court was concerned with a scheme published by the Textile Commissioner. The scheme was called the Export Promotion Scheme and it provided incentives to exporters of woollen goods. By the scheme as extended to exports to Afghanistan, the exporters were invited to get themselves registered with the Textile Commissioner for exporting woollen goods and it was represented that the exporters will be entitled to import raw materials of the total amount equal to 100 per cent of the f.o.b. value of the exports. Under Clause 10 of the Scheme, the Textile Commissioner had authority, if it was found that a fraudulent attempt was made to secure an import certificate in excess of the true value of the goods exported to reduce the import certificate. The Court held that it could not be assumed merely because the Import Trade Policy was general in terms and dealt with the grant of licences for import of goods and related matters that it was statutory in character. It was held further that even though the case did not fall within the terms of Sec.115 of the Indian Evidence Act, it was still open to a party who had acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise was not recorded in the form of a formal contract as required by Art.299 of the Constitution. The following passage in the judgment is relevant:

"The defence of executive necessity was not relied upon in the present case in the affidavit filed on behalf of the Union of India. It was also not pleaded that the representation to the Scheme was subject to implied term that the Union of India will not be bound to "grant the import certificate for the full value of the goods exported if they deem it inexpedient to grant the certificate. We are unable to accede to the contention that the executive necessity releases

the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up, no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of powers derived from the law-common or statute, the courts will be competent to and indeed would be bound to protect the rights of the aggrieved citizen."

"The orders which the Central Government may issue in exercise of the power conferred by Sec.3 of the Imports and Exports Control Act may be executive or legislative....It cannot be assumed merely because the Imports Trade Policy is general in terms and deals with the grant of licences for import of goods and related matter, it is statutory in character. The Imports and Exports (Control) Act, 1947, authorises the Central Government to make provisions".

"Prohibiting, restricting or otherwise controlling import, export, carrings etc., of the goods and by the Imports (Control) Order, 1965, dated December 7, 1955 and by the provisions which were sought to be repealed restrictions already imposed. The order was clearly legislative in character. The Import Trade Policy was evolved to facilitate the mechanism of the Act and the orders issued thereunder. Even granting that the Import Trade Policy notifications were issued in exercise of the power under Sec.3 of the Imports and Exports (Control) Act, 1947, the order as already observed authorised the making of executive or administrative instructions as well as legislative directions. It is not the form of the order, the method of its publication or the source of its authority, but its substance, which determines its true character."

7. In *Motilal Padampat Sugar Mills Co. (P.) Ltd. v. State of U.P.*, (1979)2 S.C.C. 409: 44 S.T.C. 43: (1979)2 S.C.J. 185: A.I.R. 1979 S.C. 621, the Apex Court dealt with in detail the doctrine of promissory estoppel and its applicability as against the executive actions of the State. The Court observed:

"It may also be noted that promissory estoppel cannot be invoked to compel the Government

or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel. (*State of Kerala v. Gwalior Rayon Silk Manufacturing (Weaving) Company Limited*, (1974)1 S.C.R. 671: A.I.R. 1973 S.C. 2734.)

8. A discordant note was struck by a Bench of two Judges of the Supreme Court in *M/s. Jit Ram Shiv Kumar v. State of Haryana*, A.I.R. 1980 S.C. 1285. After referring to certain earlier decisions, it was observed that the principle of estoppel was not available against the Government in exercise of legislative, sovereign or executive power. Referring to an earlier judgment in *Motilal Padampat Sugar Mills v. State of U.P.*, (1979)2 S.C.C. 409: 44 S.T.C. 43: (1979)2 S.C.J. 185: A.I.R. 1979 S.C. 621, the Bench expressed its disagreement with the principles laid down in that case.

9. The position was clarified by a Bench of three Judges in *Union of India v. Godfrey Philips India Limited*, (1985)4 S.C.C. 369: (1986)1 Comp.L.J. 46: (1986)59 C.C. 536: A.I.R. 1986 S.C. 806. The Bench overrules the earlier judgment of two Judges in *M/s. Jit Ram Shiv Kumar v. State of Haryana*, A.I.R. 1980 S.C. 1285, holding that it was not right on the part of the Bench of two Judges to express their dissent with the judgment in the earlier case and they should have referred the matter to a larger Bench, if they wanted to differ. Reiterating the proposition laid down in *Motilal Padampat Sugar Mills v. State of U.P.*, (1979)2 S.C.C. 409: 44 S.T.C. 43: (1979)2 S.C.J. 185: A.I.R. 1979 S.C. 621, the Court observed as follows:

"Of course we must make it clear and that is also laid down in *Motilal Padampat Sugar Mills v. State of U.P.*, (1979)2 S.C.C. 409: 44 S.T.C. 43: (1979)2 S.C.J. 185: A.I.R. 1979 S.C. 621, that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make.

We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in *Motilal Padampat Sugar Mills v. State of U.P.*, (1979)2 S.C.C. 409; 44 S.T.C. 43; (1979)2 S.C.J. 185; A.I.R. 1979 S.C. 621, and we find ourselves wholly in agreement with what has been said in that decision in this point."

10. In *Indian Express Newspapers (Bombay) P.Limited v. Union of India*, (1985)1 Comp.L.J. 115; (1985)1 S.C.C. 641; (1985)2 S.C.R. 287; A.I.R. 1986 S.C. 515, a Bench of three Judges considered the validity of a notification under Sec.25 of the Customs Act, observing that it is a piece of subordinate legislation, the court held that such subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. It was observed that a subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned and in addition, it may further be questioned on the ground that it was contrary to the provisions of the statute under which it was made and that it was contrary to some other statute and it was unreasonable not in the sense of not being reasonable but in the sense that it is manifestly arbitrary. The following passage in the judgment is relevant for the purpose of this case.

"A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case, the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of

mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc., etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be "taken into consideration by the statute, or say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Art.14 or Art.19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account the relevant circumstances which the court considers relevant."

"We do not, therefore, find much substance in the contention that the Courts cannot at all exercise judicial control over the impugned notifications. In cases where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a notification issued under Sec.25(1) of the Customs Act, 1962, is required to be laid before Parliament under Sec.159 thereof does not make any substantial difference as regards the jurisdiction of the Court to pronounce on its validity."

11. In *Pournami Oil Mills v. State of Kerala*, A.I.R. 1987 S.C. 590, Government Order granting package of concessions to new small scale industries in order to boost industrialisation, was issued under the Kerala General Sales Tax Act and the Court held that the Small Scale Units set up in response to the said order and before the passing of a subsequent order withdrawing the concessions, were entitled to raise the plea of estoppel against the Government. In *Delhi Cloth and General Mills Limited v. Union of India*, A.I.R. 1987 S.C. 2414, it was held that for the applicability of the doctrine of estoppel, it was not necessary for the promises to incur damage, prejudice or detriment and prove the same, but it was enough if he had altered his position on the basis of the representation made earlier. In that case, an assurance was given by the railways as regards the charges for carriage of Napptha. When such an assurance was later changed

by a subsequent notification, the court held that the principle of estoppel would apply.

12. In a recent case considered by the Apex Court, namely, *M/s. Vij Resins Pvt. Ltd. v. State of Jammu and Kashmir*, A.I.R. 1989 S.C. 1629, the Court has made an observation to the effect that even in cases of legislations, it would be possible to invoke the principle of estoppel. No doubt the observation was obiter in the particular case, because findings on facts were favourable to the premises. The following passage is significant:

"Petitioners in writ petition No.794 of 1986 had claimed that pursuant to the arrangement entered into between them and the State following the invitation by the State they had invested Rs.1.68 crores in shape of plant and machinery and 63 lacs of rupees by way of land and buildings. The petitioner in the other two cases stated that investments had been made by them as well. The petitioners were invited to set up industries by assuring them supply of the raw material. They changed their position on the basis of representations made by the State and when the factories were ready and they were in a position to utilise the raw materials, the impugned Act came into force to obliterate their rights and enabled the State to get out of the commitments. We are inclined to agree with the submissions made on behalf of the petitioners that the circumstances gave rise to a fact situation of estoppel. It is true that there is no estoppel against the legislature and the vires of the Act cannot be tested by "invoking the plea, but so far as the State Government is concerned the rule of estoppel does apply to the precedents of this Court are clear. It is unnecessary to go into that aspect of the matter as in our considered opinion the impugned Act suffers from the vice of taking away rights to property without providing for compensation at all and is hit by Art.31(2) of the Constitution.

13. In so far as High Courts are concerned, it has been consistently held by several Courts that the principle of estoppel would apply to statutory notifications issued by the Government in exercise of powers conferred by statute. A Full Bench of Bombay High Court has in *Tapti Oil Industries v. State of Maharashtra*, A.I.R. 1984 Bom. 161, held that the scheme announced by the Government to give incentives for establishing industrial units in

backward areas, would give rise to principle of estoppel, if the person concerned had taken all steps for obtaining the eligibility certificates and before he could get the same, the Government changes its policy. The Full Bench also adverted to Art.14 of the Constitution of India and observed that the said Article confers a right of equality and violation of the same could always be challenged under Art.226 of the Constitution.

14. In *Union of India v. Hindustan Platinum Private Limited*, (1989)44 E.L.T. 443 (Bom.), a Division Bench of Bombay High Court applied the principle of estoppel as against the enforcement of a public notice issued by the Central Government, pursuant to the import and export policy framed under the provisions of the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order, 1955.

15. A Division Bench of this Court has in *Union of India v. Chakra Tyres Limited*, (1990)45 E.L.T. 3 (Mad.), made a distinction between an enactment passed by the Legislature in exercise of its plenary powers on one hand and a piece of delegated legislation brought into existence by the Government in exercise of the power conferred by a statute on the other and held that a delegated legislation cannot get any immunity from the applicability of the doctrine of promissory estoppel.

16. The Rajasthan High Court has considered the matter in detail in *Union of India v. J.K. Industries Limited*, (1990)49 E.L.T. 511 and held that the notification issued by the Central Government in exercise of the powers conferred on it by Rule 8(1) of the Central Excise Rules, 1944 is not a legislative act and the Government is bound by the promissory estoppel in respect thereof, where the party has altered its position on the basis of the said notification. The relevant authorities on the subject have been discussed and the principle has been culled out therefrom by the Bench.

17. In *Orissa Cement Limited v. Superintendent, Customs and Central Excise*, (1992)61 E.L.T. 256, a Division Bench of Orissa High Court has applied the principle of promissory estoppel as against a notification issued under the Customs Act. In *Vikrant Tyres Limited v. Union of India*, (1992)61 E.L.T. 381, the Karnataka High Court upheld the plea of promissory estoppel as against the notification issued under the provisions of the Central Excise Rules.

18. Thus, it is clear that the uniform view taken by all the High Courts and the Supreme Court is that the doctrine of promissory estoppel will be available as against the Governmental action, though the said action has been taken in exercise of statutory power. There is also no doubt that the principle of estoppel is available against subordinate legislations and delegated legislations which cannot be placed on the same pedestal as an enactment passed by the Legislature in exercise of the plenary powers. In the present case, the petitioner has produced the relevant records to show that it has acted in pursuance of the representations contained in the policy which was announced for the period from 1st April, 1990 to 31st March, 1993 and incurred detriment by borrowing loans from financial institutions. Apart from that the petitioner has already prepared musical instruments, parts by applying the necessary manufacturing process and made them ready for export. At that stage, the policy of the Government is changed and undoubtedly the principle of promissory estoppel would apply against the enforcement of new policy.

19. There is also no doubt in this case that the policy is arbitrary and unreasonable in so far as the goods which are ready for export in the converted form are concerned. In the counter affidavit filed by the respondents it is stated as follows:

"The issue of licence for export of musical instrument parts and koto parts made out of red-sanders wood is not possible as the present policy bans the export of any product made out of red-sanders wood as an ecological conservation measure." (*underlining mine*)

In the counter it is stated in the same paragraph, namely paragraph 4, that in order to make the conservation measure totally effective, the Government has banned chips and powder of red-sanders wood also. There is nothing on record before me to show that cutting of red-sanders wood has been banned by the Government or any authority at any time. If that has not been done, the imposition of new policy would be like cutting the trunk of a tree while sitting on the branch of the tree. If the cutting of the trees is not banned and the citizens are allowed to manufacture musical instrument parts out of cut trees, there is no substance in the contention that the export of instrument parts of the export of wood in any form has been banned after the trees are cut and

converted into parts of musical instruments. In that case, there is no question of maintaining ecological balance or conserving ecological surroundings in the particular area. In the present case, the petitioner has categorically stated in the affidavit that necessary process has already been undergone and the goods are ready for export. The petitioner has also prayed for the issue of a licence on that footing and at this stage, if the export is stopped, it will not help in any way the respondents in maintaining or conserving ecological balance in the area.

20. Learned Standing Counsel for the Central Government refers to the provisions of Sec. 11 of the Customs Act and places reliance on Clause 2(k), (m) and (v) thereof. In the said clause the purposes for which the Central Government is entitled to issue notifications prohibiting import or export of goods are, (1) the protection of human, animal or plant life or health; (2) the conservation of exhaustible natural resources and (3) any other purpose conducive to the interests of the general public. The respondents cannot bring the ban on export of manufactured goods under any of the aforesaid clauses. In the course of arguments, learned Central Government Standing Counsel contended that it is open to the petitioner to sell the goods inside the country and they need not be exported to a foreign country. The said argument only cuts the nose of the respondents themselves. If the export of goods is banned for the purpose of conserving ecological measure, there is no substance in contending that the goods could be sold inside the country. The purpose for which the policy is alleged to have been brought into force will not be served in any manner by the sale of goods inside the country, if the trees are cut and converted into such goods. Thus, the new policy in so far as it prohibits export of goods which are ready for export is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy.

21. In the result, the petitioner is entitled to get the relief prayed for in the writ petition, namely, a direction to the respondents to grant a licence for the value of U.S. \$ 75,000 as against the letter of credit No. 41-2432445-031. There will be a *mandamus* directing the respondents to issue a licence for the export of the goods to the value of U.S. \$ 75,000 against the aforesaid letter of credit No. 41-2432445-031. The writ petition is allowed to the

extent indicated above. There will be no order as to costs.

B.S. ----- *Petition allowed.*

* [The Judgment is confirmed by the First Bench in W.A.No.127 of 1993. The Judgment of the bench dated 4.3.1993 is published in this issue itself. - Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *V.Ratnam, Actg.C.J. and
Somasundaram, J.*

W.A.No.127 of 1993 4th March, 1993.

**The Union of India represented by the Secretary,
Ministry of Commerce, New Delhi and another**
...Appellants

v.

**Rizwan International represented by its Managing
Partner, M.Moosa** ...Respondent.

(A) *Evidence Act (I of 1872), Sec.115 - Doctrine of promissory estoppel, if can be applied against enforcement of new policy issued under a statute.*

(B) *Imports and Exports (Control) Act (XVIII of 1947), Sec.3 - Order under prohibiting export of red sanders wood and its products in any form - Held unreasonable and arbitrary in so far as it prohibits export of finished goods which are ready for export.*

The respondent is a recognised exporter, its main products of export being musical instrument parts made out of red sanders wood. It was granted licence to export under the policy prevailing upto March, 1993. But, however in March 1992, the policy was changed suddenly under a new policy for 5 years from 1.4.1992. Under the policy, export of red sanders wood in any form is prohibited. After his representations failed, the respondent filed a writ petition contending that as he has made ready the musical instrument parts, under the existing policy, he would be put to loss due to the new policy, that the authorities were estopped from applying the policy to him and that the policy was arbitrary and unreasonable. In the writ

petition it is held that the doctrine of promissory estoppel would apply and that the policy was arbitrary and unreasonable insofar as it prohibited the export of the goods made ready. In appeal, *Held:* The new policy issued in exercise of the power under Sec.3 of the Act, whether such policy is considered as a Governmental action taken the exercise of the statutory power or as subordinate or delegated legislation, the doctrine of promissory estoppel can be applied against the enforcement of the new policy on the facts and circumstances of a given case. [Para. 15]

It must be pointed out that there is nothing on record to show that cutting of red sanders wood has been banned by the Government or any authority at any time. Therefore, as rightly pointed out by the learned single Judge, if the cutting of the red sanders tree is not banned and the citizens are permitted to manufacture musical instruments parts out of the cut trees, there is no substance in the contention that export of musical instruments parts or the export of red sanders wood in any form has been banned after the trees are cut and converted into parts of musical instruments as an ecological conservation measure. In view of the specific case of the respondent that the necessary manufacturing processes have been completed and that the musical instruments parts made out of the red sanders wood are kept ready for export, it is not known how the refusal to issue licence for the export of the finished goods will help in maintaining or conserving the ecological balance in the area. In the above circumstances, the court has no hesitation in accepting the contention of the learned counsel for the respondent that the new policy in so far as it prohibits export of finished goods which are ready for export is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy. [Para. 17]

Cases referred to:

Bansal Exports (P) Ltd. v. Union of India, A.I.R. 1983 Del. 445. [Para. 5]

Union of India v. Anglo Afghan Agencies, (1968)2 S.C.R. 366: A.I.R. 1968 S.C. 718. [Para. 8]

Indian Express Newspapers (Bombay) Private Ltd. v. Union of India, (1985)1 S.C.C. 641: (1985)2 S.C.R. 287: (1986)159 I.T.R. 856: A.I.R. 1986 S.C. 515. [Para. 9]

Pournami Oil Mills etc. v. State of Kerala, A.I.R. 1987 S.C. 590. [Para. 10]

Vij Resins (P) Ltd. v. State of J. & K., (1989)3 S.C.C.

115: A.I.R. 1989 S.C. 1629. [Para. 11]

Union of India v. Chakra Tyres Ltd., (1990)45 E.L.T. 3. [Paras. 12, 13]

Tapti Oil Industries v. State of Maharashtra, A.I.R. 1984 Bom. 161 (F.B.). [Para. 13]

Union of India v. Hindustan Platinum (P) Ltd., (1989)44 E.L.T. 443. [Para. 13]

Union of India v. J.K. Industries Limited, (1990)49 E.L.T. 511. [Para. 13]

Orissa Cement Limited v. Superintendent, Customs and Central Excise, (1992)61 E.L.T. 256. [Para. 13]

Vikrant Tyres Ltd. v. Union of India, (1992)61 E.L.T. 381. [Para. 13]

Appeal under Clause 15 of the Letters Patent against the Order of Srinivasan, J., dated 13.11.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.10444 of 1992 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the respondents culminating in the communication No.57/1/92EII/ 230 dated 14.5.1992 of the second respondent and to direct the second respondent to grant the licence for the value of U.S.Dollars 75000 against letter of credit No.41-2432445- 031 made available to the petitioner for which the application is pending with the second respondent and for export of musical instrument parts and koto parts in a value of U.S. \$ 1,29,000 against pending applications/firm contracts placed by overseas buyers for which ready stock is available.

M.Kalyanasundaram, Additional Central Government Standing Counsel, for Appellant.

P. Krishnamurthy, Senior Advocate for *T.B.Ramamurthi*, for Respondent.

The Judgment of the Court was delivered by *Somasundaram, J.*: This writ appeal has been filed against the order in W.P.No.10444 of 1992 issuing a writ of *mandamus* directing the appellants herein to issue a licence for the export of goods to the value of U.S.Dollars 75,000 against the letter of credit No.41-2432445- 031.

2. The respondent, a partnership firm, is recognised exporter. The main products of export is musical instruments parts made out of red sanders wood. The respondent has installed the necessary infrastructures for carrying on its export business by setting up a production facility at No.1, Rizwan Madhavaram. Red sanders wood is widely used by Japanese for making the musical instrument known as "Shamisen". Export of red sanders musical

instruments and chips powder and koto-parts had been taking place in the past several years from Tamil Nadu as per the exports and imports policy prevailing up to 31.3.1992. The export of the said products was on the basis of the licence issued by the Chief Controller of Imports and Exports, New Delhi. As a matter of fact, the export and import policy was announced for the period from April, 1990 to March, 1993. But, however, in March, 1992 the export-import policy was suddenly changed and a new policy was framed for 5 years commencing from 1.4.1992 and ending with 31.3.1997. Under the export import policy for the period from 1.4.1992 to 31.3.1997, (hereinafter referred to as new policy) a prohibition is introduced against export of red sanders in any form. The respondent made a representation to the authorities and wanted to know from them as to whether musical instruments and other chips made out of red sanders wood, which was being exported by the respondent, could be exported, even after the coming into force of the new policy. The second appellant sent a reply dated 14.5.1992 stating that the export of red sanders wood in any form is prohibited under the new policy and that the respondent will not be entitled to continue export. Aggrieved by the reply dated 14.5.1992 sent by the second appellant, the respondent filed W.P.No.10444 of 1992 for quashing the said communication dated 14.5.1992 and for the issue of a writ of *mandamus* directing the appellants herein to grant a licence for the value of U.S. Dollars 75,000 against the letter of credit No.41-2432445 -031. According to the respondent, on the basis of the earlier export and import policy, the respondent had been entering into contract with various buyers for sale of musical instruments parts. Under one such contract, a letter of credit was opened on 21.2.1992 by Sanwa Bank Limited, Osaka, in favour of Indian Overseas Bank, Madras. It is an open irrevocable letter of credit and the amount mentioned in U.S. Dollars 1,00,000. The date of expiry for negotiation was mentioned as 31.7.1992. The period was subsequently extended up to the end of December, 1992. The said letter of credit covers the musical instrument parts made of red sanders as approved by the buyer.

3. The genuineness of the letter of credit or the correctness of the claim made by the respondent that it had entered into contract with a foreign buyer prior to the introduction of the new policy is

not in dispute. Sec.3(1) of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as the Act), empowers the Central Government to make provisions by publishing an order in the Official Gazette prohibiting, restricting or otherwise controlling in all cases or in specified clauses of cases the import, export carriage costwise or shipment as ships stores of goods of any specified description. Sub-sec.(2) of Sec.3 of the Act refers to Sec.11 of the Customs Act and declares that all goods to which any order under Sub-sec.(1) applies shall be deemed to be goods of which the import or export has been prohibited under Sec.11 of the Customs Act and all the provisions of that Act shall have effect accordingly. Sub-sec.(3) of Sec.3 reads thus:

"Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose condition on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into India."

The export and import policy is made in exercise of the power under Sec.3 of the Act. Under the earlier export and import policy for the years 1990 to 1993, export of red sanders wood, was not prohibited. It is only clause 7 of Part I of the Negative List of the new policy which prohibits export of wood and wood products in the form of logs, timber, stumps, roots, barks, chips, powder, flakes, dust, pulp and charcoal. Therefore, under the new policy, even chips, powder of red sanders are prohibited. Serial Number 44 of Part V of the Negative List of the new policy allows export of processed timber alone of all species, excluding sandalwood and red sanders wood.

4. Before the learned single Judge, who heard the writ petition, it was contended on behalf of the respondent herein, that the principle of promissory estoppel would apply to the case of the respondent and the respondent having acted upon the representations made by the appellants in the earlier export and import policy which was to be in force till 31.3.1993 and suffered detriment by availing loans from financial institutions for the purpose of purchasing red sanders and manufacturing parts of musical instruments, it is not open to the appellants to change the export and import policy all on a sudden and prevent the respondent from fulfilling its contractual obligation. It was further

contended before the learned single Judge, that the new policy is unreasonable and arbitrary in so far as it relates to red sanders wood already cut and converted into parts of musical instruments. The learned single Judge on a consideration of the entire facts and circumstances of the case, found that the respondent has acted in pursuance of the representations contained in the earlier policy, which was announced for the period from 1.4.1990 to 31.3.1993 and suffered detriment by borrowing loans from financial institutions. The learned Judge also found that on the basis of the earlier policy the respondent has already prepared musical instruments parts by applying the necessary manufacturing process and made them ready for export and at that stage, the export import policy of the Government is changed and therefore, the principle of promissory estoppel would apply against the enforcement of the new policy. The learned Judge further found that the new policy is arbitrary and unreasonable in so far as the goods which are ready for export in the converted form are concerned. Consequently, the learned single Judge held that the respondent is entitled to get the relief prayed for in the writ petition and issued a writ of *mandamus* directing the appellants herein to issue a licence for the export of the goods to the value of U.S. Dollars 75,000 against the letter of credit No.41-2432445 - 031. This writ appeal is directed against the order of the learned single Judge.

5. Before us, Mr.M.Kalyanasundaram, learned Additional Central Government Standing Counsel, appearing for the appellants, contended that the principle of promissory estoppel will not apply to a legislative action. According to the learned counsel for the appellants, the export and import policy is made in exercise of a legislative function under Sec.3 of the Act and therefore, the doctrine of promissory estoppel cannot be invoked against such legislative action and the appellants cannot be prevented from enforcing the new policy during the period for which the new policy is enacted. In support of this contention, the learned counsel relied on the decision of the Delhi High Court in *Bansal Exports (P) Ltd. v. Union of India, A.I.R. 1983 Del. 445*. In that decision, it was held that the doctrine of promissory estoppel can be invoked only against executive actions of the Government, but not against legislature. In that decision, the Full Bench of the Delhi High Court further held

that the export control orders issued under Sec.3 of the Act are examples of delegated legislation and they can be amended from time to time and they being legislative in nature, the doctrine of the promissory estoppel cannot be invoked against the provision of such orders.

6. *Per contra*, Mr.R.Krishnamurthy, learned Senior Counsel appearing for the respondent, reiterated the contentions urged on behalf of the respondent before the learned single Judge and submitted that the principle of promissory estoppel will apply to the case of the respondent, because on the representations made by the appellants in the earlier policy, which was to be in force upto 31.3.1993, the respondent suffered detriment by purchasing red sanders wood after taking loans from financial institutions and by manufacturing parts of musical instruments and therefore, it is not open to the appellants to change the policy even before 31.3.1993 and prevent the respondent from fulfilling its pre-ban contractual obligations. The learned counsel for the respondent also contended that the new policy in so far as it prohibits export of goods, which are ready for export, is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy.

7. Let us first examine the position of law on the question whether the doctrine of promissory estoppel can be invoked against the Governmental action taken in exercise of statutory power and similarly against subordinate legislations and delegated legislations, before examining the question whether the respondent can invoke the principle of promissory estoppel against the action of the appellants in the present case.

8. In *Union of India v. Anglo Afghan Agencies*, (1968)2 S.C.R. 366: A.I.R. 1968 S.C. 718, in the year 1962 the Central Government promulgated the Export Promotion Scheme providing incentives to exporters of woollen textiles and goods. It provided for the grant to an exporter, certificates to import raw materials of a total amount equal to 100% of the F.O.B. value of his exports. Clause 10 of the Scheme provided that the Textile Commissioner could grant an import certificate for a lesser amount if he is satisfied, after holding an enquiry, that the declared value of the goods exported is higher than the real value of the goods. The Scheme was extended to exports of woollen textiles and goods to Afghanistan. The respondents exported

woollen goods to Afghanistan and were issued an Import Entitlement Certificate by the Textile Commissioner not for the full F.O.B., value of the goods exported, but for a reduced amount. The respondents made representations to the Central Government, but the Government confirmed the orders of the Textile Commissioner. The respondents then filed writ petitions in the High Court. The High Court set aside the orders of the Textile Commissioner and Government, and held that the respondents were entitled under the Scheme to obtain import licences for an amount equal to 100% of the F.O.B. value of their exports, unless it was found on enquiry duly made under clause 10 of the Scheme that the respondents had by 'over-invoicing' the goods disintitiled themselves to the import licences of the full value; and that the Textile Commissioner without making any such enquiry, proceeded upon his 'subjective satisfaction' that the respondents had 'over invoiced' the goods exported; and the Government also acted in a similar manner in dealing with the representation of the respondents. In the appeal, before the Supreme Court it was contended *inter alia*, on behalf of the Union of India that the Export Promotion Scheme was administrative in character, that it contained mere executive instructions issued by the Central Government to the Textile Commissioner and created no enforceable rights in the exporters, who exported their goods in pursuance of the Scheme and that it imposed no obligations upon the Government to issue import certificates. The Supreme Court while repelling the above contention of the appellant, held as follows:

"This case is, in our judgment a clear authority that even though the case does not fall within the terms of Sec.115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution."

In the above decision, the Supreme Court while holding that the Government is not exempt from liability to carry out the representations made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, observes thus:

"It cannot be assumed merely because the Import Trade Policy is general in terms and deals with the grant of licences for import of goods and related matters, it is statutory in character. The Imports and Exports (Control) Act, 1947 authorises the Central Government to make provisions prohibiting, restricting or otherwise controlling import, export, carriage, etc. of the goods and by the Imports (Control) Order, 1955, dated December 7, 1955 and by the Provisions which were sought to be repealed restrictions were already imposed. The order was clearly legislative in character. The Import Trade Policy was evolved to facilitate the mechanism of the Act and the orders issued thereunder. Even granting that the Import Trade Policy notifications were issued in exercise of the power under Sec.3 of the Imports and Exports (Control) Act, 1947, the order as already observed authorised the making of executive or administrative instructions as well as legislative directions. It is not the form of the order, the method of its publication or the sources of its authority, but its substance, which determines its true character."

9. In *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, (1985)1 S.C.C. 641: (1985)2 S.C.R. 287: (1986)159 I.T.R. 856: A.I.R. 1986 S.C. 515, the Supreme Court considered the validity of a notification issued under Sec.25 of the Customs Act. The Apex Court, while holding that the notification issued under Sec.25 of the Customs Act, is a piece of subordinate legislation held as follows:

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature, subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable

and *ultra vires*."

In paragraphs 76 and 77 of the above judgment, the Supreme Court further observes thus:

"A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts, which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Art.14 or Art.19(1)(a) of the Constitution. It cannot, no doubt be done merely on the ground that it is not unreasonable or that it has not taken into account relevant circumstances which the Court considers relevant.

77. We do not, therefore, find much substance in the contention that the courts cannot at all exercise judicial control over the impugned notifications. In cases where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a notification issued under Sec.25(1) of the Customs Act, 1962 is required to be laid before Parliament under Sec.159 thereof does not make any substantial difference as regards the jurisdiction of the court to pronounce on its validity."

10. In *Pournami Oil Mills etc. v. State of Kerala*, A.I.R. 1987 S.C. 590, the Government by an order deemed to have been made under Sec.10 of the Kerala General Sales Tax Act, granted package of concessions to new Small Scale Industries in order to boost industrialisation in the State of Kerala. On the basis of the said Government Order, several small scale units were set up. Subsequent to

the setting up of the small scale units, the Government issued another order withdrawing the concessions granted under the earlier order. The Supreme Court while accepting the case of the small scale units, based on the doctrine of promissory estoppel held as follows:

"It is not disputed that the first order namely, the one dated 11.4.1979 gave more of tax exemption than the second one. The second notification withdrew the exemption relating to purchase tax and confined the exemption from sales tax to the limit specified in the proviso of the notification. All parties before us who in response to the order of April 11, 1979 set up their industries prior to 21.10.1980 within the State of Kerala would thus be entitled to the exemption extended and/or promised under that Order. Such exemption would continue for the full period of five years from the date they started production."

11. In *Vij Resins (P) Ltd. v. State of J. & K.*, (1989) 3 S.C.C. 115: A.I.R. 1989 S.C. 1629, the Apex Court while dealing with the question whether it is possible to invoke the principle of promissory estoppel against legislature, observed thus:

"25. Petitioners in W.P.No.794 of 1986 had claimed that pursuant to the arrangement entered into between them and the State following the invitation by the State they had invested Rs.1.68 crores in shape of plant and machinery and 63 lacs of rupees by way of land and buildings. The petitioner in the other two cases stated that investments had been made by them as well. The petitioners were invited to set up industries by assuring them supply of the raw material. They changed their position on the basis of representations made by the State and when the factories were ready and they were in a position to utilise the raw materials, the impugned Act came into force to obliterate their rights and enabled the State to get out of the commitments. We are inclined to agree with the submissions made on behalf of the petitioners that the circumstances gave rise to a fact situation of estoppel. It is true that there is no estoppel against the legislature and the vires of the Act cannot be tested by invoking the plea but so far as the State Government is concerned the rule of estoppel does apply and the precedents of this Court are clear. It is unnecessary to go into that aspect of the

matter as in our considered opinion the impugned Act suffers from the vice of taking away rights to property without providing for compensation at all and is hit by Art.31(2) of the Constitution."

12. In *Union of India v. Chakra Tyres Ltd.*, (1990) 45 E.L.T. 3, a Division Bench of this Court has taken the view that the theory of promissory estoppel is not applicable only when the power is exercised under plenary power of the Legislature and not when the power is exercised under a delegated legislation.

13. The learned single Judge following the ratio of the decisions of the Apex Court and that of the Division Bench of this Court in *Union of India v. Chakra Tyres Ltd.*, (1990) 45 E.L.T. 3, referred to above and after referring to the principles laid down by; (a) the Bombay High Court in *Tapti Oil Industries v. State of Maharashtra*, A.I.R. 1984 Bom. 161 (F.B.) and in *Union of India v. Hindustan Platinum (P) Ltd.*, (1989) 44 E.L.T. 443 (D.B.); (b) the Rajasthan High Court in *Union of India v. J.K. Industries Limited*, (1990) 49 E.L.T. 511 (D.B.); the Orissa High Court in *Orissa Cement Limited v. Superintendent, Customs and Central Excise*, (1992) 61 E.L.T. 256 (D.B.) and (d) the Karnataka High Court in *Vikrant Tyres Ltd. v. Union of India*, (1992) 61 E.L.T. 381, correctly summarised the position of law, on the question of promissory estoppel in paragraph 18 of his order in the following terms:

"Thus, it is clear that the uniform view taken by all the High Courts and the Supreme Court is that the doctrine of promissory estoppel will be available as against the governmental action, though the said action has been taken in exercise of statutory power. There is also no doubt that the principle of estoppel is available against subordinate legislations and delegated legislations which cannot be placed on the same pedestal as an enactment passed by the Legislature in exercise of the plenary powers".

14. We fully endorse the above conclusion arrived at by the learned single Judge.

15. In view of the above settled position of law, we are unable to accept the contention of the learned counsel for the appellants that the doctrine of promissory estoppel cannot be invoked against the action of the appellants in the present case, because the export and import policy issued under

Sec.3 of the Act has to be taken as a legislative action. The new policy issued in exercise of the power under Sec.3 of the Act, whether such a policy is considered as a governmental action taken in exercise of the statutory power, or as subordinate or delegated legislation, the doctrine of promissory estoppel can be applied against the enforcement of the new policy on the facts and circumstances of a given case.

16. Coming to the facts of the present case, the materials on record go to show that the respondent had acted in pursuance of the representations contained in the earlier export and import policy, which was announced for the period from 1.4.1990 to 31.3.1993 to the effect that the export of red sanders in any form was permitted and entered into contract with foreign buyers for the export of musical instruments parts made out of red sanders wood and under one such a contract entered into by the respondent with a foreign purchaser, products worth U.S. Dollars 1,00,000 were agreed to be exported and for which purpose an open and irrevocable letter of credit No.41-2432445 -031 dated 21.2.1992 was opened, the beneficiary being the respondent herein. The materials on record further disclose that pursuant to the said contract, as part fulfilment of the same, U.S. Dollars 25,000 worth of products which were prepared and kept ready for export against the letter of credit referred to above, were already exported to Japan in March, 1992 after obtaining the necessary export licence. It is also seen from the records that the respondent has suffered detriment by borrowing loans from financial institutions for manufacturing musical instrument parts and for keeping them ready for export and at that stage the export and import policy though was considered to be in force till 31.3.1993, was suddenly changed by framing the new policy for a period of 5 years from 1.4.1992 to 31.3.1997. Under the new policy, the export of red sanders wood in any form is prohibited with effect from 1.4.1992. In the above circumstances, as rightly pointed out by the learned single Judge, it has to be held that the principle of promissory estoppel would apply against the enforcement of the new policy and, therefore, it is not open to the appellants to change the policy even before 31.3.1993 and prevent the respondent from fulfilling its pre-ban contractual obligations.

17. Now, let us consider the other contention of

the learned counsel for the respondent that the new policy is unreasonable and arbitrary in so far as it relates to red sanders wood already cut and converted into parts of musical instruments and which are kept ready for export. It is seen from the counter affidavit filed on behalf of the appellants herein in the writ petition that, issue of licence for export of musical instruments parts and koto-arts made out of red sanders wood is not possible as the present policy bans export of any product made out of red sanders wood as an ecological conservation measure. It is further stated in the counter affidavit that in order to make the conservation measure totally effective, the Government has banned the export of chips and powder of red sanders wood also. It must be pointed out that there is nothing on record to show that cutting of red sanders wood has been banned by the Government or any authority at any time. Therefore, as rightly pointed out by the learned single Judge, if the cutting of the red sanders tree is not banned and the citizens are permitted to manufacture musical instruments parts out of the cut trees, there is no substance in the contention that export of musical instruments parts or the export of red sanders wood in any form has been banned after the trees are cut and converted into parts of musical instruments as an ecological conservation measure. In view of the specific case of the respondent that the necessary manufacturing processes have been completed and that the musical instruments parts made out of the red sanders wood are kept ready for export, it is not known how the refusal to issue licence for the export of the finished goods will help in maintaining or conserving the ecological balance in the area. In the above circumstances, we have no hesitation in accepting the contention of the learned counsel for the respondent that the new policy in so far as it prohibits export of finished goods which are ready for export is unreasonable and arbitrary and it has no nexus whatever with the proclaimed object of the new policy. Therefore, the learned Judge is quite right in issuing a writ of *mandamus* directing the appellants to issue a licence for the export of the goods to the value of U.S. Dollars 75,000 against the letter of credit No.41-2432445 - 031.

18. For all the reasons stated above, we cannot take exception to the view taken by the learned single Judge and we see no infirmity in the order of the learned single Judge warranting interference

at out hands in this writ appeal. There is no merit in the writ appeal and it is liable to be dismissed. Accordingly, the writ appeal is dismissed. No costs. We, however, direct the licence to be issued to the respondents on or before 5th April, 1993.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mishra and S.M.Ali Mohamed, JJ.

O.S.A.No.284 of 1992 7th January, 1993.

V.A.Padmanabhan and others ...Appellants
v.

M.A.Narasimhan and others ...Respondents.

Transfer of Property Act (IV of 1882), Sec.53-A - Transferee in possession of property in part performance of contract - Rights of - If entitled to injunction on allegation of threat of dispossession.

Possession in part performance of a contract is a right falling under Sec.53-A of the Transfer of Property Act and the transferee in possession of the property in part performance of the contract can defend his possession in case there is any attempt by the transferor or any person claiming through him to dispossess him. That the transferee can do either as a plaintiff or a defendant. Ordinarily, the issue as to possession or any other right under Sec.53-A of the Act shall be consequential or a dependent issue upon the issue of the existence of the contract itself and with the decree for the enforcement of the contract, there can be an order for maintaining the possession of the agreementholder/transferee. In considering, however, whether injunction should be granted on the plea of possession and allegation of threat to dispossession to a person holding the agreement for sale, the rule will be as one reiterated almost in every case that to a plaintiff claiming only an equitable right, the court would not ordinarily grant temporary injunction pending the suit on the basis of Sec.53-A of the Act as mere possession of the plaintiff of the suit property on the date of

the suit cannot be taken to enable him to obtain injunction from the Court. The passive equity as provided under Sec.53-A of the Act shall be available as a shield against any interference by the defendant who is either the transferor himself or any other person claiming through the transferor but would not become active equity without there being something more. [Para. 16]

Cases referred to:-

H.P.Thirupathi v. Dayananthi Devi, A.I.R. 1988 Pat. 123. [Para. 10]

Kalyanpur Lime Works v. State of Bihar, A.I.R. 1951 Pat. 226. [Para. 11]

Krishnamurthy v. Paramasiva, A.I.R. 1981 Mad. 310. [Paras. 11, 12, 13]

Venkat Dharmaji v. Viswanathan, A.I.R. 1983 Bom. 413. [Para. 13]

Muktalakeshi Dawan v. Haripada Mazumdar, A.I.R. 1988 Cal. 25. [Para. 13]

S.F.Munuswami v. Erusa Goundar, A.I.R. 1975 Mad. 25. [Paras. 13, 14]

Yenugu Achayya v. Venkatasubba Rao, A.I.R. 1957 A.P. 854. [Paras. 13, 14]

Mahadevamma v. B.S.Linga Raju, (1981) 2 Kam.L.J. 388. [Para. 13]

Tshering Wongdi v. Sonam Pinto, A.I.R. 1981 Sikkim 1. [Para. 13]

Appeal under Clause 15 of the Letters Patent and O.36, Rule 11 of O.S.Rules against the Order of Thanikkachalam, J. dated 27.11.1992 and made in the exercise of the Ordinary Original civil jurisdictions in O.A.No.353 of 1992 in O.S.A.No.535 of 1992.

K.Ravi, for Appellants.

S.A.Rajan, for Respondent No.1.

The Judgment of the Court was delivered by Mishra, J.: The impugned order, according to us, has no infirmity and the appeal deserves to be dismissed *in limine*. However, since learned counsel for the appellants has persuaded us to consider the appellants' case for injunction, in particular, on the plea of possession as an independent relief of injunction, we have heard him at length and we record our opinion in some detail.

2. According to the plaintiff-appellants, the respondents executed an agreement on 12.3.1981 to sell the suit property for a total consideration of Rs.6,00,000 and received an advance of Rs.1,50,000 from the plaintiffs/appellants by way of part performance of the agreement by the plaintiffs and put them in possession of a portion of the

Schedule mentioned property, which was vacant, and further authorised the plaintiffs/appellants to recover vacant possession of the remaining portions occupied by third parties. It was agreed that the sale would be completed within three months after possession of the entire suit property was obtained or within six months from the date of execution of the agreement whichever was later. The plaintiffs who got possession over a portion of the suit property from the defendants-respondents also recovered possession of some more portions, but some portions are still in the occupation of the third parties. In order to evict those persons, the plaintiffs needed authority and money and accordingly they demanded, in writing, execution and registration of the sale deed from the respondents, but the respondents in their reply, without denying the execution of the agreement, raised a demand to a sum of Rs.9,00,000 instead of Rs.4,50,000. The plaintiffs thus moved the Court alleging that the cause of action for the suit arose at Madras on 12.3.1981 where and when the suit agreement was executed, where the suit property is situate and on which date the plaintiffs paid a sum of Rs.1,50,000 to the defendants under the said agreement, and on which date the defendants put the plaintiffs in possession of the vacant portion of the suit property in part performance of the suit agreement, besides other facts.

3. The plaintiffs/appellants then filed an application for an interim injunction seeking to restrain the respondents from intermeddling with in any manner with the corpus of the property mentioned in the schedule to the Judge's summons and from interfering with the appellants' possession and enjoyment of the suit property.

4. The trial court first granted an interim injunction as prayed for on 29-4-1991. After notice and after hearing the respondents the trial court, however, dismissed the application for injunction.

5. The defendants-respondents have accepted the agreement for sale of the suit property for a consideration of Rs.6,00,000 and also admitted that they have received a sum of Rs.1,50,000 as advance from the appellants. They have, however, disputed the appellants' case that they were put in possession of certain portion of the suit land by the respondents. They have stated that the entire property is under the occupation of slum-dwellers. There are more than 50 huts over the suit land. They tried to remove the encroachment, but they

could not do so. They then decided to sell the suit land for a consideration of Rs.6,00,000 in the year 1981 to the appellants. After the agreement, the appellants made some attempt to vacate the slum-dwellers by directly dealing with them. This gave rise to civil litigations. Many of them are still pending. The respondents were willing to provide all legal assistance for vacating the slum-dwellers from the suit land provided it was at the cost of the appellants. The appellants could not obtain possession from any of the third parties and they were unable to vacate the persons who were in possession of the suit land. They (appellants) orally said to the respondents that they were not interested in purchasing the suit land. They prevented several prospective purchasers from purchasing the suit property and even instigated the slum-dwellers to deny the title of the respondents and attempted to create a cloud over their title. They have alleged, "even though the agreement was entered into on 12.3.1981, the applicants never performed their part of the contract till now".

6. Learned single Judge has, however, stated in the order:

"According to the plaintiffs, by way of part performance of the contract, they were put in possession by the defendants and, therefore, the defendants should not be permitted to disturb their possession".

But, learned counsel for the appellants has chosen to shift the stand before us and urged on the basis of the pleadings and on the admitted facts as mentioned in the agreement that possession of certain portion of the suit land was delivered by the respondents to the appellants and they obtained possession of some other parts of the suit land from the slum-dwellers, the Court should consider whether there is a *prima facie* case and balance of convenience for granting injunction.

7. We shall for the reason of the above shift in the contention of the learned counsel for the appellants, proceed first to consider whether as to what may be in a suit for specific performance of a contract of money in which by way of part performance possession is delivered by the defendants to the plaintiffs, a plea to maintain *status quo* to preserve possession of the agreement-holder and when can such a plea be allowed and then whether independent of a claim of possession in terms of Sec.53-A of the Transfer of Property Act, possession can be taken notice of as good and

conclusive for determination of the question as to a *prima facie* case and balance of convenience. Before we do so, we may take notice of the law on the subject. The Act relating to transfer of property (Transfer of Property Act) has defined 'transfer of property' to mean an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons and 'to transfer property' is to perform such act. The word 'living person' in this section, it is explained, includes a company or association or body of individuals, whether incorporate or not. It then says in Sec.6 thereof that the property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force and enlisted in this such items of property which cannot be transferred. This comprehensive enactment is in Group B and in this group lies the provision as to part performance of a contract to transfer for consideration any immovable property. It is Sec.53-A which reads as follows:

"53-A. *Part performance*: Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall

affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

8. To raise thus a plea based on possession taken in part performance of the contract against the transferor or any person claiming under him, it is necessary that the possession of the property or any part thereof is taken in part performance of the contract or the transferee, being already in possession, continues in possession in part performance of the contract and the transferee has done some act in furtherance of the contract. This plea will be available against the transferor or any person claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract, a plea which is available to defend or protect the possession obtained or continued in part performance of the contract.

9. Sec.54 of the Transfer of Property Act defines 'sales of immovable property' and also defines 'contract for sale' in these words: 'a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property'. Considering these two provisions in the Act, a Bench of this Court, to which one of us was a member, in the case of *T.Parameshwari and others v. S.S.Investments Private Ltd., and another, O.S.A.Nos.122 and 123 of 1991 judgment dated 24.10.1991*, has stated as follows:

"These two provisions together thus leave no manner of doubt that there is no right under a contract for sale except to see for its enforcement and that possession in part performance of the contract in the hands of the transferee shall also not defeat any transfer to a third party who had no notice of the contract or of the part performance thereof.

Courts in India, have been repeatedly asked to examine the extent of the right under Sec.53-A of the Transfer of Property Act. They have almost on every time reiterated that in legal parlance, this provision cannot be used as a sword. It can be only used as a shield. It cannot be used as a weapon of offence. It can be used only as a shelter of defence under law."

10. A Bench of the Patna High Court in *H.P.Thirupathi v. Dayananthi Devi, A.I.R. 1988*

Pat. 123 has observed thus:

"The claim of the petitioner in this application is that after the execution of the deed of agreement, he continued to remain in possession not *qua tenant* but *de hors* the tenancy in his own right as a transferee. To put it in legal parlance, Sec.53-A of Transfer of Property Act was sought to be used as a sword and not a shield as a weapon of offence rather than a shelter of defence under the law. That is entirely not permissible under the statutory and salutary provisions of Sec.53-A of Transfer of Property Act, which does not envisage eviction under the Rent Control Act to be inhibited by filing of a prior suit by the adversary claiming a title on the basis of an alleged deed of agreement of sale and desirous of getting a decree for specific performance of contract therein. It is well-settled that Sec.53-A of Transfer of Property Act can be used only as a shield and not as a sword."

11. Yet another Bench decision of the Patna High Court has been referred to by the learned Judges of this Court in the case *T.Parameshwari and others v. S.S.Investments Private Ltd., and another, O.S.A.Nos.122 and 123 of 1991 Judgment dated 24.10.1991*, in which relying upon *Kalyanpur Lime Works v. State of Bihar, A.I.R. 1951 Pat. 226*, it is stated: .

"I do not think that an order of injunction should be granted in order to disturb the *status quo*. There cannot be any doubt that the appellant has no right to immediate possession, and the appellant's title would accrue after the contract has been specifically performed. In referring to English decisions on the subject, one must bear in mind that the English doctrine of an equitable estate, on a contract for sale does not apply in India, and the law of India does not recognise such equitable estates... I think that the learned Advocate-General is putting his case too high when he contends that where a *prima facie* case has been made out by showing that there is a fair question for trial, a temporary injunction must follow restraining the contracting defendant from dealing with the property. Where an order of injunction should or should not issue will, in my opinion, depend on the facts of the case, and the court must also consider the questions of irreparable or serious injury and balance of

convenience. I do not think that there is any such irreparable or serious injury from which the appellant is required to be saved by an order of injunction in the present case".

"We have also been addressed on the question whether the appellant can be sufficiently compensated by money in respect of any loss suffered before specific performance of the contract. The learned Advocate General has drawn our attention to Sec.12, Explanation and Secs.54 and 56, Specific Relief Act (old Act) Court's comment). He has also drawn our attention to Sec.19, Specific Relief Act, which says that any person suing for the performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. Personally, I do not see any reason why the appellant cannot be compensated by money for any loss he may suffer, provided the appellant is entitled to compensation in addition to specific performance; under the law, as to which I express no opinion at this stage. If, as I have already stated, there is no question of stopping the quarrying operations during the pendency of the suit for specific performance, the question of compensation will remain whether an order of injunction is or is not passed. It cannot surely be urged that in a suit for specific performance the plaintiff is entitled to ask, during the pendency of litigation, that the defendant in whom the legal title still vests should be restrained from using the property. If the plaintiff were so entitled, then in a suit for specific performance, the defendant would be required to vacate the property which he had contracted to sell or lease. That surely cannot be the law".

This decision of the Patna High Court in the words of the Division Bench of this Court in the case of *T.Parameshwari and others v. S.S.Investments Private Ltd., and another, O.S.A.Nos.122 and 123 of 1991 Judgment dated 24.10.1991*, is worthy companion of a Bench decision of this Court in *Krishnamurthy v. Paramasiva, A.I.R. 1981 Mad. 310*. In that case, the law has been stated rather elaborately and for us it is particularly relevant because one question argued by the learned counsel for the appellants has been answered therein. This Court in *Krishnamurthy v. Paramasiva, A.I.R. 1981 Mad. 310*, has stated:

"Apart from this factual aspect there is one

other impediment in the way of the respondent from getting the relief of temporary injunction in his suit for specific performance. Even assuming that the plaintiff was given possession of the suit properties on the date of the agreement of sale by the first defendant, the question still is whether the plaintiff could claim the relief of injunction based on Sec.53-A of the Transfer of Property Act. Admittedly, in this case the plaintiff has not yet got title to the properties. He can get title to the properties only if he succeeds in the suit and obtains sale deed in respect of the properties. It is well-established that an agreement of sale does not create any interest in the property which is the subject matter of the agreement. Therefore, the plaintiff if at all can claim only an equitable right based on Sec.53-A of the Transfer of Property Act. Therefore, the relief of temporary injunction claimed by the plaintiff pending the suit can be taken to have been claimed by the plaintiff only on the basis of Sec.53-A of the Transfer of Property Act as mere possession of the plaintiff of the suit properties on the date of the suit cannot be taken to enable him to obtain injunction from the Court. If that will be the case even a trespasser in possession can approach the court and ask for an injunction to protect his possession. Therefore, we have to treat the plaintiff's application for temporary injunction pending the suit as an application for claiming equitable relief under Sec.53-A of the Transfer of Property Act. If the application for injunction is so treated, then the plaintiff cannot be granted the relief for the reason that Sec.53-A can be used to resist the defendant when he seeks to dispossess the plaintiff. It is well-established that Sec.53-A of the Transfer of Property Act provides for a passive equity and not for an active equity. Therefore, the plaintiff cannot seek his relief of injunction in a court of law based on Sec.53-A of the Transfer of Property Act though he can use Sec.53-A to debar the transferor who has agreed to sell the property from claiming any right in respect of that property. It is well-established that the right conferred by Sec.53-A is a right available to the defendant only to protect his possession and on the basis of that section the defendant cannot claim any title and it merely operates as a bar to

the plaintiff to ascertain his title. Though in English law the equity of part performance is an active equity which the plaintiff in possession may enforce in an independent suit or proceeding, such as a suit for specific performance or for an injunction to restrain dispossession, such equity is not available after the amendment of the Transfer of Property Act in the year 1929. In this case, the plaintiff used his right under Sec.53-A not as a shield but as a sword. Hence, the plaintiff is not entitled to the injunction sought for by him".

12. The principle of law in the case of *Krishnamurthy v. Paramasiva*, A.I.R. 1981 Mad. 310, is a complete answer to the plea of injunction of the appellants and the learned single Judge has made no mistake in this behalf in following the rule that a plea based on possession in part performance of a contract cannot be permitted to be used as a sword to assert a right against the owner of the property as the contract or possession as above in itself creates no interest in or charge on the property.

13. In the case of *T. Parameshwari and others v. S.S. Investments Private Ltd. and another*, O.S.A. Nos. 122 and 123 of 1991 Judgment dated 24.10.1991, however, this Court has taken notice of the dissent to the view expressed by this Court in *Krishnamurthy v. Paramasiva*, A.I.R. 1981 Mad. 310, by a learned single Judge of the Bombay High Court in *Venkat Dharmaji v. Vishwanatha*, A.I.R. 1983 Bom. 413 and *Muktalakeshi Dawan v. Haripada Mazumdar*, A.I.R. 1988 Cal. 25. The Bombay decision only says that there is no bar under the Civil Procedure Code which can be invoked in support of the proposition that a plaintiff suing for specific performance, cannot obtain any injunction whatsoever and that if there is no bar in the Civil Procedure Code and if the application for temporary injunction is solely governed either by O.39, Rules 1 and 2 or in the alternative by invoking the inherent powers of the Court under Sec.151, C.P.C. there is no justification to treat such an application as an application for relief of injunction as provided by Sec.53-A of the Transfer of Property Act. Having stated so, the learned single Judge of the Bombay High Court has chosen to record his dissent from the view taken by this Court in the case of *Krishnamurthy v. Paramasiva*, A.I.R. 1981 Mad. 310. But the Bench in deciding the case of *T. Parameshwari and others v. S.S. Investments Private Ltd. and another*,

O.S.A.Nos.122 and 123 of 1991 Judgment dated 24.10.1991, has commented upon the Bombay High Court's judgment thus:

"But, then there is absolutely no reason stated why the learned Judge thought that he should dissent from the view taken by the Madras High Court. No one can question the jurisdiction of this Court to grant temporary injunction even in a suit for specific performance of a contract for sale. While applying to exercise the discretions, it would necessarily take the Court to the various provisions governing the suit for specific performance of a contract for sale of immoveable property. Presence of power alone is not enough to exercise it. It is the exercise which is controlled by judicial discipline. Courts who always advise that all adjudications must conform to the rules of equity and discretions must always be exercised within the bounds of law, cannot merely because there is no power to do a thing would do that thing. The decision in *Kalyanpur Lime Works v. State of Bihar*, A.I.R. 1951 Pat. 226 and the decision in *Krishnamurthy v. Paramasiva*, A.I.R. 1981 Mad. 310 would appear to take a principled stand to be applied in determining as to whether there is any balance of convenience in favour of the plaintiff or it is in favour of the defendant. There is no reason why we constituting a co-ordinating Bench do not follow the law stated by this Court in *Krishnamurthy v. Paramasiva*, A.I.R. 1981 Mad. 310. The Calcutta High Court's view is not essentially in conflict with the view taken by the High Court of Patna and the High Court of Madras. In *Muktalakeshi Dawan v. Haripada Mazumdar*, A.I.R. 1988 Cal. 25, all that is stated is:

"It is true that the doctrine of *lis pendens* as enunciated in Sec.52 of the Transfer of Property Act takes care of all *pendente lite* transfers; but it may not always be good enough to take fullest care of the plaintiff's interest *vis-a-vis* such a transfer. Where a suit is one for specific performance of sale in respect of the suit property and if the defendant is not restrained from selling the property to a third party and accordingly a third party purchases the same *bona fide* for value without any notice of the pending litigation and spends a huge sum on the improvement thereof or for construction thereon, the equity in his favour may intervene

to persuade the court to decline, in the exercise of its discretion, the equitable relief of specific performance to the plaintiff at the trial and to award damages only in favour of the plaintiff".

This is fully in tune with what this Court has said in the case of *T.Parameshwari and others v. S.S.Investments Private Ltd. and another*, *O.S.A.Nos.122 and 123 of 1991 Judgment dated 24.10.1991*, referred supra, that no one can question the jurisdiction of this Court to grant temporary injunction even in a suit for specific performance of a contract for sale. But while applying to exercise the discretions, it would necessarily take the court to the various provisions governing the suit for specific performance of a contract for sale of immoveable property. Presence of power alone is not enough to exercise it. It is the exercise which is controlled by judicial discipline. We, however, regard it to the credit of the learned counsel for the appellants that he has drawn our attention to a Bench decision of this Court in *S.F.Munuswami v. Erusa Goundar*, A.I.R. 1975 Mad. 25. That case related to immovable properties belonging to one of the parties who entered into a contract with another as the guardian of the plaintiff in the suit and another who were minors for sale of the properties for consideration within two years. Based on the agreement which the plaintiff's father had with the owner, he was put in possession in part performance. The owner, however, transferred the properties to another. The plaintiff then filed a suit for declaration of title and for an injunction from interference. The Trial Court found that there was an agreement of sale and the plaintiff had been put in possession and on that basis granted the prayers asked for in the plaint. The first appellate Court proceeded upon the view that Sec.53-A of the Transfer of Property Act by itself did not confer title on the plaintiff and that, therefore, he cannot raise the claim on the basis of part performance of title. As to possession, it considered that the finding of the trial Court was unnecessary and discharged the finding. When the matter came up in second appeal, a learned single Judge of this Court stated:-

"After going through the documentary and oral evidence in the case, I am of opinion that the appellant continued to be in possession of the suit properties in spite of the sale in favour of defendants 2 and 3 by the 1st defendant".

Relying upon a Judgment of the Andhra Pradesh

High Court in *Yenugu Achayya v. Venkatasubba Rao*, A.I.R. 1957 A.P. 854, the learned single Judge held that the appeal should be allowed and the trial court's decree should be restored. The Bench in the Letters Patent Appeal said that it seems to us that the judgment in second appeal cannot be supported. There can be no doubt, therefore, as to the ratio of the judgment of the Court that the judgment of the first appellate court correctly decided that a person cannot base his claim on a contract for specific performance or possession delivered in part performance thereof. But there are certain observations in the said judgment which need a little examination. After stating that the judgment in second appeal cannot be supported, the learned Judges have in deciding *S.F. Munuswami v. Erusa Goundar*, A.I.R. 1975 Mad. 25 have said, Subba Rao, C.J. (as he then was) observed:

"It is settled law that under Sec.53-A of the Transfer of Property Act, no title passes to a transferee. He cannot file a suit for declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him".

"Venkatadri, J., was, therefore, not right in allowing the appeal which would mean that he was giving declaration of title sought for. As pointed out in *Yenugu Achayya v. Venkatasubba Rao*, A.I.R. 1957 A.P. 854, which is representative of a large volume of judicial opinion, Sec.53-A of the Transfer of Property Act does confer some right on the transferee, if the conditions of that section are fully satisfied, and what is that right is also clear from the provisions of Sec.53-A. The right is to have the transferor or any person claiming under him debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. This right can be enforced by the transferee always as a shield and not as an independent claim either in the capacity of plaintiff or defendants, that is to say, he cannot ask for title basing his claim on the fact that he has fulfilled the conditions of Sec.53-A. But he can, as a shield, ask for protection of the right envisaged by Sec.53-A by debarring, in other words, by getting an injunction against the transferor and those claiming under him from interfering with his possession".

There is a more categorical statement than the one in the case of *S.F. Munuswami v. Erusa Goundar*, A.I.R. 1975 Mad. 25 in the judgment of the Karnataka High Court in *Mahadevamma v. B.S. Linga Raju and others*, (1981) 2 Karn.L.J. 388 and another of the Sikkim High Court in *Tshering Wongdi v. Sonam Pinto*, A.I.R. 1981 Sikkim 1. Like the Judgment in the case of *S.F. Munuswami v. Erusa Goundar*, A.I.R. 1975 Mad. 25, a Division Bench Judgment of this Court, no exception is taken in either of these two judgments to the rule that the equity of part performance under Sec.53-A of the Transfer of Property Act is a passive equity, figuratively expressed as a shield, and not a sword and the person claiming its benefit thus cannot use it as an action to assert a right. What is pointed out in the Karnataka judgment is that the doctrine of part performance in England was an innovation to relieve the hardship of the provisions of the Statute of Frauds which by its 4th section provided that no action could be brought upon a contract for the sale of land unless the contract was in writing and signed by the party to be charged. Answering, however, the question whether a transferee as plaintiff is entitled to invoke Sec.53 of the Transfer of Property Act for the purpose of protecting his possession, the Karnataka High Court has said that a suit by a transferee in possession as part performance under Sec.53-A for the possessory remedy of injunction protecting his possession is a mere defence suit in which the plaintiff is merely using the shield of passive equity and referred to a large number of judgments of different Courts. In the words of the learned Judges,

"We are in respectful agreement with the reasoning of Chief Justice Subba Rao (as he then was) in *Yenugu Achayya v. Venkatasubba Rao*, A.I.R. 1957 A.P. 854 and of the other decisions which take that view. An action for the possessory remedy of an injunction, by the transferee against the transferor, in protection of the possession, had in part performance of the agreement, is essentially a defensive action in which the transferee merely wields the shield of passive equity. The opposite view taken in *Shankargoud's case* and in *Muniyamma's case* in our opinion, cannot be considered to have laid down the correct law."

The Sikkim High Court has in its judgment also proceeded with almost the same reasoning to say

“that it is not also correct to say that in a civil suit it is the plaintiff who is the aggressor and has attacked or is trying to attack the defendant and has, therefore, used a “sword” and it is the defendant who only seeks to protect himself against such aggression and attack and, therefore, has used “shield” only. More often than not, a plaintiff comes to the Court for the protection of his rights and not for enforcement, unless, as I sometime feel, every protection of right involves, in some way or other, an enforcement of that right. If a transferee under Sec.53-A of the Transfer of Property Act cannot rely on his rights under that section as a plaintiff, then, as pointed out by Subba Rao, C.J., all that a transferor is required to do in order to get rid of such a transferee is to dispossess him forcefully and forcibly as in such a case the transferee would not be able to enter the portals of the Court as a plaintiff to seek protection of his rights.”

14. The judgment of this Court in the case of *S.F. Munuswami v. Erusa Goundar*, A.I.R. 1975 Mad. 25 and the Karnataka High Court's decision in the case of *Mahadevamma v. B.S. Linga Raju and others*, (1981) 2 Karn. 388 as well as the Sikkim Court in *Tshering Wongdi v. Sonam Pinto*, A.I.R. 1981 Sikkim 1 are all inspired by the judgment of Subba Rao, C.J., in the case of *Yenugu Achaya v. Venkata Subba Rao*, A.I.R. 1957 A.P. 854. This Andhra Pradesh judgment is categorical on the necessary conditions for the application of Sec.53-A of the Act and says the necessary conditions for the application of the section are: (i) there is a contract to transfer immovable property for consideration, (ii) the contract is signed by or on behalf of the transferor, (iii) the terms can be ascertained with reasonable certainty from the document, (iv) the transferee is put in possession or if he has been already in possession continues in possession, (v) he has done some act in furtherance of the contract, and (vi) the transferee has performed or is willing to perform his part of the contract. If the aforesaid conditions are fulfilled the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of that property.

15. It has been categorically pointed out in this judgment that Sec.53-A does not even if the conditions laid down therein are complied with, convey title to the transferee. Notwithstanding the

section, title can be transferred only after the registration of the document. This provision prevents a transferor from enforcing his rights in respect of the property against the transferee but enables him to sue the transferee upon the covenants contained in the document. In short, the mutual covenants will be operative, though title does not pass under the document”. After laying down the law as above it is stated in this judgment that the section does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff. Under the terms of the section the transferor is debarred from enforcing against the transferee only rights in respect of the property and this bar does not depend upon the array of the parties. The transferee can resist any attempt on the part of the transferor to enforce his rights in respect of the property whatever position he may occupy in the field of litigation. In one sense, it is a statutory recognition of the defensive equity. It enables the transferee to use it as a shield against any attempt on the part of the transferor to enforce his rights against the property. Whether the transferee occupies the position of a plaintiff or a defendant, he can resist the transferor's claim against the property. Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property under Sec.53-A against the transferee. The utility of the section and of the rights conferred thereunder should not be made to depend on the manoeuvring for positions in a Court of Law, otherwise a powerful transferor can always defeat the salutary provisions of the section by dispossessing the transferee by force and compelling him to go to a Court as plaintiff. Doubtless, the right conveyed under the section can be relied upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield.

16. What has been culled out by us leaves no manner of doubt that possession in part performance of a contract is a right falling under Sec.53-A of the Transfer of Property Act and the transferee in possession of the property in part performance of the contract can defend his possession in case there is any attempt by the transferor or any person claiming through him to dispossess him. That the transferee can do either as a plaintiff or a

defendant. Ordinarily, the issue as to possession or any other right under Sec.53-A of the Act shall be consequential or a dependent issue upon the issue of the existence of the contract itself and with the decree for the enforcement of the contract, there can be an order for maintaining the possession of the agreement-holder/transferee. In considering, however, whether injunction should be granted on the plea of possession and allegation of threat to dispossession to a person holding the agreement for sale, the rule will be as one reiterated almost in every case that to a plaintiff claiming only an equitable right, the court would not ordinarily grant temporary injunction pending the suit on the basis of Sec.53-A of the Act as mere possession of the plaintiff of the suit property on the date of the suit cannot be taken to enable him to obtain injunction from the Court. The passive equity as provided under Sec.53-A of the Act will be available as a shield against any interference by the defendant who is either the transferor himself or any other person claiming through the transferor but would not become active equity without there being something more. The doctrine of *lis pendens* as enunciated in Sec.52 of the Act and similar other doctrines will take care of all *pendente lite* transfers. But there may be exceptional cases where the other rules of equity as are noticed in the cardinal principles for grant of injunction will intervene and injunction may be the proper and equitable order. The Bench decision of this Court in the case of *T.Parameshwari and others v. S.S.Investments Private Ltd., and another*, O.S.A.Nos.122 and 123 of 1991 Judgment dated 24.10.1991, which has been affirmed by the Supreme Court in S.L.P.Nos.17926 and 17927 of 1991, has clearly said that no one can question the jurisdiction of the Court to grant temporary injunction even in a suit for specific performance of a contract for sale. But, while applying to exercise the discretion it would necessarily take the court to the various provisions governing the suit for specific performance of a contract for sale of immovable property as well as other equitable doctrines.

17. When we come to the facts of the instant case, however, there is a vague assertion in the plaint that pursuant to the agreement the defendants delivered possession of a certain portion of the land under the conveyance and that the plaintiffs have come in possession of certain other portions

after getting third parties evicted. There is no specific mention on the portions of which the plaintiffs are exercising possession. The agreement is dated 12.3.1981. The suit has been filed in the year 1992. The alleged part performance is of the year 1982, in so far as possession of certain portion delivered by the defendants is concerned and it is not known when and how the plaintiffs obtained possession of the other part of the suit property and what portion is still remaining in the possession of the third parties or in the possession of the defendants. A Court shall allow a passive equity only to a limit and not beyond. It will be necessary in all cases to see if the property is not preserved in a *status quo* who will suffer greater injury, the plaintiff or the defendant? Learned single Judge has adverted to this aspect of the matter also and said as follows:

"The fact remains that according to sale agreement the defendants put the purchasers/plaintiffs in possession of a portion of the suit land and the possession of the rest of the portions are in the hands of the third parties. Neither the plaintiffs nor the defendants can so far able to evict them. Unless the possession of the entire suit land is obtained the plaintiffs would not come forward to complete their part of the contract. The plaintiffs stated that they have already taken steps to vacate the third parties from the suit land. The defendants who entered into a contract for sale of the suit land with the plaintiffs are also unable to proceed any further. The defendants being the owner of the suit property, they are also having their right over the suit property. The plaintiffs claim their right to be in possession on the basis of part performance of the contract under Sec.53-A of the Transfer of Property Act, and if there is any threat to their possession, their possession would be safeguarded. Considering all these points, I am of the opinion that the *prima facie* case and the balance of convenience are not in favour of the plaintiffs/applicants".

18. Learned counsel for the appellants has tried to persuade us to imagine that the transferor and/o others claiming through him have intended to dispossess the plaintiffs. He has also tried to persuade us to hold that even though there are no specific specifications of the land in possession of the plaintiffs available, the defendants know about it and the third parties in possession also are full

aware of it. The Court should order maintenance of *status quo* which, according to learned counsel for the appellants, would serve the ends of justice. We are, however, unable to accept this extreme contention. We have no material before us to hold that plaintiffs are in possession of any portion of the suit property. Learned counsel for the appellants/plaintiffs has tried to show to us the mention of possession of a certain portion delivered to the plaintiffs by the defendants as part performance of the contract. But the defendants have denied any such possession by the plaintiffs, in the written statement that they have filed in the suit. It is not a fit case, in our opinion, for any interference with the impugned order. The appeal is dismissed. No costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Bellie and Abdul Hadi, JJ.*

A.S.No.355 of 1982 8th July, 1992

Ramaswami and others ...Appellants
v.

C.S.Venkitasubramania Iyer ...Respondent.

Tamil Nadu Agriculturists Relief Act (IV of 1938) (as amended by Act VIII of 1973), Secs.8 and 10(2)(ii) - Transfer of Property Act (IV of 1882), Sec.55(4)(b) - Property sold by plaintiff to defendants for Rs.40,000, Rs.20,000 paid in cash - For balance of Rs.20,000, mortgage created in respect of the same property - Suit on foot of mortgage - Amount due whether can be scaled down.

The plaintiff sold the suit properties to the defendants 1 and 2 and their father for Rs.40,000. A sum of Rs.20,000 was paid in cash and for the remaining Rs.20,000, a mortgage deed Ex.A-1 mortgaging the same property was executed as per which the amount shall be paid with interest at 15% per annum within one year. The amount not having been paid, a suit for recovery of the amount was

filed. The defendants pleaded that the amount due under the mortgage stood discharged or must be scaled down as per the provisions of the Tamil Nadu Debt Relief Acts. The trial Court held that the mortgage had been executed as security for the unpaid balance purchase money and that therefore under Sec.55(4)(b) of the Transfer of Property Act, the plaintiff had a charge over the suit property and that such liability was excepted under Sec.10(2)(ii) of the Tamil Nadu Debt Relief Act IV of 1938. In appeal,

Held: There is absolutely nothing to suggest that the mortgage deed Ex.A-1 contains terms that constitute a contract to the contrary so as to exclude the charge under Sec.55(4)(b) of the Transfer of Property Act. The court is clearly of the view that the money due under the mortgage must be considered as unpaid purchase money and therefore it is subject to a charge under Sec.55(4)(b) of the Transfer of Property Act and hence, in view of Sec.10(2)(ii) of Act IV of 1938 the mortgage amount is not liable to be scaled down under Sec.8 of the Act (IV of 1938).

[Paras. 9 & 12]

Cases referred to:

Krishnaswami Aiyangar and another v. Subramanian Ganapatigal and another, 35 M.L.J. 304: 7 L.J. 210. [Para. 6]

K.G.Lakshmana Aiyar and another v. Ramaswami Naicker and others, (1940)2 M.L.J. 827.

[Paras. 8 & 11]

Athiyappa Goundan v. Ramanathan Chettiar, (1940)1 M.L.J. 367. [Paras. 10 & 11]

V.Narayanaswami, for Appellants.

A.K.Kumarasamy, for Respondent.

The Judgment of the Court was delivered by *Bellie, J.*: The only question that arises for consideration in this appeal is whether the amount claimed as mortgage amount due is liable to be scaled down under Sec.8 of the Tamil Nadu Agriculturists Relief Act, IV of 1938. This question has been answered by the trial court in the negative.

2. The suit properties were sold by the plaintiff to the defendants 1 and 2 and their father Appichi Gounder for a sum of Rs.40,000. A sum of Rs.20,000 was paid in cash and for the remaining Rs.20,000 a mortgage deed mortgaging the same property was executed as per which the amount shall be paid with interest at the rate of 15% per annum within a period of one year. Alleging that the mortgage amount is due the suit has been filed.

Appichi Gounder died and his wife has been impleaded as the third defendant on the allegation that she is also liable to pay the mortgage amount from out of the properties left by Appichi Gounder.

3. The defendants pleaded that they have paid a sum of Rs.3,000 towards interest which has not been given credit to in the suit. They further pleaded citing a number of Debt Relief Act that the amount due under the mortgage stands discharged or must be scaled down as per the provisions of the said Acts.

4. The trial court held that it is true that an amount of Rs.3,000 has been paid by the defendants towards interest and therefore it has to be given credit to. As regards the other contentions raised by the defendants the trial court rejected them. As regards the contention raised by the defendants that the mortgage amount is liable to be scaled down under Act 4 of 1938 as amended by Act 8 of 1973 the trial court held that the mortgage has been executed as security for the unpaid balance purchase money and therefore under Sec.55(4)(b) of the Transfer of Property Act, the plaintiff has a charge over the suit property and under Sec.10(2)(ii) such a liability is excepted from scaling down and as such the defendants will have no remedy under Act 4 of 1938. In the result the trial court passed a preliminary decree for the suit amount less Rs.3,000.

5. In the appeal by the defendants Mr. V. Narayanasamy, learned counsel appearing for them submits that the mortgage amount is liable to be scaled down under Act IV of 1938 as amended by Act VIII of 1973 and the finding of the trial court to the contrary is erroneous.

6. Now, as seen above, for the sale consideration of Rs.40,000 Rs.20,000 was paid in cash and for the balance amount of Rs.20,000 due to the plaintiff the suit mortgage was executed mortgaging the same property sold. Clearly the mortgage was executed as security for payment of the balance amount. However, Mr. Narayanasamy would argue that by execution of the mortgage deed the balance of sale consideration would stand discharged and therefore there is no question of there being a charge over the property under Sec.55(4)(b) of the Transfer of Property Act as held by the trial court and hence Sec.10(2)(ii) of Act IV of 1938 is not attracted. In support of this contention the learned counsel relies on a Division Bench decision in *Krishnaswami Aiyangar*

and another v. *Subramania Ganapatigal and another*, 35 M.L.J. 304: 7 L.W. 210, from which the following proposition emerges:

"It is open to a vendor to accept a security from the vendee for part of the purchase money in lieu of cash and thus lose his lien for the unpaid purchase money. But whether he actually does so or whether he accepts the agreement merely as collateral security for future payment is question of the intention of the parties. The intention of the parties must be inferred from the documents of sale itself and the surrounding circumstances giving due weight to the fact, that the vendor has a statutory lien for unpaid purchase money which he can enforce in the absence of an agreement to the contrary".

7. In the instant case the Sale Deed has not been filed. A reading of mortgage deed Ex.A-1 also does not show that the parties had the intention that the execution of the mortgage deed shall be in lieu of the cash consideration, and on account of that the seller-mortgage has lost his lien for the unpaid purchase money. Therefore the said decision cited by the learned counsel does not help him much.

8. There is a later Division Bench decision in *K.G. Lakshmana Aiyar and another v. Ramaswami Naicker and others*, (1940) 2 M.L.J. 827, wherein the vendees of some property executed a mortgage in favour of the vendors for the full amount of the sale price giving as security not only the property sold but also some other property. The principal was repayable after five years but was to carry interest from the date of the bond. In an application to scale down the decree passed in a suit on the mortgage it was held that the terms of the mortgage do not constitute a contract to the contrary so as to exclude the statutory charge under Sec.55(4)(b) of the Transfer of Property Act, and by reason of Sec.10(2)(ii) of Act IV of 1938 to debt is excluded from the scaling down provisions. In this decision the earlier decision in *Krishnaswami Aiyangar and another v. Subramania Ganapatigal and another*, 35 M.L.J. 304: 7 L.W. 210, has been referred to.

9. There is absolutely nothing to suggest that the mortgage deed Ex.A-1 contains terms that constitute a contract to the contrary so as to exclude the charge under Sec.55(4)(b) of the Transfer of Property Act.

10. In another later judgment rendered by a single

judge in *Athiyappa Goundan v. Ramanathan Chettiar*, (1940)1 M.L.J. 367, a mortgage deed was executed for Rs. 7,000 on the 4th November, 1914, the whole of the mortgage debt being the price payable by the mortgagors for lands purchased by them from the mortgagees and subsequent to the mortgage there was a partition among the mortgagors and after the partition the mortgage debt was split up and a subsequent mortgage for Rs. 2,500 of other ancestral properties was executed by the new mortgagor for the portion of the debt that fell to him and a decree was passed on that mortgage. When it was sought to be scaled down under Sec. 19 of the Act IV of 1938 it was held that Sec. 10(2) (ii) of Act IV of 1938 is a sufficient answer to the petition for scaling down. In view of the scheme of the Act and in view of the wording of the clause the giving of other property as security did not affect the applicability of the clause in Sec. 10 as to the lien for unpaid purchase money. 11. The facts in the present case are more in favour of the plaintiff than those in the said latter two decisions *K.G. Lakshmana Aiyar and another v. Ramaswami Naicker and others*, (1940)2 M.L.J. 827 and *Athiyappa Goundan v. Ramanathan Chettiar*, (1940)1 M.L.J. 367, inasmuch as wherein the present suit the very same property has been mortgaged, in the first of the said two decisions besides the property sold some other property also has been mortgaged, and in the second decision entirely different property has been mortgaged.

12. Considering all these we are clearly of the view that the money due under the mortgage must be considered as unpaid purchase money and therefore it is subject to a charge under Sec. 55(4)(b) of the Transfer of Property Act and hence in view of Sec. 10(2)(ii) of Act IV of 1938 the mortgage amount is not liable to be scaled down under Sec. 8 of Act IV of 1938.

13. We thus find no merit in the appeal. Apparently, it is dismissed with costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Ratnam, J.*

A.A.O. Nos. 199, 243, 244, etc. of 1990 and C.R.P. Nos. 847, 849 and 1232 of 1990 and Memo of Cross Objection Nos. 119 of 1992, etc.

1st October, 1992.

The Managing Director, Thanthai Periyar Transport Corporation Ltd., Villupuram

...Appellant

v.

Sellamuthu and others

...Respondents.

(A) *Motor Vehicles Act (IV of 1939), Sec. 110-A - Motor accident - Number of persons dying or sustaining injuries - Number of petition for compensation filed - Claim petitions need not be considered independently.*

Though all the claim petitions arose out of the accident, the tribunal proceeded to consider the claims for compensation independently, examining the same persons in different claim petitions which could have well been avoided. [Para 4]

(B) *Motor Vehicles Act (IV of 1939), Sec. 110-A - Motor Accident - Heavy rain - Trees falling across road - Warning to bus driver at bus-stand - Driver fully aware of weather conditions - Driving bus over narrow bridge - Water was overflowing the bridge - Driver of bus prevailing upon passengers not to get down from bus - Driver held to be rash and negligent.*

In this case, the driver of the bus TML.8364 was fully aware of the weather conditions even as he drove upto Tindivanam and as a prudent, careful and cautious driver, he should have watched out before venturing on to a narrow Tondiyar bridge. Indeed, the driver should not have gone over the narrow bridge at all after having observed that the weather conditions were not favourable and that water was overflowing the bridge. The evidence also discloses that the water was flowing below and over the bridge and was knee deep over the bridge and that certainly would not have given any indication to the driver of the bus that he can safely cross the bridge. The evidence also discloses that the driver of the bus had prevailed upon the passengers not to get down from the bus. Thus, the driver of the bus ignoring the warning

administered about heavy rain and gale, had made bold to take the bus across the narrow bridge over which water was flowing. In doing so, the driver ignored the duty cast on him for the care and safety of the passengers. It is common knowledge that it is dangerous to cross the bridge or a cause-way which is submerged. In this case, the evidence clearly establishes that water was flowing over the bridge by about 2 feet or so and the water was also rising and in such a situation, to drive the bus over the bridge was an extremely dangerous and hazardous operation on the part of the driver. Even before approaching the bridge, the driver having regard to what he observed on the way, viz. heavy rain gale and fallen trees and also the overflow of water on the bridge, ought to have stopped before entering the bridge. There was thus a breach of duty which the driver of the bus owed to the passengers. That the driver proceeded to drive the bus on such a narrow bridge with overflowing of water is by itself an act of negligence and having regard to the available evidence that the bus stopped on the bridge and the passengers were not even allowed to get down from the bus, it is clear that it was only the rash act of the driver in driving the bus and his negligence in not having bestowed care and caution on the safety of the passengers that had caused the accident. [Para. 7]

(C) *Pleadings - Motor accident case - Transport Corporation putting forward plea of act of God - Issue tried as preliminary issue and adverse finding given - Finding becoming final - Corporation, if can re-agitate the plea in appeal proceedings.*

It is not in dispute that even prior to the disposal of the claim petitions by the tribunal, at the instance of the Corporation, the issue, whether the accident was an act of God or was due to the rash and negligent driving of the bus TML. 8364 by its driver was tried as a preliminary issue and a finding adverse to the Corporation had been rendered. That finding had been allowed by the Corporation to become final and not having been challenged in a manner known to law, the Corporation cannot again re-agitate that question in the course of the present proceedings. [Para. 9]

(D) *Motor accidents - Corporation - Quantum - Payment made to claimants on the death of person as ex-gratia - Amount, if can be deducted from amount of compensation payable to them.*

The payment made to the appellants on the death of 'S' was *ex-gratia* and not referable to any claim

as such under the provisions of the Motor Vehicles Act. The tribunal was to error in deducting a sum of Rs.5,000 from out of the compensation amount of Rs.20,000 determined by it.

[Para. 12]

Cases referred to:

Province of Madras v. I.S. and C.Machado, A.I.R. 1955 Mad. 519. [Paras. 5, 8]

S.Vedanthacharya v. Highways Department, 1987 A.C.J. 783 (S.C.). [Paras. 5, 8]

M/s.Chaurasiya and Company v. Smt.Pramila Rao, 1974 A.C.J. 481. [Paras. 5, 8]

A.P.Dorairaj v. State of Madras by Commissioner of Police, 1974 A.C.J. 174. [Paras. 11, 12]

K.Vasantha and three others v. Venugopal Achari and two others, 1987 T.L.N.J. 196. [Paras. 11, 12]

The Court delivered the following

JUDGMENT: These appeals and revisions, at the instance of Thanthai Periyar Transport Corporation Ltd. (hereinafter referred to as 'the Corporation') as well as another appeal and Memorandum of Cross objections at the instance of the claimants, have been preferred against the awards of the Motor Accidents Claims Tribunal (Sub Court) Tindivanam, in M.C.O.P.Nos.65, 17, 69, 201, 58, 117, 55, 159, 17, 54, 141, 292, 294, 304, 16, 59 and 56 of 1986 respectively. In the appeals and revisions filed by the Corporation it has challenged the awards of the tribunal on its conclusion on the question of the negligence of the driver of the bus TML.8364, which plied on the route Madras to Tiruvannamalai on 12.11.1985 and met with an accident resulting in the death of several passengers in the bus. In C.M.A.No.419 of 1990 and the Memorandum of Cross objection Nos.119 of 1992, 138 of 1991, 59 of 1992 and 148 of 1991 in C.M.A. Nos.332, 344, 597 and 798 of 1990 respectively the claimants have challenged the propriety of the amount of compensation awarded and have prayed for the award of higher compensation.

2. Briefly stated, the facts giving rise to these proceedings are as follows: On 12.11.1985, while the bus TML.8364 belonging to the Corporation and plying on route No.122 between Madras and Tiruvannamalai was proceeding between Kona-kampattu and Vallam villages over Tondiyar bridge, the bus was washed away from the bridge by floods and in that, several persons, who were passengers in the bus, lost their lives. The accident, according to the claimants, took place on account of the rashness and negligence of the

driver of the bus TML.8364 belonging to the Corporation. In respect of the death of the passengers who travelled by that bus and also the injuries sustained by some, the claimants prayed for the award of compensation in different amounts.

3. These claims for compensation were resisted by the Corporation, while accepting the accident, on the ground that the accident took place on the Deepavali day, as the passengers asked the driver to drive over the bridge overflowing with water and though the bus was stopped on the bridge, it could not be moved further nor could it be moved backwards because of a lorry TMW.9509 behind and another bus and the engine of the bus had also stopped and at that time, the bridge gave way and the bus TML.8364 as well as the lorry TMW.9509 were swept away and the accident thus took place on account of an act of God and unexpected forces which could not be reasonably anticipated by human agency. Referring to the *ex-gratia* payment of Rs.5,000 made by the Corporation to the dependants of the deceased persons and others, the Corporation also put forward the plea that the compensation claimed was excessive and exorbitant.

4. Though all the claim petitions arose out of one accident, the tribunal proceeded to consider the

claims for compensation independently after examining the same persons in different claim petitions, which could have well been avoided. Considering the oral as well as the documentary evidence so let in in the claim petitions, the tribunal found that the rash and negligent driving of the bus TML.8364 over the bridge by its driver, despite the water flowing over the bridge and below it and knowing that the bridge was likely to be washed away and by not even allowing the passengers to get down from the bus, had caused the accident. Referring to the plea that the accident was an act of God, the tribunal took the view that having regard to the weather conditions that prevailed on the day of the accident, the driver of the bus TML.8364 should not have ventured to proceed over the narrow bridge on Tondiyar river and that the Corporation was also further precluded from raising the plea of act of God in view of the finding given by the tribunal on a preliminary issue on that point in the interlocutory proceedings, which had also become final and in that view, negatived the plea of act of God. In regard to the compensation awardable, the tribunal, on a consideration of the available evidence, determined it as under:

CMA/CRP. No.	MCOP No.	Amount claimed Rs.	Amount awarded. Rs.
C.M.A.199/90 (By Corporation)	65/86	1,00,000	25,000
C.M.A.243/90 (By Corporation)	17/86	1,00,000	15,000
C.M.A.410/90 (By Claimants)	17/86	1,00,000	15,000
C.M.A.244/90 (By Corporation)	69/86	50,000	15,000
C.M.A.246/90 (By Corporation)	201/86	50,000	15,000
C.M.A.305/90 (By Corporation)	58/86	75,000	25,000
C.M.A.307/90 (By Corporation)	117/86	1,00,000	32,400
C.M.A.332/90 (By Corporation)	55/86	15,000	10,000
Cross-objection No.119/92 in C.M.A.332/90 By Claimant)		5,000	

C.M.A.344/90 (By Corporation) Cross-objection 138/91 in C.M.A. 344/90 (By Claimant)	159/86	50,000 35,000	15,000
C.M.A.597/90 (By Corporation) Cross-objection 59/92 in C.M.A. 597/90 (By Claimant)	54/86	15,000 5,000	10,000
C.M.A.599/90 (By Corporation)	141/86	50,000	15,000
C.M.A.796/90 (By Corporation)	292/86	15,000	15,000
C.M.A.797/90 (By Corporation)	294/86	15,000	15,000
C.M.A.798/90 (By Corporation) Cross-objection 148/91 in C.M.A. 798/90 (By Claimant)	304/86	50,000 35,000	15,000
C.R.P.847/90 (By Corporation)	16/86	30,000	6,000
C.R.P.849/90 (By Corporation)	59/86	50,000	5,000
C.R.P.1232/90 (By Corporation)	56/86	15,000	5,500

It is the correctness of the awards so passed by the tribunal that is questioned in the appeals preferred by the Corporation, while in one appeal as well as Memoranda of Cross-Objections, the claimants have prayed for enhancement of compensation as indicated earlier.

5. Mr.R.Krishnamurthi, learned counsel for the Corporation, contended that the accident which took place on 12.11.1985 in which the bus TML.8364 belonging to the Corporation was washed off Tondiyar bridge was an act of God. Elaborating this, learned counsel submitted that the evidence of Annadurai, examined as R.W.2 in M.C.O.P. No.16 of 1986, the conductor of another bus TML.8363, showed that the bridge was safe till about 4.15 p.m. on the day of the accident and the fact that other vehicles had followed the bus TML.8364 established that the bridge was safe and there was therefore, no rashness, or negligence on the part of the driver of the bus TML.8364.

The bridge over Tondiyar river breached on account of heavy and unprecedented floods and that, according to learned counsel, was an act of God. Reference was also made by learned counsel to the decisions reported in *Province of Madras v. I.S. and C.Machado, A.I.R. 1955 Mad. 519* and *S.Vedanthacharya v. Highways Department, 1987 A.C.J. 783 (S.C.)*. On the other hand, Mr.K.Ranganathan, who appeared on behalf of most of the claimants, submitted that the evidence disclosed that there had been heavy and unusual downpour resulting in the falling of the trees across the road and overflow of water on the bridge and in spite of it, the bus TML.8364 was driven over the narrow bridge and that was so done despite the warning about the bad weather made available at Tindivanam. The further submission of learned counsel was that the driver of the bus did not even allow the passengers to get down on the ground that the bus may not be swept

off, if passengers remained in the bus and that certainly was not a prudent act on the part of the driver and that clearly established negligence and want of care and caution on his part and the accident was thus not the outcome of any act of God. Reference in this connection was made by learned counsel to the decision reported in *M/s. Chaurasiya and Company v. Smt. Pramila Rao, 1974 A.C.J. 481.*

6. Before proceeding to consider the question whether the accident involving the bus TML.8364 belonging to the Corporation in which several passengers lost their lives was due to an act of God or not, it would be necessary to make a reference to the evidence regarding the prevalent weather conditions on the date of the accident as well as the manner in which the accident took place. Gunasekaran, examined as P.W.1 in M.C.O.P. Nos.16 and 17 of 1986, is one of the passengers in the bus TML.8364 which met with the accident and who survived. As P.W.1 in M.C.O.P.No.17 of 1986, he stated that on Deepavali New Moon Day, he boarded the bus TML.8364 at Tindivanam and there was tom tom regarding the worsening weather condition and that as he was informed by the conductor and the driver of the bus that the bus will proceed, he and his wife got into the bus and the bus started at 5 p.m. when it was raining heavily and there was gale as well. He also stated that the passengers requested that the bus need not proceed, but the conductor and driver assured them that they need not be anxious. P.W.1 referred to the heavy rain, gale and also the water overflow on the road at the time when the bus was nearing Konakkampattu and stated that the driver was asked to stop the bus, but he drove ahead without paying any heed to the requests so made. The bus according to P.W.1, had crossed three-fourths of the bridge and was stopped, as there was a depression ahead, and the bus was parked in the middle of the bridge and on account of the raising water, the bus was washed away and he was also carried by the floods for about a mile and that after clinging on to a tree, he survived. In his cross-examination, P.W.1 stated that several lakes had breached and there was sudden and heavy floods in the river and that the parapet walls of the bridge were washed away and the bridge also collapsed when the bus was swept away. P.W.1 admitted, however, that he did not file any document to show the warning issued by the Municipality at Tindivanam regarding the

inclement weather. P.W.1 also added that the bus was washed away after about 15 minutes after it had stopped in the bridge. A suggestion that owing to natural causes and an act of God, the accident took place, was denied by him. Yet another survivor, Renu, has been examined as P.W.1 in M.C.O.P.No.64 of 1986. According to him, he and his wife, his brother and his wife and children and others boarded the bus at Tambaram at about 10 a.m. and by the time they reached Tindivanam, it was about 6 p.m. Resuming the onward journey from Tindivanam to Tiruvannamalai, the bus, according to this witness, stopped at the middle of Tondiyar bridge and water was overflowing and when they got down, the water was flowing upto their knees. He had also referred to a lorry and another Corporation bus behind the bus TML.8364. The further evidence of P.W.1 is to the effect that they requested the driver of the Corporation bus behind TML.8364 to move backwards, but he refused on the ground that the bus TML.8364 can proceed forward and the bus behind TML.8364 could not, therefore, be moved. The driver of the bus TML.8364, according to this witness, asked the passengers to remain in the bus stating that the bus will not be washed away, if the passengers remained therein and despite the requests of the passengers to get down, the driver did not allow them to do so and they remained in the bus for nearly half an hour, by which time, the flow of water increased and the bus was washed away. P.W.1 had clearly stated that the cause of the accident was only the driver of the bus TML.8364. In his cross-examination, P.W.1 referred to the bus remaining on the bridge for nearly half an hour and stated that they could have, if they had been allowed to get down, waded through the knee deep water and reached a safe place, but the driver prevented them from getting down. One Ponuswamy, examined as P.W.2 in M.C.O.P.No.58 of 1986, in his evidence stated that he and some other persons were proceeding in the bus TML.8364 from Tambaram to Tiruvannamalai and the bus left Tambaram at 10 a.m. and there was heavy rain and gale and that led to the bus reaching Tindivanam at about 6 p.m. Referring to the onward journey of the bus from Tindivanam to Tiruvannamalai P.W.2 stated that the bus stopped on Tondiyar bridge where water upto knee was overflowing and the driver was asked to move the bus for which the driver stated that the vehicle behind

must be moved and that the driver of that bus agreed to move the bus, if the other driver gave it in writing and that again, the driver of the bus TML.8364 was asked to move the bus, but he did not allow anybody to get down and stated that they would wait for the floods to recede and that led to the passengers remaining within the bus, as, according to the driver, without the passengers, the bus would be swept away, P.W.2 had also stated how the bus was washed away and he fell into the water and swam for a distance of nearly two furlongs and how he survived by catching hold of a casuarina tree and reached the shore at 6 a.m. the next day. The accident, according to P.W.2, took place only on account of the negligence of the driver of the bus TML.8364 as well as the driver of the bus behind. In his cross-examination, P.W.2 stated that he gave the first information report and he denied the suggestion that he did not travel in the bus. Referring to the stopping of the bus on the Tondiyar bridge, he stated that it was stopped for nearly two hours and the driver did not allow the passengers to get down and for nearly two hours, they had remained so between 7.30 p.m. and 9.30 p.m. P.W.2 also stated that the bus was washed away while he was within it and that he escaped and subsequently survived, but that others were washed away by the floods. R.W.1 in M.C.O.P.No.16 of 1986 was the Tahsildar at Gingee on the day of the accident and he had inspected the scene of the accident and had also prepared a report. In his cross-examination, he stated that on 7.11.1985, flood warning had been received and he had informed the village officers about the precautions to be taken and also to inform the villagers by tom tom. R.W.1, however, stated that he did not inform the Transport Department, as it was not necessary to do so. R.W.2 in M.C.O.P.No.16 of 1986 is the conductor of the bus TML.8363, which was proceeding in route No.122 from Tiruvannamalai to Madras. His evidence shows that the bus left Tiruvannamalai at 2.15 p.m. to proceed to Madras, but on reaching Tindivanam, it was realised that the bus could not proceed further and the bus was, therefore, driven back to Tiruvannamalai and after removing a fallen tamarind tree near Salai village, the bus reached Tondiyar bridge, when the bus TML.8364 was standing on the bridge and behind that a lorry the bus TML.8364 and his bus stood and there were also several other vehicles behind.

R.W.2 stated that it was about 8 p.m. and water was flowing in front of the bus TML.8364 and below the bridge as well and the bus could not proceed towards west. R.W.2 also stated that he had enquired Sadanandam, the driver of the bus TML.8364 as to why the bus stopped and that he replied that as water was overflowing the bridge, the bus could not proceed and the bus could be moved only if the floods receded. Referring to the attempts to reverse the bus TML.8363 and its wheel being caught in a depression. R.W.2 stated that the water flow increased and the engine of his bus also stopped and as the bridge was narrow, the bus and the lorry ahead could not come back and some of the passengers in TML.8364 were in the bus, though some others walked. The driver of the bus TML.8364, according to R.W.2, did not ask the passengers not to get down, but that he on his part took the passengers in his bus to a safe place and that was at about 10.30 p.m. R.W.2 referred to the increasing floods thereafter and stated that the distance between the place where he stood and the bus TML.8364 and the lorry standing behind was about one furlong. A suggestion that the driver of the bus TML.8364 was responsible for the accident, was denied by him. In his cross-examination, R.W.2 stated that the day on which the accident took place was a New Moon Day and the bus TML.8364 was on the bridge. He had also stated that he moved his bus in the reverse covering a distance of nearly one furlong and that he observed what was going on. He also accepted that the bridge near Konakkampattu was very narrow. Referring to his crossing the bridge at about 3.20 p.m. R.W.1 stated that at that time, water did not overflow the bridge. R.W.2 added that it was about 4.15 p.m. when he returned from Tindivanam to Tiruvannamalai after securing advice from the bus-stand, though there was nothing in writing to show the same. R.W.2 frankly admitted that there was no document produced by him to show that he was working as conductor in the bus on the day of the accident, but that he got information to depose. Referring to the rescue of the passengers in his bus, R.W.2 stated that after 8.30 p.m. the bus was moved by about a furlong and on the right side of the river water upto a height of 10 to 12 feet was flowing and that by struggling for nearly two hours, the bus was taken to a safe place and it was raining even then. R.W.2 also stated that he did not know that the bus TML.8364 was washed away in the

floods. R.W.2 also stated that he did not know about the storm warning given.

7. From the evidence referred to above, it is clearly established that the bus TML.8364 had taken an unusually long time to reach Tindivanam from Madras or even Tambaram and that was only on account of unfavourable weather conditions. The rain was heavy and trees had fallen across the road, as seen from the evidence and that should have put the driver of the bus TML.8364 on notice of adverse weather conditions. The evidence referred to also discloses that warning at Tindivanam bus-stand should have been made available to the drivers of the buses in order to enable them either to proceed or to stop the buses in order to ensure safety to the travelling public. In this case, the driver of the bus TML.8364 was fully aware of the weather conditions even as he drove upto Tindivanam and as a prudent, careful and cautious driver, he should have watched out before venturing on to a narrow Tondiyar bridge. Indeed, the driver should not have gone over the narrow bridge at all after having observed that the weather conditions were not favourable and that water was overflowing the bridge. The evidence also discloses that the water was flowing below and over the bridge and was knee deep over the bridge and that certainly would not have given any indication to the driver of the bus TML.8364 that he can safely cross the bridge. The evidence also discloses that the driver of the bus TML.8364 had prevailed upon the passengers not to get down from the bus. Thus, the driver of the bus TML.8364, ignoring the warning administered about heavy rain and gale, had made bold to take the bus across the narrow bridge over which water was flowing. In doing so, the driver ignored the duty cast on him for the care and safety of the passengers. It is common knowledge that it is dangerous to cross a bridge or a cause-way which is submerged. In this case, the evidence clearly establishes that water was flowing over the bridge by about 2 feet or so and the water was also rising and in such a situation, to drive the bus over the bridge was an extremely dangerous and hazardous operation on the part of the driver. Even before approaching the bridge, the driver having regard to what he observed on the way, viz., heavy rain gale and fallen trees and also the overflow of water on the bridge, ought to have stopped before entering the bridge. There was thus a breach of duty which the driver of

the bus TML.8364 owed to the passengers. The available evidence, viz., that of Gunasekaran (P.W.1 in M.C.O.P.No.17 of 1986) Renu (P.W.1 in M.C.O.P.No.64 of 1986 and Ponnuswamy P.W.2 in M.C.O.P.No.58 of 1986) clearly established want of care and caution on the part of the driver of the bus TML.8364 while attempting to cross the bridge. The evidence of R.W.1 in M.C.O.P.No.18 of 86 does not throw any light regarding the manner in which the accident took place. No reliance could be placed upon the evidence of R.W.1 for it is difficult to believe that he could have observed anything between 8.30 p.m. and 10.30 p.m. Obviously, R.W.2 has been examined to support the case of the Corporation that it was an act of God. When even according to R.W.2 he was able to remove the bus behind by one furlong also the passengers to a place of safety, it is difficult to believe that it was not so possible at all for the driver of the bus TML.8364 to do so and that would only establish that the evidence of the claimants, that the passengers were not allowed to get down from the bus is true. The evidence of R.M.2 contra in M.C.O.P.16 of 86 cannot therefore, be accepted. The admission of R.W.2 that he did not produce any document to show that he was on duty as the conductor in the bus is also significant. Likewise, his evidence that he received intimation to give evidence, but he did not go to the office would also show that he is an unreliable witness and his evidence cannot be accepted at all. Therefore the evidence of R.W.2 that the bridge was safe till about 4.15 p.m. cannot be accepted as true. Even assuming that the bridge was safe till 4.15 p.m. having regard to the heavy rains and gale and the falling of the trees, the driver of the bus TML.8364 could not have just taken it for granted that the bridge was safe even when that bus came to cross the bridge. That there were other vehicles which followed the bus TML.8364 is again no indication that the bridge was safe. It is common knowledge that when one vehicle proceeds ahead, other vehicles following it also follow suit and the fact that other vehicles follows the bus TML.8364 and were not involved in any accident, is not a clear pointer that the bridge was all right. It is significant that in this case the evidence of R.W.2 is to the effect that the bus in which he was working as a conductor had been reversed for about one furlong. Obviously, therefore, realising that the driver of his bus had committed a mistake in

following the vehicles ahead, that bus had been reversed and, therefore, from the circumstance that other vehicles had followed the bus TML.8364 it cannot be assumed that everything was clear and safe. It had earlier been pointed out that the driver of the bus TML.8364, before entering the bridge, ought to have exercised reasonable care and caution and also should not have entered the narrow bridge after seeing the flow of water below as well as over the bridge. It is further seen from the evidence that five days prior to the accident, i.e. on 7.11.1985 itself, the weather had worsened and warning had been issued and it is difficult to believe that the Transport Department and through that the drivers and conductors did not know about the deteriorating weather conditions. That the driver proceeded to drive the bus on such a narrow bridge with overflowing of water is by itself an act of negligence and having regard to the available evidence that the bus stopped on the bridge and the passengers were not even allowed to get down from the bus, it is clear that it was only the rash act of the driver in driving the bus and his negligence in not having bestowed care and caution on the safety of the passengers that had caused the accident.

8. It now remains to refer to the decisions relied on by counsel on both sides. In *Province of Madras v. I.S. and C. Machado, A.I.R. 1955 Mad. 519*, the Division Bench referred to what constitutes an act of God and it was found on the evidence that there was nothing overwhelming or could not have been anticipated in relation to the loss sustained and, therefore, the claim for the value of the rice bags lost was quite in order. This decision does not in any manner assist the Corporation, for, it has been found on an appreciation of the evidence relating to the manner in which the accident took place that there was lack of care and caution on the part of the driver of the bus TML.8364 and the accident could be regarded as one which had taken place as a result of the operation of the natural forces which no human foresight can provide against and of which prudence is not bound to recognise the possibility. Indeed, it can be said in this case that but for the act of the driver of the bus TML.8364 in driving across the submerged bridge, there would have been no accident whatever from act of God. Likewise, the decision in *S. Vedanthacharya v. Highways Department, 1987 A.C.J. 783 (S.C.)*, also does not assist the Corporation. In that case, a

transport vehicle plunged into a stream as the culvert on which it was passing collapsed and in the suit filed by the parents of the deceased claiming Rs.25,000 by way of damages against the owner of the vehicle and the insurance company as well as the Highways Department, the owner of the vehicle and the insurance company were absolved of their liability, but the Highways Department alone was held liable as the collapse of the culvert raised a presumption of negligence. On appeal by the Government on behalf of the Highways Department, the High Court took the view that the culvert collapsed because of the heavy down-pour of rain and also the breach of a small tank and that justified the deletion of the liability on the Highways Department. On further appeal to the Supreme Court, the Court pointed out that merely because the cause of the accident was heavy rain and floods, the Highways Department could not be absolved of its liability, unless something further is indicated that necessary preventive measures had been taken in anticipation of such rain and floods and in its absence, the High Court was not justified in dismissing the suit. This decision also, in my view, does not assist the Corporation in any manner, as, it has earlier been found that the driver of the bus TML.8364 had not observed care and caution for the safety of the passengers, but had rashly driven the bus across the submerged bridge and that eventually led to the bus being washed off and the passengers losing their lives. It will be useful in this connection to refer to the decision relied on by learned counsel for the claimants in *M/s. Chaurasiya and Company v. Smt. Pramila Rao, 1974 A.C.J. 481*. At page 484, it has been observed as follows:

"The question then is whether the driver was negligent and whether his negligence caused the death of the passengers. It cannot be doubted that the driver owed a duty of care for the safety of the passengers. It is a matter of common experience that when a causeway or a bridge gets submerged, it is very risky to cross it on a motor vehicle. In the instant case the water over the cause-way was about two feet; even the stones embedded on the sides were completely submerged and were not visible. Further, the water was rising. In such a situation, it was extremely dangerous for the safety of the passengers to drive the bus over the cause-way. The driver should have waited till the water

receded and he should not have attempted to cross the cause-way. The driver was clearly in breach of his duty which he owed to the passengers and was, therefore, negligent.....”

The aforesaid observations are clearly applicable to these cases as well in view of the finding on the question of negligence rendered earlier on a consideration of the evidence, negating the claim of the Corporation that the accident arose out of an act of God. It would also be appropriate to point out that now the defence based on act of God has undergone a total change in approach as a result of considerations of foreseeability of harm.

9. There is also yet another aspect which would preclude the Corporation from putting forward the plea of act of God. It is not in dispute that even prior to the disposal of the claim petitions by the tribunal, at the instance of the Corporation, the issue whether the accident was an act of God or was due to the rash and negligent driving of the bus TML.8364 by its driver was tried as a preliminary issue and a finding adverse to the Corporation had been rendered. That finding had been allowed by the Corporation to become final and not having been challenged in a manner known to law, the Corporation cannot again re-agitate that question in the course of the present proceedings. Viewed, therefore, from any point of view, the tribunal was quite justified in its conclusion that the rash and negligent driving of the bus TML.8364 by its driver caused the accident on 12.11.1985, in which a number of people lost their lives and some had also sustained injuries. The tribunal was, therefore, right in its conclusion in this regard.

10. On the question of compensation, Mr.R. Krishnamurthi very fairly stated that it is difficult to question the amount of compensation awarded to the claimants, as, in most of the cases, the compensation awarded by the tribunal was less than the compensation awardable on the principle of no fault. However, the claimants in C.M.A.No.410 of 90 and the cross objection Nos.119 of 1992, 138 of 1991, 59 of 1992 and 148 of 1991 in C.M.A.Nos.332, 344, 597 and 798 of 1990 respectively have prayed for enhanced compensation.

11. In C.M.A.No.410 of 1990 arising out of the award in M.C.O.P.No.17 of 1986, the claimants have prayed for the award of additional compensation in a sum of Rs.35,000 restricting the total amount of compensation to Rs.50,000 against Rs.1,00,000 claimed in the claim petition. The

deceased in that case was one Sornammal, wife of the first appellant and mother of appellants 2 to 6. Though it was claimed that the deceased was aged about 38 years at the time of her death and she was also contributing Rs.1,000 per mensem, the appellants did not place any reliable or acceptable evidence in support of the same. The tribunal proceeded to determine the compensation awardable in a sum of Rs.20,000 but deducted Rs.5,000 representing the *ex-gratia* payment made by the Government and ultimately awarded to the appellants in C.M.A.No.410 of 90 compensation in a sum of Rs.15,000 together with interest at 12 per cent per annum from 10.1.86. Mr.A.K. Kumaraswami, learned counsel for the appellants in C.M.A.No.410 of 1990 first contended that the deduction by the tribunal of a sum of Rs.5,000 from the compensation awardable in a sum of Rs.20,000 was not justified at all. Reliance was also placed upon the decisions reported in *A.P.Dorairaj v. State of Madras by Commissioner of Police, 1974 A.C.J. 174* and *K.Vasantha and 3 others v. Venugopal Achari and 2 others, 1987 T.L.N.J. 196*.

12. In so far as the deduction of Rs.5,000 from out of the amount of compensation awardable to the claimants is concerned, the tribunal fell into an error. The payment made to the appellants on the death of Sornammal was *ex-gratia* and not referable to any claim as such under the provisions of the Motor Vehicles Act. It is in this context that the decisions relied on by learned counsel are relevant. In *A.P.Dorairaj v. State of Madras by Commissioner of Police, 1974 A.C.J. 174 at 180*, it has been clearly laid down that the law is quite clear that gratuitous payment should not be taken into consideration in assessing the compensation awardable. Again in *K.Vasantha and three others v. Venugopal Achari and two others, 1987 T.L.N.J. 196*, it was reiterated that amounts paid towards family benefit could not be deducted and in so holding, reference has been made to a decision of an earlier Division Bench to the effect that an *ex-gratia* payment made by the Government should not be taken into account in calculating the compensation payable, which is on different principles. In view of the principles referred to above, the tribunal was in error in deducting a sum of Rs.5,000 from out of the compensation amount of Rs.20,000 determined by it. It is further seen that the first appellant had lost, by reason of the death

of Sornammal, the love and affection of his wife as well as the consortium and the children have lost for ever the kindness, love and affection of the mother, besides the benefit of her service till they attain a footing in life. Taking into account these aspects, it would be just, fair and reasonable to award to the appellants in C.M.A.No.410 of 1990 a total compensation in a sum of Rs.30,000 in respect of the death of Sornammal, together with interest at 12% per annum from 10.1.1986 till the date of payment, credit being given to payments, if any made meanwhile. Out of the amount of Rs.30,000 each of the six appellants would be entitled to Rs.5,000 together with interest as stated earlier and the share of minor appellants 4 to 6 will remain invested as a Fixed Deposit in a nationalised or scheduled bank on cumulative basis till such time as each of the minors attains majority. The award in M.C.O.P.No.17 of 86 will, therefore, stand modified as indicated earlier.

13. In cross objection No.119 of 1992 in C.M.A.332 of 1990, the claimant has prayed that an additional compensation in a sum of Rs.5,000 should be awarded to him. The cross objector had lost his son aged about one year in the accident that took place on 12.11.1985 and had claimed Rs.15,000 by way of compensation. The tribunal had, however, awarded compensation in a sum of Rs.10,000 together with interest at 12% per annum from 5.2.1986. The accident having been taken place on 12.11.1985, long after 1.10.1982, when the compensation for death, even on the principle of no fault was Rs.15,000 the tribunal was not justified in not awarding to the cross-objector, compensation as claimed by him in a sum of Rs.15,000. On the materials available, there is no justification whatever for reducing the amount of compensation. The award of the tribunal in M.C.O.P.No.55 of 1986 will stand modified in that the claimant therein will be entitled to recover compensation in a sum of Rs.15,000 together with interest thereon at 12% per annum from 5.2.1986 till the date of payment, credit being given to payments, if any, made meanwhile.

14. In regard to Cross Objection No.138 of 1991 in C.M.A.No.344 of 1990, it is seen that the mother of the cross objector had lost her life in the accident, in respect of which compensation in a sum of Rs.50,000 was prayed for. The tribunal however, had awarded compensation in a sum of Rs.15,000 together with interest at 12% per annum from

23.4.1986. The Cross Objector has prayed that additional compensation in a sum of Rs.35,000 should be awarded to her. According to the case of the cross-objector, at the time of her death her mother was aged about 44 years and was earning daily on an average Rs.20 to Rs.40 by vending vegetables. Though there is no acceptable evidence to show the age of the deceased or her earning even by doing work, the deceased would have been in a position to earn at least Rs.10 per day or Rs.300 per mensem. The cross-objector is the only daughter of the deceased as per evidence. Though she might have been married and in that sense not wholly dependant upon the earnings of her mother, it is not uncommon for mothers to lavish their love and affection on their only child, as in this case, and whatever earnings the deceased could have saved, would, in the normal course have been made available to the cross-objector, had the mother been alive. Considering the age of the claimant, the deceased should have been about 50 years at the time of her death and at best, she could have lived for 15 more years taking the average longevity as 65 and would have contributed not less than Rs.27,000 after meeting her own expenses out of her earnings and that had been lost to the cross-objector as a result of the sudden demise of her mother. Making a provision for other uncertainties in life and also taking into account the lumpsum payment to the cross-objector, it would, in my view, be just, fair and reasonable to award to her compensation in a sum of Rs.25,000 together with interest at 12% per annum from 28.4.1986 till the date of payment, credit being given to payments, if any, made meanwhile. The award of the tribunal in M.C.O.P.No.159 of 1986 will stand modified as indicated earlier.

15. In regard to Cross Objection No.59 of 1992 in C.M.A.No.597 of 1990 it is seen that the cross-objector had lost her mother in the accident that took place on 12.11.1985 and in respect of that, award of compensation in a sum of Rs.15,000 had been prayed for. The tribunal had awarded compensation in a sum of Rs.10,000 together with interest thereon at 12% per annum from 5.2.1986. The claimant, in this cross-objection has prayed for the award of additional compensation in a sum of Rs.5,000. It is seen that having regard to the date of the accident, even on the application of the principle of no liability, the claimant would be entitled to payment of compensation in a sum of

Rs.15,000. It is true that there is no evidence to show that deceased Anjalai was supporting the cross-objector's family. However, on the application of the principle of no fault, the cross-objector should have been awarded compensation in a sum of Rs.15,000 together with interest thereon at 12% per annum from 5.2.1986 till the date of payment, credit being given to payments, if any, made meanwhile. The amount awarded, as directed by the tribunal, will be invested in a nationalised or scheduled bank. The award of the tribunal in M.C.O.P. No.54 of 1986 will stand modified as indicated earlier.

16. Regarding Cross Objection No.148 of 1991 in C.M.A.No.798 of 1990, it is seen that the cross-objector had prayed for the award of compensation in a sum of Rs.50,000, but the tribunal had awarded Rs.15,000. The disallowed portion of compensation in a sum of Rs.35,000 forms the subject-matter of the cross-objection. The son of the cross-objector, his daughter-in-law and two grand-children were washed away in the floods as a result of the accident to the bus and the entire family of the cross-objector has thus been wiped out. In that context, the cross-objector would naturally have to depend on others for the rest of his lifetime for comfort and support and the compensation awardable should be such as to secure to him for the rest of his lifetime the minimum comforts and in that view, the compensation awarded by the tribunal cannot be said to be adequate. Further, the age of the cross-objector has also to be taken into account and that was stated to be 65 and considering the loss of the entire family, the affection of the son, daughter-in-law as well as that of the grand-children in old age and the need to depend on others for his daily needs, as some solace and comfort to the claimant, it would be, in my view, fair, just and reasonable to award to the cross-objector compensation in a sum of Rs.25,000 together with interest at 12% per annum from 16.6.1986 till the date of payment, credit being given to payments, if any, made meanwhile the award of the tribunal in M.C.O.P.No.304 of 1986 will stand modified as indicated earlier.

17. In the result, C.M.A.Nos.199, 243, 244, 246, 305, 307, 332, 344, 597, 599, 796, 797 and 798 of 1990 and C.R.P.Nos.847, 849 and 1232 of 1990 will all stand dismissed, while C.M.A.No.410 of 1990 and Cross objection Nos.138 and 148 of 1991 in C.M.A.Nos.344 and 798 of 1990 will stand allowed.

in part and the awards of the tribunal in M.C.O.P.Nos.17, 159 and 304 of 1986 will stand modified as indicated earlier. Cross Objection Nos.119 and 59 of 1992 in C.M.A.Nos.332 and 597 of 1990 will stand allowed and the awards of the tribunal in M.C.O.P.Nos.55 and 54 of 1986 will stand modified as indicated earlier. There will be, however, no order as to costs either in the appeal revisions or in the memoranda of cross-objections.

B.S --- Petitions and Appeals ordered.

IN THE HIGH COURT OF JUDICATURE AT
MADRAS.

Present: *Abdul Hadi, J.*

C.R.P.No.2504 of 1992 17th December, 1992

A.Mani *...Petitioner*
v.

A.Chandranath ...Respondent.

(A) Civil Procedure Code (V of 1908), O.21, Rule 37(1), (2) - Petition for arrest and detention - Judgment-debtor appearing before executing court and filing counter - Paying several amounts towards decree - Not appearing before court on one day and not paying amount directed to be paid by him on that day - Decree-holder filing affidavit stating that judgment-debtor had means to pay - Court satisfied with the affidavit - Ordering arrest of the judgment-debtor - Order whether legal.

(B) Civil Procedure Code (V of 1908), Sec. 51, proviso and O.21, Rules 37(1), (2), 40(3) and 40(4) - Arrest of judgment-debtor for non-payment of decree amount when can be ordered - Court should give a finding that reason for such order exists - Nature of enquiry to be held.

Pursuant to a notice under O.21, Rule 37, Criminal Procedure Code, the judgment-debtor appeared before the executing court and filed his counter to the execution petition for his arrest and detention in prison. He was paying several amounts towards the decree amount on different dates on which the

execution petition was posted. But on 2.12.1991, he did not appear before court and he did not pay a sum of Rs.6,000 which he was directed to pay in the preceding hearing date. Therefore, he was set *ex parte* and the execution court ordered his arrest by 31.12.1991. Observing that from the petitioner's affidavit, it had been proved that the judgment-debtor had the means to pay the amount. This order was challenged contending that the court ought to have proceeded to hear the decree-holder and take such evidence as might be produced by him and then given the petitioner an opportunity of showing cause why he should not be committed to the civil prison.

In the present case, even though originally the petitioner-judgment-debtor appeared before court and filed counter, he did not appear on 2.12.1991 and the court below passed the order of arrest on the ground that the decree-holder's affidavit proved that the judgment-debtor had means to pay the decree amount. Therefore, it cannot be said that the impugned order was without jurisdiction as it could fall under O.21, Rule 37(2), Civil Procedure Code.

[Para. 4]

It must be noted that O.21, Rule 37(1) will apply as per the very words used therein, only where the application is for the execution of a money decree by arrest and detention of a judgment-debtor who is liable to be arrested in pursuance of the application. So notice under O.21, Rule 37(1), Civil Procedure Code cannot be issued to the judgment-debtor if he is not 'liable to be arrested'. While dealing with execution of money decrees by arrest and detention four situations are expressly and specifically mentioned in the Civil Procedure Code, where the execution court could order arrest and, even in those situations, it has to be seen whether the judgment-debtor is actually, 'liable to be arrested'. The first such situation is indicated in the proviso to O.21, Rule 37(1), Civil Procedure Code that is where the court is satisfied by affidavit or otherwise that with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court. In such a case, without issuing the notice under O.21, Rule 37(1), Civil Procedure Code, straightaway the court can order arrest. The second situation is provided in O.21, Rule 37(2) as indicated above, that is, where appearance of the judgment-debtor is not made in obedience to the notice of the court under

O.21, Rule 37(1), Civil Procedure Code and the decree-holder requires issuance of a warrant for the arrest. The third situation is under O.21, Rule 40(3), Civil Procedure Code, that is, after the conclusion of the enquiry under O.21, Rule 40(1), Civil Procedure Code for detention in prison and subject to Sec.51, Civil Procedure Code an order for detention is passed. In such an event, the court can also pass an order of arrest if the judgment-debtor is not already under arrest. The fourth situation is mentioned in O.21, Rule 40(1), Civil Procedure Code which says that a judgment-debtor released under Rule 40 may be re-arrested. Even in the abovesaid four cases, before arrest order could be passed, the court should find that any one of the reasons mentioned in the proviso to Sec.51, Civil Procedure Code exists, in the light of the construction placed by the Supreme Court in *Jolly George Varghese v. Bank of Cochin*, (1980)2 S.C.C. 360, on Sec.51, Civil Procedure Code. No doubt in such a case, the said proof need not necessarily be in an enquiry as contemplated under O.21, Rule 40, Civil Procedure Code that is, by taking evidence as may be produced by the decree-holder etc. That is so because O.21, Rule 37(2), does not provide for any particular mode of enquiry. In other words, even by affidavit evidence, the execution court could come to the conclusion that the necessary proof is there for ordering arrest of the judgment-debtor.

[Paras. 9 & 12]

Cases referred to:

P.G.R. Padayachi v. Mayavaram Financial Corporation, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.).

[Paras. 4, 5, 7]

Madhusudan v. Trimbak, A.I.R. 1961 Bom. 23.

[Para. 4]

K.N. Gangappa v. A.M. Subramnya Mudaliar, 100 L.W. 306. [Para. 4]

Jolly George Varghese v. Bank of Cochin, (1980)2 S.C.C. 360. [Para. 6]

Xavier v. Canara Bank Ltd., 1969 K.L.T. 927.

[Paras. 6, 7]

Alagappan v. Rajaguru and Co., (1985)1 M.L.J. 331. [Para. 7]

Londa Abbayee of Pithapuram v. Badam Suryanarayana and others, (1947)1 M.L.J. 246: A.I.R. 1948 Mad. 9(1). [Para. 8]

B.K. Puttaramiah v. H.I.E. and Sons, A.I.R. 1959 Mys. 94 (D.B.). [Para. 8]

Namachivaya Mudaliar v. P. J. A. Manickavelu, (1972)2 M.L.J. 78: A.I.R. 1972 Mad. 292. [Para. 8]

T. Kunhiraman v. Madhavan Nair, (1957) 2 M.L.J. 28: A.I.R. 1957 Mad. 761. [Para. 8]

M. Ramachandra Iyer v. Thomas Mathai, A.I.R. 1966 Ker. 65. [Para. 8]

Firm Prabhu Dyal v. Probdu Mal, A.I.R. 1938 Lah. 692. [Para. 8]

Gokuldas v. Appandanatha Nainar, 1990 T.L.N.J. 25. [Para. 10]

Ismail Bai v. M. Chinniah, (1990) 1 L.W. 155. [Para. 11]

Soundararajan v. Saiyee Finance, (1986) 1 M.L.J. 214. [Para. 11]

Petition under Sec. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Krishnagiri, dated 2.12.1991 and made in R.E.P.No.172 of 1990 in O.S.No.44 of 1986.

S.M. Abdul Wahab, for Petitioner.

V. Raghoevachari, for Respondent.

The Court made the following

ORDER: This civil revision petition by the judgment-debtor-respondent in R.E.P.No.172 of 1990 on the file of the Subordinate Judge's Court, Krishnagiri, is against the order dated 2.12.1991 in the said petition for his arrest.

2. Admittedly, pursuant to notice under O.21, Rule 37, C.P.C. the judgment-debtor appeared before the executing court and filed his counter to the said execution petition for his arrest and detention in prison. No doubt the petitioner was paying several amounts towards the decree amount on different dates, on which the execution petition was posted. But, on the abovesaid date 2.12.1991, he did not appear before court and he did not also pay a sum of Rs.6,000 which he was directed to pay in the preceding hearing date. Therefore, he was set *ex parte* by the impugned order and the execution court below, observing

“மனுதார் தாக்கல் செய்த பிரமாணத்தின் மூலம் எதிர்மனுதாரரின் வசதி நிரூபிக்கப்பட்டது.”

ordered arrest by 31.12.1991.

3. The learned counsel for the petitioner submits that this order is against the procedure prescribed under O.21, Rule 40, C.P.C. According to the said provision, when the judgment-debtor appears before court, pursuant to notice under O.21, Rule 37, C.P.C., “the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for

execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.” The contention of the learned counsel for the petitioner is that the execution court has erred in not conforming to this provision by proceeding to hear the decree-holder and take such evidence as may be produced by him and then give the petitioner an opportunity of showing cause why he should not be committed to civil prison, and in ordering straightaway arrest simply stating that by way of affidavit of the decree-holder, the means of the judgment-debtor have been proved. As against this contention, the learned counsel for the respondent-decree-holder submits that the impugned order could be justified pursuant to what is contained in O.21, Rule 40(2), C.P.C. or under O.21, Rule 37(2), C.P.C.

4. But, O.21, Rule 40(2), C.P.C., *inter alia* only says pending conclusion of enquiry under sub-rule (1), the court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of court. This sub-rule (2) of Rule 40 does not at all provide for order of arrest. However, it has to be seen whether in the light of what is laid down in *P.G.R. Padayachi v. Mayavaram Financial Corporation*, (1973) 2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), the impugned order could be sustained under O.21, Rule 37(2), C.P.C. O.21, Rule 37(1) and (2) run as follows:

“37. Discretionary power to permit judgment-debtor to show cause against detention in prison:

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the court is satisfied, by affidavit, or otherwise that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

(2) Where appearance is not made in obedience to the notice, the court shall, if the

decree-holder so requires, issue a warrant for the arrest of the judgment-debtor".

The abovesaid Division Bench case is also similar to the present one. There too, the executing court has notice under O.21, Rule 37(1), C.P.C. to the judgment-debtor and he appeared before the court and filed a counter. However, the judgment-debtor offered to pay the decree amount and the executing court gave him time for payment. On the adjourned date, no payment was made and that is why the executing court passed the order of arrest, which was challenged before the Division Bench. In that context, the Division Bench upholds the order of arrest, *inter alia* observing as follows:

"This order can only be under O.21, Rule 37(2). The judgment-debtor had no doubt appeared in court in obedience to the notice sent under Rule 37(1), but on the adjourned date he defaulted. As already noticed though he had originally offered to pay the decree amount, he had failed to pay the same and there is nothing to show that the judgment-debtor was bodily present in the court on the date on which the order now in appeal was passed. Therefore, even though the judgment-debtor had originally appeared in court in obedience to the notice issued under Rule 37(1) on the date on which the order of arrest was passed, it must be deemed that the judgment-debtor had disobeyed the notice."

Therefore, what the Division Bench has held is that even though the non-appearance of the judgment-debtor is on an adjourned date of hearing after his original appearance pursuant to the notice under O.21, Rule 37(1), C.P.C., it must be deemed that the judgment-debtor had disobeyed the said original notice, by his such non-appearance in a subsequent hearing. In the present case also even though originally the petitioner-judgment-debtor appeared before court and filed counter, he did not appear on the abovesaid date 2.12.1991 and the court below passed the abovesaid Order of arrest on the ground that the decree-holder's affidavit proved that the judgment-debtor had means to pay the decree-amount. Therefore, it cannot be said that the impugned order was without jurisdiction, as it could fall under O.21, Rule 37(2), C.P.C. Apart from the abovesaid Division Bench decision in *Madhusudan v. Trimbak*, A.I.R. 1961 Bom. 23 also it was held so. The relevant observation therein is as follows:

"It may be that the petitioner was present on the date originally mentioned in the notice and actually filed his written statement on that day but the matter was not taken up by the court on that day but on a subsequent day. Therefore, it was obligatory upon the petitioner to remain present on that date. By his failure to do so he brought upon himself the consequences provided by sub-rule (2) of Rule 37 of O.21."

In a similar situation in *K.N.Gangappa v. A.M.Subramanya Mudaliar* 100 L.W. 306, also order of arrest was upheld by this court, though the said decision does not particularly refer to O.21, Rule 37(2), C.P.C. The learned counsel for the petitioner could not cite any decision contra on this point. At any rate, in view of the fact that the above referred to *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973) 2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), is a Division Bench judgment, I am bound by it in so far as the aforesaid view held by it.

5. Thus, even though the executing court has got jurisdiction to pass an order of arrest in the above situation, the further question to be decided is whether before passing such an order of arrest, the court should give reasons therefor and in particular, whether the court should give necessarily a finding on any one of the reasons mentioned in the proviso to Sec.51, C.P.C. One of the said reasons is that the judgment-debtor has or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. In the present case, no doubt the impugned order, as already stated, observes that from the affidavit of the decree-holder it is proved that the judgment debtor had the abovesaid means. But, the learned counsel for the petitioner submits that the executing court cannot merely go by what is contained in the abovesaid affidavit, but it should hold enquiry as enjoined in O.21, Rule 40(1), C.P.C. and come to the necessary conclusion and thereafter may pass an order of detention in prison, as well as order of arrest, as prescribed under O.21, Rule 40(3), C.P.C. The said learned counsel for the petitioner further points out that as on 2.12.1991 admittedly no such enquiry was held and that if at all such enquiry was sought to be made only subsequently on 6.3.1992. Therefore, according to the said counsel, the impugned order is illegal. O.21, Rule 40(1) and (3) no doubt runs

as follows:

“40 Proceedings on appearance of judgment-debtor in obedience to Notice or After Arrest.

(1) When a judgment-debtor appears before the court in obedience to a notice issued under Rule 37, or is brought before the court after being arrested in execution of a decree for the payment of money the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(3) Upon the conclusion of the inquiry under sub-rule (1) the court may, subject to the provisions of Sec.51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest”.

However, the learned counsel for the respondent argues that the proviso to Sec.51 will apply only to order for detention in civil prison and not for order for arrest and that therefore, in the case of order for arrest, the court need not give any reason and in particular, the court need not find that the judgment-debtor refused or neglected to pay the decree-amount despite having means. In this connection, she cited another ruling in the above referred to *P.G.R. Padayachi v. Mayavaram Financial Corporation*, (1973) 2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), itself. In the said Division Bench decision, it has also been held thus:

“The provisions of the Code make a distinction between an order of arrest and an order of detention. There is nothing in Sec.51 or in any other provisions of the Code that even before ordering arrest of the judgment debtor, the executing court should give him an opportunity to show cause against such an order and also record its reasons in support of its order. Such procedure is contemplated as per the proviso to Sec.51, only before ordering the detention of the judgment-debtor in civil prison..... Whether the executing court issues a warrant of arrest without notice or whether it issues such a warrant under sub-rule (2) of Rule 37, the Code does not contemplate the court recording any reason in support of such an order of arrest.”

6. But, in view of a subsequent Supreme Court decision, viz., *Jolly George Varghese v. Bank of Cochin*, (1980) 2 S.C.C. 360, with due respect to the said Bench, I have to hold that the said Division decision is no longer good law, in so far as it decides that the judgment-debtor's means to pay the decree debt need not be gone into before ordering arrest and that for that matter no reason need be given at all before ordering arrest. In the said Supreme Court case in execution of a money decree, a warrant for arrest was made by the execution court on the ground that on an earlier occasion also, a similar warrant had been issued. The High Court in a short order, had summarily dismissed the revision filed by the judgment-debtors against the order of arrest. In that context the question before the Supreme Court was, whether the personal freedom of the judgment-debtors could be held in ransom until the repayment of the debt and if Sec.51 read with O.21, Rule 37, C.P.C. did warrant such a step, whether the provision of law was constitutional and in conformity with the inherent dignity of human person in the light of Art.11 of the International Covenant on Civil and Political Rights. While dealing with this question, the Supreme Court set aside the judgment of the High Court and directed the executing court to decide *de novo* the means of the judgment-debtors to discharge the decree in the light of its interpretation placed on the abovesaid relevant provisions. In this context, the Supreme Court approved a Kerala decision in *Xavier v. Canara Bank Ltd.*, 1969 K.L.T. 927 and the following observation therein:

“Art.11 grants immunity from imprisonment to indigent but honest judgment-debtors.... viewed in this progressive perspective we may examine whether there is any conflict between Sec.51, C.P.C. and Art.11 of the International Covenants quoted above. As already indicated by me, this latter provision only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Sec.51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Sec.51 of the Code, but this does not violate the mandate of Art.11. However, if he once had the means but now has not or if he

has money now on which there are other pressing claims, it is violative of the spirit of Art.11 to arrest and confine him in jail so as to coerce him into payment....." [emphasis supplied]

Further, after quoting extensively from the abovesaid Kerala decision, the Supreme Court observes as follows:

"Indeed, the Central Law Commission, in Its Fifty-fourth Report, did cognise the covenant, while dealing with Sec.51, C.P.C.:

The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.

The Law Commission in its unanimous report, quoted the key passages from the Kerala ruling *Xavier v Canara Bank Ltd.*, 1969 K.L.T. 927, 931, 933 referred to above and endorsed its ratio. 'We agree with this view' said the Law Commission and adopting that meaning as the correct one did not recommend further change on this face of the Section. It is important to notice that, interpretationally speaking, the Law Commission accepted the denamice of the changed circumstances of the debtor:

However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment.... We

concur with the Law Commission in its construction of Sec.51, C.P.C. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Art.11 of the Covenant, because then no detention is permissible under Sec.51, C.P.C. Equally meaningful is the import of Art.21 of the Constitution in the context of imprisonment for non-payment of debts... To be poor, in this land of *Daridra Narayana*, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Art.21

- unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is

inferable from Art.11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Sec.51, C.P.C. and the lethal blow of Art.21 cannot strike down the provision, as now interpreted."

7. In this connection I have to point out that the abovesaid *Xavier v. Canara Bank Ltd.*, 1969 K.L.T. 927, which was approved by the Supreme Court was also referred to in the above referred to *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.). But, it was held that the said Kerala case is a case of an order of detention and not merely an order of arrest. But, I may respectfully state that it is not difficult to gather from the above referred to observations in the Kerala decision that those observations would apply to a case of arrest also. In fact, as indicated above, the abovesaid extracted observation refers to order of arrest also along with order of detention. Anyway, in view of the above referred to principles enunciated in the above referred to Supreme Court decision., I am bound to follow the Supreme Court decision, rather than the abovesaid *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), so far as this aspect is concerned, (though as already indicated, I follow another reasoning of *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), in relation to the interpretation to be put to O.21, Rule 37(2), C.P.C. since that reasoning does not conflict with the above referred to Supreme Court decision). I may also add that the said Supreme Court decision was also relied on in *Alagappan v. Rajaguru and Co.*, (1985)1 M.L.J.331 and this court set aside the order of arrest passed by the execution court since it was silent about the means of the judgment-debtor to pay or about himself wilfully evading to pay the decree amount.

8. In this connection I may also point out that *Londa Abbayee of Pithapuram v. Badam Suryanarayana and others*, (1947)1 M.L.J. 246: A.I.R. 1948 Mad. 9(1) (Horwill, J.), *B.K.Puttaramiah v. H.I.E. & Sons*, A.I.R. 1959 Mys. 94 (D.B.), *Namachivaya Mudaliar v. P.J.A.Manickavelu*, (1972)2 M.L.J. 78: A.I.R. 1972 Mad. 292 and *Soundararajan v. Saiyee Finance*, (1986)1 M.L.J. 214 have also expressed similar view as that of *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), regarding the

applicability of the proviso to Sec.51 to arrest orders. Therefore, with due respect, I state that those decisions also are no longer good law in view of the above referred to Supreme Court decision. On the other hand, I may also point out that there were also other decisions of this court and other courts holding a contrary view which would accord with the above referred to principles enunciated in the Supreme Court decision. Some of them are, *T.Kunhiraman v. Madhavan Nair*, (1957) 2 M.L.J. 28; A.I.R. 1957 Mad. 761, *N.Ramachandra Iyer v. Thomas Mathai*, A.I.R. 1966 Ker. 65 and *Firm Prabhu Dyal v. Bhondu Mal*, A.I.R. 1938 Lah. 692. To illustrate in *T.Kunhiraman v. Madhavan Nair*, (1957) 2 M.L.J. 28; A.I.R. 1957 Mad. 761, *Panchapakesa Ayyer J.* has observed thus:

"The arrest of a citizen of the Indian Republic is a grave matter involving his fundamental rights Sec.51, C.P.C. has clearly stated, among other things, that a judgment-debtor should not be ordered to be arrested unless the court holds that he has had, since the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects to pay the same. This court has held that the mandatory provisions of Sec.51, C.P.C. must be complied with before arrest is ordered. The lower court does not say that in its opinion the judgment-debtor has had, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and has refused or neglected to pay the same.

The order of arrest is therefore illegal and has to be set aside. It is phenomenally brief and runs: "Respondent called. Absent. Vakil reports no instructions. Arrest by "16.7.1955." No reason whatever is given as to why arrest is ordered, and the mandatory provisions of Sec.51, C.P.C. have been ignored. Mr.Sesha Aiyar says that as the petitioner was *ex parte*, reasons need not be given. I am afraid I cannot agree. Under our law *ex parte* orders of arrest and orders of arrest after contest are exactly on the same footing, and Sec.51, C.P.C., makes no difference whatever between the two cases. Arrest after contest or *ex parte* involves the same painful consequences to the man arrested."

In *N.Ramachandra Iyer v. Thomas Mathai*, A.I.R. 1966 Ker. 65 also, the relevant observation is as follows:

"There can be no arrest in execution where no

detention is possible any more than there can be attachment in execution where no sale is possible. I have never heard of an application for more arrest in execution without detention; and if one were made I should think it would forthwith be thrown out for the absurdity that it is. What is to be done with the judgment-debtor after he has been arrested if he cannot be detained? Released forthwith? And then the same game again and again *ad libitum*?"

9. It must also be noted that O.21, Rule 37(1) will apply as per the very words used therein, only where the application is for the execution of a money decree by arrest and detention of "a judgment-debtor who is liable to be arrested in pursuance of the application." So, notice under O.21, Rule 37(1), C.P.C. cannot be issued to the judgment-debtor, if he is not "*Liable to be arrested.*" So far as I could see, while dealing with execution of money decree by arrest and detention, four situations are expressly and specifically mentioned in the Civil Procedure Code, where the execution court could order arrest and, even in these situations it has to be seen whether the judgment-debtor is actually "liable to be arrested". The first such situation is indicated in the proviso to O.21, Rule 37(1), C.P.C. that is, where the court is satisfied by affidavit or otherwise that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court. In such a case, without issuing the notice under O.21, Rule 37(1), C.P.C., straightaway the court can order arrest. The second situation is provided in O.21, Rule 37(2), C.P.C., as indicated above, that is where appearance of the judgment-debtor is not made in obedience to the notice of the court under O.21, Rule 37(1), C.P.C. and the decree-holder requires issuance of a warrant for the arrest. The third situation is under O.21, Rule 40(3), C.P.C. that is, after the conclusion of the enquiry under O.21, Rule 40(1), C.P.C. for detention in prison and, subject to Sec.51, C.P.C. an order for detention is passed. In such an event, the court can also pass an order of arrest, if the judgment-debtor is not already under arrest. The fourth situation is mentioned in O.21, Rule 40(4), C.P.C., which says that a judgment-debtor released under Rule 40 may be re-arrested. Even in the abovesaid four cases, before arrest order could be passed, the

court should find that any one of the reasons mentioned in the proviso to Sec.51, C.P.C. exists, in the light of the construction placed by the Supreme Court in the abovesaid *Jolly George Varghese v. Bank of Cochin*, (1980)2 S.C.C. 360, on Sec.51, C.P.C.

10. In the light of the abovesaid discussion and conclusions I must also state that an observation in my own judgment in *Gokuldass v. Appandantha Nainar*, 1990 T.L.N.J. 25, requires a modification. In that case, the execution court below had ordered arrest by simply saying "no substantial payment, arrest J.D." In the said judgment, I set aside the order of arrest. No doubt, the said final decision in the said case is correct since it is clear from the above discussions that by a mere finding of no substantial payment, arrest order could not be passed. However, the following observation there, "after the respondent has appeared before the court and has been also making several payments as stated above, no order of arrest could be made", is not quite correct, since I have now held, following *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), that such an order of arrest could be passed under O.21, Rule 37(2), C.P.C., even if on any adjourned date of hearing, the judgment-debtor is not bodily present in the court and his such absence in court should be deemed to be disobedience of the original notice issued under O.21, Rule 37(1), C.P.C.

11. Likewise, in my another decision in *Ismail Bai v. M.Chinniah*, (1990)1 L.W. 155, also a similar modification of a similar observation found therein is required. There, I also relied on the above referred to decision in *Soundararajan v. Sayee Finance*, (1986)1 M.L.J.214, which in turn relied on the abovesaid *P.G.R.Padayachi v. Mayavaram Financial Corporation*, (1973)2 M.L.J. 93: A.I.R. 1974 Mad. 1 (D.B.), to conclude that no reason need not be given while ordering arrest. I have already pointed out that the said ruling that no reason need be given while ordering arrest, is also not correct in the light of the abovesaid *Jolly George Varghese v. Bank of Cochin*, (1980)2 S.C.C. 360.

12. I have already pointed out in page 20 supra that even in a case where order of arrest is passed under O.21, Rule 37(2), C.P.C. anyone of the reasons mentioned in proviso to Section 51 has to be proved. No doubt in such a case the said proof

need not necessarily be in an enquiry as contemplated under O.21, Rule 40, C.P.C., that is, by taking evidence as may be produced by decree-holder etc. That is so, because O.21, Rule 37(2), C.P.C. does not provide for any particular mode of enquiry. In other words, even by affidavit evidence, the execution court could come to the conclusion that the necessary proof is there for ordering arrest of the judgment-debtor. In the present case, the execution court below has found that from the decree-holder's affidavit, the means of the judgment-debtor have been proved. No doubt it also finds that the sum of Rs.6,000 which the judgment-debtor was earlier directed to pay to the decree-holder, was not paid and that the judgment-debtor failed to appear before the court resulting in himself being set *ex parte*. But, yet there is no finding by the court below, as required under the proviso to Sec.51, that there was also a refusal or neglect to pay the decree amount. Not can I conclude, merely because of the absence of the judgment-debtor on 2.12.1991 or his non-payment of the abovesaid Rs.6,000, there was such refusal or neglect, particularly because admittedly the judgment-debtor in the present case had already paid in several instalments a substantial amount of the decree amount. Further, the Supreme Court has also observed in the abovesaid *Jolly George Varghese v. Bank of Cochin*, (1980)2 S.C.C. 360, thus:

"The provision emphasises the need to establish not mere omission to pay, but an attitude of refusal on demand, verging on dishonest disowning of the obligation under the decree."

13. Further arrest under Rule 37(2) can be passed only "if the decree holder so requires". That is even though the E.P. itself is for arrest and detention before passing order under Rule 37(2), the court should once again ascertain from the decree holder whether he actually requires arrest. But on the present case, there is nothing to show about the said ascertainment and there is no finding to that effect.

14. The learned counsel for the respondent also brought to my notice, the following facts that have happened subsequent to 2.12.1991 order: The judgment-debtor was arrested and brought before the court and he also made some more payments towards the decree amount and subsequently he was released. Then, P.W.1, the decree-holder was examined and a second order of arrest was made

on 6.3.1992, when also, the judgment-debtor remained *ex parte*. So, according to the learned counsel for the respondent, the earlier order dated 2.12.1991 has worked itself out and on that ground, the civil revision petition has to be dismissed. But, on the other hand, the learned counsel for the petitioner argues that the order dated 2.12.1991 was an illegal order and if this Court declares it illegal, then the judgment-debtor could sue the respondent for damages for illegal arrest pursuant to 2.12.1991 order. So, according to the learned counsel for the petitioner, the civil revision petition cannot be disposed of as infructuous in view of what has happened subsequently. I think there is some force in this argument of the learned counsel for the petitioner, though my such an observation should not be taken as my opinion, any way in favour of the petitioner with reference to any such suit. At any rate, I do not think that simply because pursuant to the order dated 2.12.1991, the judgment-debtor had been actually arrested subsequently or even because of the abovesaid subsequent events, the civil revision petition could be described as having become infructuous. This order no doubt will not affect the abovesaid subsequent order of arrest dated 6.3.1992.

15. The net result is, the impugned order of arrest dated 2.12.1991 is hereby set aside and this civil revision petition is allowed. However, in the circumstances of case, there will be no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Thanikkachalam, J.*

C.R.P.No.3330 of 1988

31st July, 1992.

Muniappan

...*Petitioner*

v.

Hazrathunnissa

...*Respondent.*

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), Sec.3(4)(b) - Default in payment of rent - Eviction on ground of - Revenue Court not giving time to tenant to deposit rent - Order, if can be sustained.

According to Sec.3(4)(b) of the Tamil Nadu Cultivating Tenants' Protection Act, 1955, after ascertaining the arrears of rent, a duty is cast upon the Revenue Court to grant time to the tenant to deposit the rent. This was not done by the Revenue Court in this case. Therefore, the order passed by the Revenue Court is hit by Sec.3(4)(b) of the Act. The order of eviction is set aside on this ground. [Para. 10]

Case referred to:

Ayyanmal v. M.Venkataraman, (1982)2 M.L.J. 432 [Para. 10]

K.Mohanram, for Petitioner.

T.R.Rajagopalan, for Respondent.

The Court made the following

ORDER: The landlady filed a petition for eviction under Sec.3(4) (a) (b) of the Tamil Nadu Cultivating Tenants Protection Act, Act 25 of 1955 (hereinafter referred to as 'the Act'). The petitioner herein is the tenant under the respondent herein in respect of the land belonging to the respondent in Survey No.505/92. The tenant had taken the land on lease from the Predecessor-in-interest of the present landlady for agricultural purpose, particularly, for cultivation of paddy. The present annual rent payable by the tenant to the landlady is Rs.2,500 and six salugais of paddy. According to the landlady, the rent is payable in every month of Thai. On 4.2.1987 the tenant sent a draft for Rs.3,500 to the landlady along with a letter. In the letter it was stated that the rent of Rs.3,500 was sent to the landlady, but the landlady refused to receive the same and returned the draft along with her letter. In the said letter, she has stated that two years rent is due from the tenant

for the period 14.4.1985 to 13.6.1986 and since the tenant has sent only Rs.3,500 the same was returned back. It was, therefore, pleaded that the tenant committed default in payment of rent and thereby rendering himself liable to be evicted under Sec.3(2)(aa) of the Act.

2. The landlady further stated that the land was leased to the tenant for the purpose of cultivation, but the tenant used the land and continues to use it for a purpose which is neither agricultural nor horticultural coming within the meaning of Sec.3(2)(b) & (c) of the Act.

3. According to the landlady, there was only a small tiled shed in the demised land by the side of the well. Last year, the tenant had constructed a tiled office room and several water tanks inside the original shed for the purpose of storing water and wetting the yarn, and also constructed a big tiled shed for the purpose of drying yarn and put up new oven in the original shed for dyeing and bleaching the yarn and has been running a yarn dyeing factory there under the name and style of 'Vijayakumar Saya Salai'. The tenant has also dismantled the new shed put up by him and used the space for drying the yarn. The tenant has done all these acts without the knowledge and consent of the landlady unauthorisedly and illegally. The tenant misused the agricultural electric service connection and continues to misuse the same for the purpose of running the aforesaid dyeing industry unauthorisedly. Thus the tenant has unauthorisedly and illegally converted a portion of the demised agricultural land for industrial purposes, which was entirely alien to the agricultural tenancy. Therefore, the tenant is liable to be evicted under Sec.3(4)(a) and (b) of the Act.

4. The tenant filed a counter: The case put forward by the tenant is as under:

It is false to state that the annual rent is Rs.2,500 and six salugais of paddy. On the contrary, the annual rent is Rs.2,500 including six salugais of paddy. The tenant has not committed any default in payment of rent. When the rent was sent by draft, the landlady refused to receive the same. The tenant did not convert the agricultural land for any industrial purpose. The land was put into use only for agricultural purpose. The electric connection was obtained by the tenant with his own funds. The tenant deepened the well and using the water, for agricultural purposes. The tenant raised sugarcane crops in the demised land.

The shed which has been built by the tenant is in existence for a long time. It is not correct to state that the shed has been built for drying the yarn. There is no such bleaching operation as alleged by the landlady. There is no dyeing factory under the name and style of 'Vijayakumar Saya Salai' as alleged. Therefore, the petition for eviction filed by the landlady is liable to be dismissed.

5. The landlady examined three witnesses. The tenant examined himself as R.W.1. The tenant also examined one Sundaram as R.W.2. The landlady filed 17 documents and the tenant filed 7 documents. Ex.C-1 and Ex.C-2 are the inspection report and plan filed by the Assistant Tahsildar.

6. Considering the facts arising in this case, the Revenue Court held that the tenant committed default in payment of rent and the tenant also put in use the agricultural land let out to him for the purpose other than for which it was let out. Accordingly, eviction was ordered on both these grounds. It is against this order, the tenant is in revision before this Court.

7. The learned counsel appearing for the tenant/petitioner herein submitted as under:

The Revenue Court was not correct in holding that the rent is Rs.2,500 and six salugais of paddy every year. The tenant is not in arrears of rent as alleged by the landlady. The Revenue Court overlooked the payments made by the tenant's counsel to the landlady's counsel of a sum of Rs.2,500 on 30-11-1987 and a sum of Rs.5,000 on 29-7-1988. The revenue court has committed an error of law in not granting time to the tenant as per Sec. 3(4) (b) of the Act so as to enable the tenant to pay the arrears of rent and as such the order is liable to be set aside.

8. The tenant has not used the agricultural land for the purpose of dyeing yarn. P.W.1 in his evidence stated that originally there was a tiled shed and later on it was extended for the manufacture of jaggery. Further, the tenant put up an oven and a tank in the above said shed for the purpose of manufacture of jaggery. P.W.1 admitted that for crushing the sugarcane and for the manufacturing of jaggery a shed is necessary and a room is also necessary for storing the jaggery. Therefore, it is not correct to state that the tenant started a dyeing factory. No dyeing factory can be run without obtaining a licence. No licence was produced to show that the tenant was running a dyeing factory. There is no notice from the landlady of objecting to

the running of the dyeing factory. P.W.1 had admitted the existence of thrashing floor. There is no evidence on record to show that the tenant committed acts of waste. Even assuming if a dyeing factory had been running the shed put up in the thrashing field, that will not constitute an act of waste. In the Tahsildar's report the exact extent of land used for dyeing factory is not mentioned. The penalty levied for the use of the agricultural service connection for non-agricultural purpose by itself would not be sufficient to establish that the petitioner was running a dyeing factory. The penalty was paid by the tenant to restore the pumpset connection to save the standing sugarcane crops. In Ex.C-1 and C-2, the Assistant Tahsildar has not got the signature of the village Administrative Officer who was allegedly present at the time of inspection. No chemical waste were let out to the land. Ex.P-11 to Ex.P-17 relates to service connection sought for the land in Survey No.502/2 and not for 505/2. It was, therefore, pleaded that the revenue court was not correct in ordering eviction on both these grounds. The learned counsel for respondent while supporting the order passed by the Revenue Court reiterated the arguments advanced before the revenue court.

9. I have heard the rival submissions.

10. The petitioner herein is the tenant that the landlady, who is respondent herein, in respect of agricultural land of an extent of 2,038 sq.ft. in Survey No.505/2. According to the landlady, the rent is Rs.2,500 and six salugais of paddy payable every year in the Tamil Calendar month of Thai. The landlady stated that the tenant failed and neglected to pay the arrears of rent for the period of two years from 14.4.1985 to 13.6.1986. According to the tenant, he sent the rent by Money Order, which was refused by the landlady. According to the tenant he sent Rs.3,500 by way of draft along with a letter stating that this amount was sent towards the rent payable by him. Since two years rent works out of Rs.5,000 and since the tenant sent only Rs.3,500, the landlady refused to receive the same. Ex.B-5, dated 4.2.1987 is the demand draft sent by the tenant to the landlady for Rs.3,500. Ex.B-4 is the letter sent by the tenant along with the demand draft. In the said letter there is no mention as to the amount sent by the tenant is relating to which year. The landlady refused to receive the same and sent back this demand draft along with the letter (Ex.A-6). In spite of the fact

that the landlady refused to receive the rent, the tenant did not make any attempts to deposit the same in court. Before the Revenue Court the tenant stated that the rent is only Rs.2,000 and the value of six salugais of paddy would be Rs.500 and, therefore, the total rent is Rs.2,500. In the lease agreement dated 6.6.1985 the tenant agreed to pay Rs.2,500 as rent and six salugais of paddy every year. Under such circumstances, the Revenue Court came to the conclusion that the tenant is in arrears of rent. Accordingly, the Revenue Court ordered eviction. But this order is not in accordance with the relevant provisions of the Act. According to Sec.3(4)(b) of the Act after ascertaining the arrears of rent, a duty is cast upon the Revenue court to grant time to the tenant to deposit the rent. This was not done by the Revenue Court in this case. Therefore, the order passed by the Revenue Court is hit by Sec.3(4)(b) of the Act. This was the view taken by this Court in the case of *Ayyammal v. M.Venkataraman*, (1982)2 M.L.J. 432. In view of the abovesaid legal position, the eviction order passed by the Revenue Court on the ground of arrears of rent is not in order. Therefore, I set aside the order of eviction passed by the Revenue Court on this ground.

11. The next ground in this revision relates to eviction sought for under Sec.3(2)(b) of the Act. According to the landlady, the land was leased out to the tenant for the purpose of carrying out the agricultural operations. But according to the landlady the tenant was guilty of negligence in destructing the land, etc., and the land was used for non-agricultural purposes. The landlady submitted that the tenant started a yarn dyeing factory in the demised land under the name and style of 'Vijayakumar Saya Salai' and recently the tenant had dismantled the new shed put up by him and used the space for drying the yarn. It was further pleaded that the tenant has done all these acts without the knowledge and consent of the landlady and therefore he is liable to be evicted for using the land for the purpose other than for which it was let out. On the other hand, the tenant submitted that he did not run any dyeing factory as alleged by the landlady. The shed was used for manufacturing jaggery. Therefore, according to the tenant the landlady was not correct in saying that a portion of the land was converted for industrial purpose. The landlady filed a petition before the Revenue Court requesting the court to inspect the land

personally. But that petition was dismissed. As against this order, C.R.P.No. 2256 of 1988 was filed before this Court. The said revision was also dismissed on 26.8.1988. However, the land was inspected by the Assistant Tahsildar. After his inspection, the Assistant Tahsildar filed his report dated 30.8.1986. The inspection was made in the presence of the tenant and other persons. The Assistant Tahsildar, who conducted the inspection was also examined as C.W.1. In his report, the Assistant Tahsildar stated that in a portion of the demised land a dyeing factory was running under the name and style of 'Vijayakumar Saya Salai'. He has also stated that caustic soda was kept in that place. The landlady made a complaint to the Engineer, Coimbatore Municipality. The Assistant Engineer visited the spot. By using the agricultural service connection the tenant drew water from the well for the purpose of his dyeing factory. This was shown in Ex.B-3 and Ex.B-7. Since the tenant used this service connection, which was meant for the agricultural purposes, in order to draw water for industrial purpose, a penalty of Rs.10,270.75 was levied by the Electricity Department against the tenant and the power was also disconnected. It is the contention of the landlady that the waste water after dyeing the yarn was used to be let out in the agricultural land, which is injurious to the agricultural soil. This was accepted by the Revenue Court. The tenant said the shed was used for the purpose of manufacturing jaggery. But no evidence was adduced to support this version. The tenant applied for service connection to the demised land in order to get electric current for commercial purposes. The tenant said that in the application he has given the survey number as 502/2 and, therefore, service connection was not applied for the demised land for which the Survey No. is 505/2. Admittedly, the tenant has no connection with the land in Survey No.502/2. Further, he is also not the owner of any other hand. It was stated that in the demised land two water tanks were constructed by the tenant. The tenant has also constructed a big shed. In the centre of the shed there were two water tanks. There were two ovens inside the shed. By the side of these tanks, on a bench three bags of caustic soda were kept. On the front side of the door a board displaying 'Vijayakumar Saya Salai' was hanging. These are all the facts found by the Assistant Tahsildar who inspected the demised land.

The tenant did not produce any evidence to controvert to report filed by the Assistant Tahsildar. The landlady examined her husband, one Mr.Ramalingam, Assistant Engineer in the Electricity department and one Mr. Kuppuraj, Accountant who is also in the Electricity Department in order to prove her case. The Assistant Tahsildar, Kovai was examined as C.W.1. Considering the facts arising in this case, both oral and documentary, the Revenue Court came to the conclusion that the tenant used a portion of the agricultural land for the purpose of running his dyeing factory. Therefore, eviction was ordered since the tenant was guilty of negligence in the destruction of the land etc. and for using the land for non-agricultural purposes as contemplated under Sec.3(2)(b) and (c) of the Act.

12. On a careful consideration of the facts arising on this aspect, I am of the opinion that the Order passed by the Revenue Court on this aspect is in order since on facts, the landlady proved her case that the tenant conducted his dyeing factory in a portion of the demised land. Since the order of eviction passed by the Revenue Court under Sec.3(2)(b) and (c) of the Act is in order, I am not inclined to interfere with the same. Therefore, the tenant is liable to be evicted under Sec.3(2)(a) and (b) of the Act. Since the order of eviction passed by the Revenue Court on one of the grounds was upheld in this revision, I consider that the petition filed on the ground of arrears of rent need not be remitted back for fresh disposal in accordance with the decisions of this Court cited supra.

13. Accordingly, this revision is dismissed. However, there will be no order as to costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and Arumugham, JJ.*

O.S.A.Nos.64 and 65 of 1986 20th October, 1992.

M/s. Gold Star Line Ltd. ...Appellant
v.

Bafna Brothers herein represented by their Power of Attorney Agent and others ...Respondents.

Madras Port Trusts Act (II of 1965), Sec.39(3) and Major Port Trusts Act (XXXVIII of 1963), Sec.42 - Gratulatory immunity under Sec.39(3) - Ship owner delivering goods to the Port Trust - If absolved of liability to the consignee.

Held: If goods are delivered to the Port Trust in accordance with the contract, the carrier is absolved of any liability. If, however, it is not so delivered, notwithstanding Sec.39(3) of the Madras Port Trusts Act or Sec.42 of the Major Port Trusts Act, the carrier shall continue to be answerable and liable under his contract. In the instant case, the learned single Judge has taken the correct view of the law on the facts of the case as above when it is admitted that goods were not delivered in full and in accordance with the contract with the first defendant, its liability did not cause on delivery of goods to the Port Trust.

[Paras. 16 & 17]

Cases referred to:

Union of India v. M/s. Ralli Bros. Ltd., (1968)2 M.L.J. 199. [Para. 10]

Steel Authority of India v. Indian Steamship Co. by Agent, 1979 T.L.N.J. 196. [Para. 11]

The Trustees of the Port of Madras by its Chairman v. K.V. Shaik Mohammed Rowther and Co., (1963)2 S.C.R. (Supp.) 915. [Para. 10]

The Madras Port Trust v. K.P.A. T. Annamalai Nadar, (1967)2 M.L.J. 594: I.L.R. (1966)1 Mad. 164. [Para. 10]

The Shipping Corporation of India Ltd., Bombay v. The Union of India, A.I.R. 1976 A.P. 261. [Para. 12]
M/s. United Bleaders v. South East Asia Shipping Company (P.) Ltd., 1978 T.L.N.J. 35.

[Paras. 12, 14, 16]

Appeals under Clause 15 of the Letters Patent against the Order of Singaravelu, J., dated 22.9.1983 and made in the exercise of the Ordinary Civil Jurisdiction of the High Court in C.S.Nos.209 and

210 of 1980.

The Judgment of the Court was delivered by *Mishra, J.*: It would have been more in order had these appeals been heard by the same Bench which heard O.S.A.Nos.181 and 182 of 1985 filed on behalf of the Port Trust against the impugned judgment, but these appeals by the first defendant/Carrier, have been listed after the said two appeals have been heard by another Bench (*Mishra, J.* and *Padmini Jesudurai, J.*). We are informed that judgment in the said two appeals has not yet been delivered.

2. The two plaintiffs, viz. the consignee represented by their power of Attorney Agent and National Insurance Company Limited have filed the suits C.S.Nos.209 and 210 of 1980, alleging *inter alia* that the first defendant/Carrier, or the ship known as M/s. Gold Star Line Limited, incorporated in Hongkong, carried consignments of a merchant at Bangkok to the first plaintiff, they being 4,000 bags of greengram and another 2,000 bags of greengram, to the same destination, Madras. The consignments were insured with the second plaintiff National Insurance Company Limited. The vessel 'M.V. Gold Leaf' carrying the two consignments arrived at Madras on 26.8.1979. The landed cargo was not stacked markwise and the marks were also missing on number of bags and, therefore, the consignment could not be delivered in full. The 1st plaintiff in C.S.No.209 of 1980 was given delivery of 2,207 out of 4,000 bags, leaving a shortage of 1,793 bags. The 1st plaintiff in C.S.No.210 of 1980 was given delivery of 1,340 out of 2,000 bags, leaving a shortage of 660 bags.

3. On complaint the first defendant-carrier alleged that they had landed the entire manifested quantity and that it was in the custody of the second defendant, Madras Port Trust, which could not deliver the goods according to the marks. On claim by the first plaintiff, the second plaintiff as insurer has settled the claim for Rs.3,26,830.50 being the value of the goods short delivered. In view of the subrogation, the suits are filed by both the plaintiffs, claiming the invoice value of the goods with interest.

4. The first defendant, who is common in both the suits, filed a written statement, stating that the Carrier was not aware of the condition and the quantity of the cargo entrusted at the Bangkok Port, that the cargo was duly discharged at Madras to the custody of the second defendant, Madras

Port Trust, who issued tally receipts, and that, therefore, the liability, if any, of the Carrier had come to an end once the cargo is discharged from the vessel. It denied any short-landing and stated that if there was any shortfall, it was perhaps due to the cross-deliveries effected by the second defendant.

5. The second defendant filed a written statement alleging that though the goods were shown as landed in the tally sheets, the quantity that was actually lying under the marks was much less. The black and green grams were not landed mark wise and all the bags were landed in a mixed up condition. Further, the goods were in bad condition, and were packed in a single gunny and, therefore, there was heavy spillage at the time of landing. The first plaintiff refused to take delivery of the heap shown to them and therefore, the same was out turned as excess landed and a 'B' certificate was issued to the plaintiff.

6. D.W.1, the agent of the first defendant carrier, in his deposition stated that the goods quantity wise landed at Madras Port completely and that most of the cargo were mentioned under marks, but in specific cases, a large number of bags have been mentioned under 'various' marks; the mark 'various' means that several marks of the items landed together which were not segregated separately and that is why they were classified so. He stated that the segregation was done by the Port labourers at the cost of the shipper and the goods were discharged markwise, but the second defendant had carried it under 'various' mark. It is on record that the first plaintiff's agents requested the Shipper to cause a survey of the goods landed under 'various' mark since they were in a damaged condition in the sheds. The first defendant did not make any survey though admittedly it was a part of its duty (*vide*, the admission of B.W.1). The evidence of this witness is significant with respect to the goods landed in so far as he has admitted that the cargo landed in a mixed up condition and on landing those goods which did not have specific marks were branded as 'various' and as per the out-turn statement Ex.D-5 issued by the Port Trust, the contents of 2,453 bags were lying in one lot as a heap under 'nil' mark. Since the tally statement and the out-turn statement contradicted each other, the Port Trust issued 'B' certificate as if the cargo had short landed.

7. The Ship Master at Madras Port Trust was

examined as D.W.2 and he stated that the manifested quantity that arrived through the vessel on 26.8.1979 was 52,100 bags out of which the second defendant had delivered a total quantity of 49,647 bags. He stated that the consignor used only one single gunny bag and that some of the bags arrived in torn condition. Referring to Ex.D-9, he stated that the goods were received in mixed up condition 'cover torn and contents falling out'. Goods marked 'various' also landed. He stated that 3,797 bags under 'various' mark and 1,898 bags under 'nil' mark were annotated as 'cover torn and contents falling out'. According to him, the steamer agent stacked it in a mixed up condition and was liable for it and the agent of the first defendant was also a party to the tally sheet which recites that the goods landed in a mixed up and damaged condition with cover torn, etc. The carrier took the goods from the wharf to the shed by their own transport utilising their own men and labour for unloading etc. Because the steamer agent stacked it in a mixed up condition, the first plaintiff could not identify the goods and, therefore, according to D.W.2 the goods were not removed.

8. On the basis of the above and on the consideration of the other evidence on record, a learned single Judge of this Court has found as follows:

"...in the face of the evidence on record, there is no difficulty in finding that the 1st defendant had not delivered the entire cargo in apparent good condition in conformity with the Bill of Lading and consequently the liability of the 1st defendant does not come to an end once the cargo is discharged from the vessel. The evidence also clearly establishes that the specific marks in the manifest were absent when the goods were tendered for delivery. There is also discrepancy between the tally sheet and the out-turn statement. We have already found that the annotation in the tally sheet is 'cover torn and contents falling down'. The tally sheet itself is prepared by the Port Trust in the presence of the 1st defendant's agent and it is an internal arrangement between the defendants. The consignee does not at all come into the picture at that stage. It would appear that for the sake of easy and quick disposal of the enquiry, the Port Trust more often issues 'B' Certificate as if the goods short landed and they show it as 'Excess landing' when the landed goods do not conform to the description in the

invoices or in the Bill of Lading. The issue of 'B' Certificate is perhaps the easiest way by which the Port Trust seeks to avoid the liability or the claim by the consignee. On the other hand, by showing 'excess landing' under the 'B' certificate, the Port Trust stands to gain since it sells the claimed goods and appropriates the same for itself. In my opinion, the issue of 'B' certificate by the 2nd defendant was not at all justified as it is clear from the evidence that there was no short landing or even excess landing. The consigned goods arrived in full. But, some of them did not conform to the description or did not contain the marks or arrived in a damaged condition. It is also clear from the evidence that there was mixing up of green gram and black gram and the 'markings' also did not tally. This is clearly due to the negligence or misconduct on the part of the workers and the lower officials in the Port Trust on the spot, who actually supervise the unloading and stocking of the goods. For no fault of his, the consignee is now put to loss and admittedly these two quantities of short deliveries cannot at all be denied. The consignee cannot be compelled to take whatever is offered to him in whatever condition. I am satisfied that the short delivery is on account of the negligence and misconduct on the part of the agents and servants of both the defendants".

It is on the basis of the finding that the issue of 'B' certificate by the second defendant was not at all justified that the learned single Judge found that there was no short landing or even excess landing and that the goods arrived in full.

9. Learned counsel for the appellant has contended that the learned single Judge has committed an error of law in holding the carrier responsible for loss to the consignee. He has drawn our attention to Sec.39(3) of the Madras Port Trust Act as well as Sec.42(7) of the Major Port Trusts Act to contend that the ship owner's liability ended with delivery of goods in full with the Port Trust, an argument which was advanced with vehemence before the learned single Judge but negated in these words:

"The law on this aspect is well-settled by a Division Bench of our High Court in *Union of India v. M/s. Ralli Bros. Ltd.*, (1968) 2 M.L.J. 199, wherein it has been held that 'the

responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship, but continues up to their delivery in accordance with the terms of the bill of lading'. The decision in *Steel Authority of India v. Indian Steam Ship Co. by Agent*, 1979 T.L.N.J. 196, was also placed before me for the proposition that the mere issue of tally certificate does not absolve the liability of the carrier and that the 'markings' on the goods are necessary for their identification. In the second cited decision, Padmanabhan, J., held that 'the issue of tally sheet by the Port Trust to the ship owner is a matter of internal checking between the ship owner and the Port Trust and it does not bind the consignee and that the fact that the ship owner has obtained a certificate from the Port Trust under Sec.39(3) of the Port Trust Act will not amount to an absolute discharge of the ship owner of his liability to deliver the cargo to the consignee. It was further held that the consignee was given a 'B' certificate will be conclusive proof that the goods conforming to the Bill of Lading had not been landed at the Madras Port. In the face of these decisions and in the face of the evidence on record, there is no difficulty in finding that the 1st defendant had not delivered the entire cargo in apparent good condition in conformity with the Bill of Lading and consequently the liability of the 1st defendant does not come to an end once the cargo is discharged from the vessel".

At another place while dealing with issue of 'B' Certificate, the learned single Judge has observed: "The consigned goods arrived in full. But, some of them did not conform to the description or did not contain the marks or arrived in a damaged condition".

10. In a Division Bench judgment of this Court in *Union of India v. M/s. Ralli Bros. Ltd.*, (1968) 2 M.L.J. 199, the facts were as follows:

"The first defendant in the suit chartered the ship on the 4th April, 1955 (Ex.D-1) as the charter party specifically for a full complete cargo of refined sugar in bags not exceeding 9,450 long tons, not less than 9,000 long tons nett for carriage to Madras. On the very day the third defendant in the suit, the shippers, sub-chartered the ship for the carriage of the sugar. The goods were taken aboard at London on

22nd September, 1955, Ex.D-3 being the relative bill of lading. The ship arrived at Madras on 19th October, 1955 and it commenced to discharge the cargo on 27th October, 1955, and the discharge of the cargo was completed, it is stated on 8th November, 1955. According to the plaintiff, there was short landing of 414 bags of sugar weighing 1.41.8.0.0 as per bill of lading. The plaintiff also complained that 6,807 bags were discharged in a bad, slack, cut and torn condition and 747 bags of sugar were sweat-stained and damaged making the sugar unfit for use. The shortage in the weight in respect of the slack, cut and torn and sweat-stained bags was estimated at 1.86.13.3.4. There was a survey with reference to the 7,554 bags in slack, cut and torn condition or sweat-stained and as against this it was stated, there were available 420 bags of ship-sweepings and 521 bags of shad-sweepings giving a weight of 1.76.12.2.25".

On the merits while holding that 414 bags had not been delivered to the plaintiff by the Port Trust, the learned single Judge of the Court was of the view that this was not a case of short-landing, as tally-sheets issued by the Port Trust showed the entire quantity of cargo as discharged and the Assistant Traffic Manager of the Port Trust admitted that the entire quantity was landed and that the tally-sheets were correct. The learned single Judge proceeded in the view that the Port Trust, by operation of law was made to accept the goods as bailee of the consignee, when it took charge of the goods from the ship and that the delivery of the goods to the Port Trust must be held to be delivery to the consignee. In taking this view, the learned Judge in the words of the Division Bench 'purported' to follow certain earlier decisions of this Court'. The Bench upon that said:

"Now this view of the jural position of the Port Trust cannot be maintained after the decision of the Supreme Court in *The Trustees of the Port of Madras by its Chairman v. K.V. Shaik Mohammed Rowther and Co.*, (1963) 2 S.C.R. (Supp.) 915. The legal relationship between

- the shipowner and the shipper or the consignor and the consignee is thus enunciated in the said decision:

'There is no doubt that the ship-owner is the bailee of the shipper, the consignor and that he is responsible for the delivery of the goods to

the consignee or a transferee according to the terms of the bill of lading. This duty the ship-owner discharges only when he has delivered the goods to the consignee or such person who be entitled to take delivery in accordance with the endorsements on the bill of lading. Delivery to the Board is not delivery to the consignee or person both because the delivery is to be on the presentation of the bill of lading and because the Act contains no provision which would constitute the Board an agent of the consignee for the purpose of taking delivery of the goods.... It is true that on the Board's taking charge of the goods and giving a receipt about it to the ship-owner, the master or the owner of the vessel is absolved from liability for any loss or damage which may occur to the goods which had been landed, but this provision by itself does not suffice to convert the receiving of the goods by the Board after they had been landed by the ship-owner to the Board's taking delivery of those goods on behalf of the consignee. The Board simply takes charge of the goods on being required by the steamer-agent to take charge of it.... It is clear therefore that when the Board takes charge of the goods from the ship-owner, the ship-owner is the bailor and the Board is the bailee and the Board's responsibility for the goods thereafter is that of a bailee. The Board does not get the goods from the consignee..." Lower down their Lordships pointed out:

"The responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship, but continues upto their delivery in accordance with the terms of the bill of lading".

In *The Madras Port Trust v. K.P.A.T. Annamalai Nadar*, (1967) 2 M.L.J. 594: I.L.R. (1966) 1 Mad. 164, following the above decision of the Supreme Court, we have ourselves considered the relative positions of the ship-owner, the Port Trust and the consignee and the effect of the tally-sheet. It follows that the whole matter and the relative liabilities of the parties in this case will have to be examined afresh in the light of the above decisions".

The Bench, however, found that the learned single Judge in the view he had taken on the legal issues had not referred to all the available evidence on the matter and the several aspects which did call

for consideration, if the liability has to be definitely fixed, and observed:

"True, some damage could have occurred in the premises of the Port Trust after landing. A question will arise whether notwithstanding Sec.39(3), the ship-owner or carrier could be made liable for the same. We need not go into these questions now and here. That there has been carelessness in the handling of the goods on board and after landing is apparent from the records. It is unfortunate that even formally the Port Trust has not been made a party to this suit and the claim against it has been allowed to get barred by limitation in endless correspondence. It may be that the Port Trust is a statutory Corporation, but that does not absolve it from liability for the loss if any for which it is answerable to the Union Government".

The Bench remanded the case to the trial court for determination of the damages on the basis of the evidence notwithstanding the rule as found in Sec.39(3) of the Madras Port Trust Act.

11. In *Steel Authority of India v. India Steam Ship Co. by Agent*, 1979 T.L.N.J: 196, a learned single Judge of this Court was dealing with a case in which the vessel at Madras Port discharged part of the cargo, which on inspection by the Customs Authorities was found to be without labels and the markings were not according to the specifications. In some cases, there were no markings at all and in some, the destination was shown as Bombay. The Port Trust issued a 'B' certificate stating that the 36 parcels shown in the Bill of Lading were not landed by the vessel which arrived in Madras. One of the contentions before the learned single Judge was with respect to the legal effect of Sec.39(3) of the Port Trust Act. After referring to the earlier decisions of this Court, the learned Judge stated the law in these words:

"What can be deduced from the above decision is that the issue of tally sheet by the Port Trust to the ship owner is a matter of internal checking between the ship-owner and the Port Trust and it does not bind the consignee. The fact that the ship-owner has obtained a certificate from the Port Trust under Sec.39(3) of the Port Trust Act will not amount to an absolute discharge of the ship owner of his liability to deliver the cargo to the consignee. In other words, a delivery to a wharfinger or to a dock

authority is not in itself sufficient unless the contract provides for such delivery or unless there is a custom to that effect. The responsibility of the carrier for the goods does not cease merely by technical discharge of the goods from the ship and obtaining a certificate from the Port Trust under Sec.39(3) of the Port Trust Act, but continues up to the delivery in accordance with the Bill of Lading. Further, the fact that the consignee had given a 'B' Certificate to the Port Trust will be conclusive proof that the goods conforming to the Bill of Lading had not been landed at the Madras Port".

12. Of the three decisions that learned counsel for the appellant has cited, one that has been relied upon most is the judgment by a learned single Judge of this Court in *M/s. United Bleaders v. South East Asia Shipping Company (P.) Ltd.*, 1978 T.L.N.J. 35, in which it was held that it was wrong to contend that the liability of the ship owner would extend right upto the time of the actual delivery of the goods to the consignee and that the statutory interposition of the Port Trust between the landing of the goods and their delivery would not absolve the ship owner of his liability. The learned single Judge has in this behalf entered into a discussion of law and observed:

"...for this purpose certain passages from the decisions of the Supreme Court in the *The Trustees of the Port of Madras by its Chairman v. K.V. Shaik Mohammed Rowther and Co.*, (1963)2 S.C.R. (Supp.) 915, were relied on. The learned counsel for the respondent relied on Sec.39(3) and also certain other decisions of the Supreme Court as supporting his stand that the carrier was absolved of his liability as soon as he delivered the goods to the Port Trust.

It would be seen that the Supreme Court was concerned with finding out whether the charges could be levied on the ship-owner or on the consignee. It is only in that context that the Supreme Court went into the various provisions to examine whether the Madras Port Trust has been constituted as the agent of the consignee. It was held that the Port Trust was not the agent of the consignee and that the Port Trust did not receive the goods on behalf of the consignee. It does not appear to be proper to take these passages as if they

determined the liability of a ship owner when that matter was not and could not have been in issue in that case *vis-a-vis* the consignee.

In *The Madras Port Trust v. K.P.A.T. Annamalai Nadar*, (1967) 2 M.L.J. 594: I.L.R. (1966) 1 Mad. 164, a case somewhat similar to the one here arose. It was held that under Sec.39(3) once a receipt was given that a particular consignment had been taken charge, a complete discharge was given to the ship-owner and that the Port Trust was rightly held liable. Consistently with this decision the ship-owner cannot be held liable in this case. There is another decision of this Court in *Union of India v. M/s. Ralli Bros*, (1968) 2 M.L.J. 199. The Andhra Pradesh High Court in *The Shipping Corporation of India Ltd., Bombay v. The Union of India*, A.I.R. 1976 A.P. 261, dealing with a parallel provision of Sec.42 of the Major Port Trust Act, 1963 took the same view. It was held that from the moment the receipt was given to the shipper/carrier by the Board, it was the Board that became responsible for the loss of the goods".

13. In the above view of the principles of law, according to learned counsel for the appellant, the instant case is one in which the Port Trust alone could be held liable, as the ship had delivered the goods to it under Sec.39(3) and the Port Trust had issued a certificate of discharge to the consignee, with respect to which learned single Judge has to say, the "the consigned goods arrived in full".

14. In *M/s. United Bleaders v. South East Asia Shipping Company (P.) Ltd.*, 1978 T.L.N.J. 35, cited supra, the learned single Judge was dealing with a case in which the carrier had delivered all the eight bales consigned safely to the Port Trust and the Court below had held that there was no short-landing. After stating as stated above, the learned Judge has said:

"....But as soon as the proper goods were delivered to the statutory authorities interposed between the ship-owner and the consignee, then the delivery to the statutory authorities would absolve the ship-owner of his liability. The question whether the statutory authority is the agent of the ship-owner or of the consignee is not relevant. The statutory immunity given under Sec.39(3) is absolute in its terms and is not dependent on the Port Trust being the agent of the consignee. Having regard to

the statutory provisions which confer immunity on the ship-owner, it is not possible to hold that the ship-owner continues to be liable notwithstanding the fact that he has delivered the proper goods in their entirety to the Port Trust. If the appellants' contention were to be accepted, then Sec.39(3) would be practically rendered nugatory, as cannot apply to any conceivable situation. In the present case, it is clear from the records that the tally sheets issued to the Master of the ship confirmed the delivery of the 8 bales. The Port Trust delivered to the first only two bales. If there was a short delivery to the consignee, in these circumstances, the ship-owner cannot be blamed thereafter".

15. Learned counsel for the appellant drew our attention to the following passage in Halsbury's Laws of England, Volume 3 (Shipping and Navigation), paragraph 639, page 450:

"The ship-owner remains liable under his contract until he has made delivery to a person entitled thereto. A delivery to a wharfinger or to a dock authority is not, in itself, sufficient, unless the contract provides for such delivery, or unless there is a custom to that effect".

16. We are in complete agreement with the view expressed by the learned single Judge in *M/s. United Bleaders v. South East Asia Shipping Company (P.) Ltd.*, 1978 T.L.N.J. 35, referred to above, that if goods are delivered to the Port Trust in accordance with the contract, the Carrier is absolved of any liability. If, however, it is not so delivered, notwithstanding Sec.39(3) of the Madras Port Trust Act or Sec.42 of the Major Port Trusts Act, the Carrier shall continue to be answerable and liable under his contract.

17. In the instant case, learned single Judge has taken the correct view of the law on the facts of the case as above when it is admitted that goods were not delivered in full and in accordance with the contract with the first defendant, its liability did not cease on delivery of goods to the Port Trust. We have refrained from making any observations on the liability of the Port Trust, besides that of the appellant herein, for the reason of the matter being in appeal in O.S.A.Nos.181 and 182 of 1985. Since we have found no error in the judgment of the learned single Judge, these appeals must fail and the appeals are accordingly dismissed. On the facts of these cases, however, there shall be no

order as to costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Bellie, J.

A.S.No.661 of 1982 9th December, 1992.

Seethalakshmi Ammal ...Appellant
v.

T.P.Srinivasa Naicker ...Respondent.

Negotiable Instruments Act (XXVI of 1881), Sec.87 - Material alteration - Endorsement of repayment on promissory note - If a negotiable instrument - Material alteration in endorsement - If material alteration of the negotiable instrument.

A reading of Sec.87 of the Negotiable Instruments Act would show that to attract that action, the material alteration must be of the Negotiable Instrument. The question is whether the endorsement which has been altered is negotiable instrument. The court is of the view that an endorsement of repayment on the promissory note cannot be said to be a negotiable instrument. A negotiable instrument has already come into being with the execution of it by the defendant. That is the body of the promissory note containing the names of the parties and the terms before any endorsement of repayment is made thereon. Such endorsement only relates to repayment and not to any terms of the promissory note as such. Therefore, by no stretch of reasoning an endorsement of repayment made on the promissory note can be said to be a negotiable instrument or part thereof. Hence, it follows that there is no material alteration of the promissory note. [Para. 8]

Cases referred to:

Shivalingappa v. P.B.Puttappa, A.I.R. 1971 Mys. 273. [Para. 9]

Krushna Charana Padhi v. Gourochandro Dyano Sumantho, (1939)2 M.L.J. 686. [Para. 10]

R.G.Rajan, for Appellant.

N.Rosi Naidu, for Respondent.

The Court delivered the following

JUDGMENT: The plaintiff Seethalakshmi Ammal is the appellant whose suit has been dismissed with costs.

2. The plaintiff filed the suit for recovery of a sum of Rs.12,712.50 said to be due on a promissory note executed by the defendant Srinivasa Naicker. The plaintiff's case is that the defendant borrowed a sum of Rs.15,000 from the plaintiff on 14.9.1964 and executed the suit promissory note Ex.A-1 agreeing to repay the said amount with interest at 12% per annum. The defendant paid a sum of Rs.1,000 on 10.11.1966, a sum of Rs.2,200 on 4.11.1969 and Rs.1,000 on 3.1.1972 and made endorsements in his own handwriting on the reverse of the suit promissory note. In spite of several demands by the plaintiffs the defendant has not paid the balance amount. Therefore the suit. The further case of the plaintiff is that since the defendant is an agriculturist he is entitled to the benefits of Tamil Nadu Debt Relief Act 4 of 1938 as amended by Act 8 of 1973 and therefore interest is claimed as per that Act.

3. The defendant resisted the suit contending that on 3.1.1972 he made a payment of Rs.6,000 and made an endorsement thereof and not only Rs.1,000 as alleged in the plaint, but on inspection of the promissory note the defendant found that 6,000 has been corrected into 1,000 and the portion covering the words "six thousand" has been torn off. Therefore the promissory note has been materially altered and therefore is hit by Sec.87 of the Negotiable Instruments Act, and hence the suit is liable to be dismissed. It is further contended that the entire interest has been paid up to 3.1.1977 and as per the provisions of Act 4 of 1938 as amended by Act 8 of 1973 that amount has to be adjusted towards the principal and if it is done so there would be no amount liable to be paid, and on this ground also the suit cannot stand.

4. The trial court on consideration of the evidence held that on 3.1.1972 the defendant as contended by him has paid a sum of Rs.6,000 and not Rs.1,000 only as is pleaded by the plaintiff and in the endorsement made therefor on the back of the promissory note the plaintiff has made alterations and this would amount to material alteration of the promissory note and hence it is hit by Sec.87 of the Negotiable Instruments Act. The trial court further found that as contended by the defendant the entire interest amount has been paid up to

3.1.1972 and if that amount is adjusted towards the principal as provided under Act 4 of 1938 as amended by Act 8 of 1973 there would be no amount payable by the defendant. On these findings the trial court dismissed the suit.

5. Now in the appeal Mr.R.G.Rajan, learned counsel appearing for the appellant-plaintiff contends that the finding of the trial court that on 3.1.1972 a sum of Rs.6,000 was paid as contended by the defendant and not Rs.1,000 as pleaded by the plaintiff is not correct, and that even if that finding is correct the further finding of the trial court that there is material alteration is erroneous. He also contended that the trial court is in error in holding that the defendant has paid the entire interest due on 3.1.1972. These are the points to be considered in the appeal.

6. Even from the very look at Ex.A-1 suit promissory note it is apparent that the defendant should have paid a sum of Rs.6,000 on 3.1.1972 and made an endorsement thereof and that has been altered into Rs.1,000 by the plaintiff. Besides the defendant (D.W.1) he has also examined one Thiruvengkatappa Naicker as D.W.2 who is admittedly an attester to the disputed endorsement, and he has testified that the defendant did pay Rs.6,000 on 3.1.1972 as found by the trial court he appears to be a well-to-do person and no reason whatsoever has been alleged by the plaintiff as to why he should give false evidence. Thus there is nothing to discredit his evidence.

7. To the naked eye it is clear that the figure 1,000 in the endorsement must be an alteration for some other figure and that could be 6,000. The portion containing the words of the amount paid has been torn off. The reason given by the plaintiff's husband as P.W.1 is that his grand-daughter pulled off that portion. Even if that is true, as rightly said by the trial court the plaintiff could have preserved that portion torn off and shown to the defendant and he could have obtained another endorsement. That he has not done. His plea that the torn off portion were in bits is unbelievable. And even then nothing prevented the plaintiff from informing the defendant of the same. Therefore I quite agree with the finding of the learned trial court that on 3.1.1972 the defendant has paid a sum of Rs.6,000 and made an endorsement to that effect.

8. There is no doubt that this endorsement has been an alteration by the plaintiff without the consent and knowledge of the defendant. Then

the question is whether this amounts to material alteration so as to attract Sec.87 of the Negotiable Instruments Act. A reading of Sec.87 of the Negotiable Instruments Act would show that to attract that section the material alteration must be of the Negotiable Instrument. The question is whether the endorsement which has been altered, is negotiable instrument. I am of the view that an endorsement of repayment on the promissory note cannot be said to be a negotiable instrument. A Negotiable Instrument had already come into being with the execution of it by the defendant. That is the body of the promissory note containing the names of the parties and the terms before any endorsement of repayment is made thereon. Such endorsement only relates to repayments and not to any terms of the promissory note as such. Therefore by no stretch of reasoning an endorsement of repayment made on the promissory note can be said to be a negotiable instrument or a party thereof.

9. Here it may be useful to refer to a decision by V.S.Malimath, J., as he then was of Mysore High Court in *Shivalingappa v. P.B.Putappa*, A.I.R. 1971 Mys. 273. The learned Judge has said:

"The endorsement which is alleged to have been made on the backside of the pronote does not form part of the negotiable instrument. It is an independent transaction, unconnected with the negotiable instrument in question. The alleged endorsement could as well have been made on an independent piece of paper and not on the back side of the pronote. Merely because an endorsement has been made on the back side of the pronote, it does not become part of the pronote. As the endorsement in question is not a part of the negotiable instrument, any alteration in the said endorsement does not attract the penal provisions of Sec.87 of the Indian Negotiable Instruments Act."

I entirely agree with this judgment. It appears this judgment has been quoted before the trial Judge, but he was not prepared to rely on it stating that what is stated there is only an obiter.

10. Instead the trial court seems to have relied on a Judgment of this Court in *Krushna Charana Padhi v. Gourochandro Dyanò Sumantto*, (1939)2 M.L.J. 686. But in that case there was an alteration in the date of promissory note itself and also in the endorsement. Therefore that decision will not help to decide the point whether the alteration

made in the endorsement amounts to material alteration or not. Hence it follows that there is no material alteration of the promissory note.

11. On the question whether the defendant has paid the entire interest due till 3.1.1972 a reading of the endorsement dated 3.1.1972 in my view would clearly mean that the entire interest amount due till then has been paid. The relevant words are:

“வட்டிக்காக நாளது தேதிவரை செல்லானது போக அசலுக்காக வரவு ரூ.1,000/-

This would only mean that the entire interest due till that date has been paid. Mr.R.G.Rajan would however argue that this would only mean that ‘apart from the amount paid towards interest till that date’ and not that the ‘entire amount of interest due till that date has been paid’. I am not able to accept this contention. When interest is due on the promissory note and the promisor pays any amount the promisee will adjust that amount paid only towards interest due first and he will not adjust that amount towards principal. Hence I agree with the trial court that the interest due till 3.1.1972 has been paid.

12. Then the further question arises, even if the entire interest due till 3.1.1972 has been paid, will it be sufficient to wipe off the entire amount due under the promissory note as per the provisions of Tamil Nadu Debt Relief Act 4 of 1938 as amended by Act 8 of 1973. In this connection the learned counsel appearing for the respondent-defendant submitted a calculation memo as per which there will be a balance amount of Rs.2,700 due. This appears to be correct.

13. In the result, therefore, the appeal is allowed in part, and there will be decree for a sum of Rs.2,700 with subsequent interest at 6 1/2% per annum from 1.3.1972 to 31.12.1972 and thereafter at 6% per annum till date of payment. There will be no order as to costs throughout.

B.S. ----- Appeal allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Bellie, J.

C.R.P.No.3187 of 1992 24th November, 1992

Ramalakshmi alias Ranjitham ...Petitioner
v.
Janaki and others ...Respondents.

Practice and procedure - Will - Genuineness of, in question - Evidence in piecemeal, if can be allowed. When the genuineness of an alleged Will is in question and the evidence has to be let in by the plaintiff, it would be just and necessary that all the witnesses who would speak as to the genuineness of the Will should be examined on the same day.

[Para. 3]

Petition under Sec.115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Tirunelveli dated 9.11.92 and made in I.A.No (unregd. G.L. 10255) of 1992 in O.S.No.17 of 1987.

T.R.Rajaraman, for Petitioner.

The Court made the following

ORDER: This civil revision petition is preferred against an order dismissing the plaintiff's application before the trial court to reopen the case.

2. It appears the dispute in the case relates to an alleged will. The court informed the counsel for the plaintiff that for proof of the Will all the witnesses shall be examined on the same day. The counsel for the plaintiff examined one attester to the Will and made an endorsement on the plaint that the evidence for the plaintiff is closed. But after a week a petition has been filed on behalf of the plaintiff stating that the counsel has made the said endorsement inadvertently and that the plaintiff has to examine another attesting witness and the scribe and therefore the case may be reopened. This petition was dismissed. Hence this revision.

3. I do not think that the order of the trial court can be interfered with. When the counsel has made the endorsement he knew all the implications thereof. Therefore there is no point in saying subsequently after a week that it is necessary that two more witnesses have to be examined. It is stated that the endorsement was made inadvertently. It cannot be believed. The counsel has not filed any affidavit stating so. The petitioner is rather incompetent to

say that. Then the genuineness of an alleged Will is in question and the evidence has to be let in by the plaintiff it would be just and necessary that all the witnesses who would speak as to the genuineness of the will should be examined on the same day as in this case the learned trial Judge has told the counsel for the plaintiff.

4. If one witness was examined and the counsel has made an endorsement stating that the plaintiffs' side is closed the plaintiff shall stand by that. Merely because the plaintiff states that it was due to inadvertence the counsel made the endorsement the case cannot be reopened. It is stated that by reopening the case the opposite side will not be prejudiced. It is not correct. When the first witness has been examined as to the genuineness of the Will he will know the line of the cross examination by the opposite side. If the next witness is to be examined not on the same day, but subsequently that witness will know as to what questions would be put to him in the cross examination. Therefore naturally the cross-examination will not be effective. This is how the other side would be prejudiced.

5. In the circumstances of the case, I do not think this is a fit case that the case shall be reopened as prayed for by the plaintiff. Thus I find no merit in the civil revision petition. Accordingly it is dismissed.

B.S. ----- Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No.506 of 1983 6th January, 1993.

The Kancheepuram Kamakshi Amman Silk Handloom Weavers' Co-operative Production and Sale Society Limited ...Appellant

v. Yamuna Bai and others ...Respondents.

Specific Relief Act (XLVII of 1963), Secs.9 and 10 - Suit for specific performance of agreement - Un

explained silence and wanton delay in approaching court - Plaintiff, if disentitled to relief - Plaintiff's witnesses not speaking truth before court - Relief, if can be refused.

Held: There is no explanation as to why the society waited for nearly a year after issuing every notice. Once it was made clear to the society that the defendants would not execute a sale deed as claimed by them, they should have proceeded to enforce specific performance. But they did not do so. They issued a notice again after a year and filed a suit after expiry of a further year. In the absence of any explanation for this inordinate delay in approaching the court, it can be inferred that the society has waived the performance of contract and abandoned the same. This is a case of unexplained silence and wanton delay and the society cannot escape the consequence of the same by saying that mere delay in seeking specific performance would not disentitle them to get the relief. In the present case, it is clear from a reading of the evidence of P.Ws.1 and 2 that they are not willing to speak the truth before the court. It is obvious that they are cancelling the facts from the court and their evidence is false. Even that is sufficient to refuse the relief to the plaintiff. [Paras. 9 & 10]

Cases referred to:

Kantilal Sahah v. A.C. Devarajulu Reddiar, (1977)2 M.L.J. 484 (D.B.) [Para. 9]

Easwari Amma v. M.K. Korah, (1972)1 M.L.J. 218. [Para. 10]

Satyannarayana v. Vellohi Rao, (1965)2 M.L.J. (S.C.) 145; (1965)2 An.W.R. (S.C.) 145; (1965)2 S.C.J. 678; A.I.R. 1965 S.C. 1405. [Para. 10]

Subbarayalu v. Tatayya, 1957 M.W.N. 1158. [Para. 10]

Alagammal v. Rajagopala Servai, (1976)2 M.L.J. 397. [Para. 11]

V.Chandranathan, for Appellant.

The Judgment of the Court was delivered by Srinivasan, J.: The plaintiff, which is a co-operative society has filed this appeal. The suit is one for specific performance of an agreement dated 26.10.1976 under Ex.A-1 entered with the plaintiff by one Radhakrishnan. Under the terms of the agreement, the consideration—was fixed as Rs.1,04,000 and an advance of Rs.5,000 is said to have been paid. The time for completion of the transaction was agreed to be three months. In other words, it was to be completed before 25.1.1977. On 16.11.1976, the said Radhakrishnan gave a

letter to the plaintiff stating that he signed the agreement without knowing the contents when the members of the society compelled him to sign the same. According to him, he was not having a steady mind at that time and after he returned to his house, the members of his family expressed the dissent to the transaction. He prayed for cancellation of the agreement.

2. On 20.11.1976, the Board of Directors passed two resolutions, one deciding to apply for sanction to purchase the property to the concerned authority *viz.*, The Director of Handlooms and Textiles and the other to apply for loan from the Provident Fund kept in deposit with the Central Co-operative Bank, Kancheepuram. Radhakrishnan wrote another letter on 7.12.1976 marked as Ex.B-2 on the same lines as Ex.B-1. There was a reply by the Society to Radhakrishnan on 17.1.1977 through its lawyer. It was stated in the reply that the Society was ready and willing to have the sale deed completed and pay the balance of the sale price. He was called upon to fix and intimate a date to the society for the execution and registration of the sale deed. Radhakrishnan sent a reply in Ex. A-4 on 28.1.1977 stating that the agreement was executed when he was not sober. He stated that the agreement could not be completed and he would not execute a sale deed. The society kept quiet after receiving the said reply.

3. Radhakrishnan died on 23.7.1977. The society sent notices to the legal representatives on 13.8.1977 under Ex.A-5 and Ex.A-6 calling upon them to execute a sale deed as per the agreement referred to earlier. A reply was sent by the legal representatives who are the defendants herein on 22.8.1977 under Ex.A-7 in which they stated categorically that the sale deed would not be executed and the society was not entitled to call upon them to specifically perform the agreement. Nearly a year lapsed before the society issued another notice under Ex.A-7 dated 28.6.1978 again calling upon the defendants to execute the sale deed. There is no explanation in the notice as to why the society kept quiet after receiving the earlier reply notice dated 22.8.1977. There was a reply by the defendants on 9.7.1978 under Ex.A-9 once again reiterating their stand. Again, the society kept quiet till 5.6.1979, when a registered notice was issued by the society's lawyer under Ex.A-10. Then the suit was filed on 18.6.1979 by the society for specific performance. It is averred in the plaint that the

society is ready and willing to deposit the sum of Rs.99,000 under directions of the Court out of which amount, the amount necessary to obtain Income Tax Clearance Certificate under Sec.230-A of the Income Tax Act may be directed to be paid to the authorities by the court and the same adjusted against the price of the suit property. There is no explanation in the plaint as to why the Society kept quiet for nearly three years after the date of the agreement in spite of being aware of the stand taken by Radhakrishnan and his legal representatives. There is also no explanation as to why the society waited for more than a year after issuing the so-called final notice under Ex.A-6 to the defendants.

4. The defendants raised several contentions. The main contention was that the agreement was not entered into voluntarily by Radhakrishnan and at the time of agreement, he was under the influence of alcohol and his senses were not in his control. It was also alleged that he was steeped in debts and owing to pressure of debts and unhappiness, he became an addict to drinks. It was further alleged that the office-bearers of the society compelled him to execute the agreement and the property was worth much more than the consideration stated in the agreement. The entitlement of the plaintiff to the relief of specific performance was also challenged on the ground that the plaintiff was not ready and willing to perform its part of the contract and had abandoned the contract.

5. The trial court framed nine issues. The trial court found against the plea of the defendants that the agreement was executed by Radhakrishnan at the time when he was not fully conscious or when he was under the influence of drinks. It also found that the plaintiff society had sufficient money to be drawn for the purpose of paying the balance of consideration. However, the trial court found that the plaintiff was not ready or willing to perform the contract and it had not even obtained the sanction from the Director of Handlooms as required by law. It was also found that the plaintiff was guilty of laches and abandonment of the contract. Consequently, the suit was dismissed by the trial court. Incidentally, it should be mentioned that defendants 4 and 5 who were impleaded in the suit were tenants in the property and it was found by the trial court that they were necessary parties. But, when the appeal was pending in this Court, an endorsement was made by the appellant's counsel

that the appeal was not pressed as against defendants 4 and 5. Consequently, the appeal was dismissed against respondents 4 and 5.

6. Learned counsel for the plaintiff/appellant contends that the documents produced by the plaintiff and the oral evidence, adduced on the said of the plaintiff proved beyond doubt that it was always ready and willing to perform its part. According to learned counsel, once it is found that the contract is not vitiated by fraud, coercion or undue influence, the court is bound to grant specific performance, particularly when it is found that the society had sufficient funds to perform its part of the contract.

7. The evidence adduced by the plaintiff is discrepant. It is not necessary for us to consider all the questions raised in the court below. Suffice it to point out that the finding of the court below that the plaintiff was not ready and willing to perform its part of the contract is acceptable and cannot be interfered with. No doubt, the correctness of the finding of the court below on the question as to whether Radhakrishnan executed the contract when he was sober and steady is open to doubt. There are reasons to hold otherwise, but we do not propose to do so as the evidence is not sufficient therefor. The learned trial Judge has chosen to disbelieve the version of D.W.1, the wife of Radhakrishnan on the ground it is unnatural. According to him, she has repeated what is contained in Exs.B-1 and B-2 the letters written by Radhakrishnan to the Society. That is hardly a ground for rejecting the evidence of D.W.1. A perusal of her evidence shows that it is natural and she has only spoken what happened in the house when Radhakrishnan informed the family of his signature having been taken on some papers by the society. She has given evidence that Radhakrishnan was always under the influence of drinks on account of pressure and tension. She has also stated that the property was worth more than Rs.2,00,000 at the time of the agreement. There is no necessity to reject her evidence. We accept her evidence. But, that is not sufficient for us to give a finding that the agreement was executed by Radhakrishnan at a time when he was under the influence of drinks. None who was present at the time of agreement has been examined. The first defendant has not examined any other third party to prove that Radhakrishnan was always under the influence of drinks. She has not also proved the

existence of debts which pressurised Radhakrishnan. She has not let in evidence to prove the value of the property at the time of agreement. Hence, we are not in a position to accept the defence fully though we find no reason to reject her evidence as such which in our opinion is not sufficient to give a finding in her favour.

8. As regards the readiness and willingness of the plaintiff society, it is not in dispute that the society has to obtain sanction of the Director for purchasing immovable property. The resolution was passed only on that basis on 20-11-1976 by the Board of Directors. It was decided that an application should be made to the Director of Handlooms and Textiles for sanction of the purchase for a consideration of Rs.1,04,000. In the same meeting, another resolution was also passed that loan would be obtained from out of the Provident Fund on an application made to the Bank. Having passed such resolutions, the society has admittedly failed to make application either to the Director of Handlooms or to the Bank. It is sought to be projected in the evidence that a sum of Rs.2,00,000 was available in the building fund of the society in 1976-77 and there is no necessity to borrow money. Ex.A-2, a report of the Auditor of the society has been filed. It is seen from an entry in Ex.A-2 that a sum of 2,12,531 was available as on 30.6.1977 under the building fund and earlier a sum of Rs.1,82,395 was available on 30.6.1976 under the same fund. But, the resolution passed is to the effect that they should borrow from the provident fund. If really a sum of Rs.2,00,000 and odd was available at the time of the agreement, it is not known why the resolution was passed to borrow from the provident fund. There is no explanation therefor. P.W.2 one of the Directors, who took part in the meeting and a signatory to the resolution denies passing of such a resolution. According to his evidence, it was not decided to borrow loan from the provident fund. He has also stated that the resolution was erroneous and there was no application at all for loan. If his version in the box is correct, there is no explanation as to how the minutes book contains such entries evidencing resolutions having been passed. P.W.2 has also admitted that there was no sanction from the Director of Textiles for the purchase of the property. He has admitted that it is open to the Director to either reject or accept their application. P.W.1 also admits that it is necessary to obtain

sanction of the Director. But, P.W.1 adds that it is usual to complete the transaction and later apply for ratification. But, that is not evident from any of the documents. That also runs counter to the resolutions passed as well as the evidence of P.W.2. The evidence of P.Ws.1 and 2 shows that it was necessary to obtain sanction before making the purchase. Admittedly such sanction has not been obtained. Hence, it cannot be said that the plaintiff was always ready to perform its part of the contract. When in the eye of law, the plaintiff could not have performed its part of the contract, it cannot claim that it was ready to perform the same. The willingness cannot also be said to have been established when there is material discrepancy in the matter of drawing of funds. It may be that the society had more than Rs.2,00,000 in the building fund. But, the resolution passed by the Board of Directors is not to draw from the building fund. It is only to apply for a loan from the bank and admittedly no such application was made. Hence, it cannot be contended that the society has proved its willingness to perform its part of the contract.

9. We have already referred to the notices issued by the society once a year. There is no explanation as to why the society waited for nearly a year after issuing every notice. Once it was made clear to the society that the defendants would not execute a sale deed as claimed by them, they should have proceeded to enforce specific performance. But, they did not do so. They issued a notice again after a year and filed a suit after expiry of a further year. In the absence of any explanation for this inordinate delay in approaching the court, it can be inferred that the society has waived the performance of contract and abandoned the same. This is a case of unexplained silence and wanton delay and the society cannot escape the consequence of the same by saying that mere delay in seeking specific performance would not disentitle them to get the relief. See: *Kantilal Sahah v. A.C. Devarajulu Reddiar*, (1977) 2 M.L.J. 484 (D.B.).

10. Reliance is placed on the judgment in *Easwari Amma v. M.K. Korah*, (1972) 1 M.L.J. 218. A Division Bench of this Court has held that mere delay will not preclude the plaintiff for obtaining specific performance if the suit is otherwise in time. It has also been pointed out by the Bench that the delay must not be such from which it may be properly inferred that the plaintiff has abandoned

his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. The Bench has referred to a judgment of the Supreme Court in *Satyanarayana v. Vellohi Rao*, (1965) 2 M.L.J. (S.C.) 145 (1965) 2 An.W.R. (S.C.) 145; (1965) 2 S.C.J. 678; A.I.R. 1965 S.C. 1405. The Apex Court has pointed out that the grant of relief of specific performance is discretionary though not arbitrary and it should be guided by judicial Principles. Reference has also been made to an earlier judgment of another Bench in *Subbarayalu v. Tatayya*, 1937 M.W.N. 1158. In the earlier case, the Division Bench of this court refused specific performance on two grounds, (1) the plaintiff had given false testimony in the witness box and (2) granting specific performance would be doing injustice to the respondent. In the present case, it is clear from a reading of the evidence of P.Ws.1 and 2 that they are not willing to speak the truth before the court. It is obvious that they are concealing the facts from the court and their evidence is false. Even that is sufficient to refuse the relief to the plaintiff. In addition to it, the delay on the part of the plaintiff is not explained at all.

11. Learned counsel referred to a judgment of V. Sethuraman, J. in *Alagammal v. Rajagopala Servai*, (1976) 2 M.L.J. 397. The learned Judge held in that case that it was not necessary for the plaintiff to actually tender the money or deposit the same in court except when the court directed the same. According to that judgment, it is sufficient if the plaintiff avers readiness and willingness to perform the contract according to its true construction. That ruling will have no bearing on the present case. No doubt, there is an averment in the plaint that the plaintiff is ready and willing to perform its part. We have already referred to the evidence on record which disproves the averments of the plaintiff. The plaintiff has miserably failed to prove in this case readiness and willingness to perform the contract.

12. In the circumstances, we are entirely in agreement with the findings of the lower court that the plaintiff is guilty of laches and abandonment of the contract. In any event, we refuse to exercise our discretion in favour of the plaintiff and grant specific performance as prayed for. Hence, the appeal fails and it is dismissed. As the respondents have not entered appearance in this appeal, we

make no order as to costs.

B.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Pratap Singh, J.*

A.A.A.O.No.3 of 1993 27th January, 1993.

V.G.Shyamsundar Sah Appellant
v.
Sumitra Bai ...Respondent.

Hindu Marriage Act (XXV of 1955), Secs.5(iii) and 11 - Marriage of minor girl - Not made void under statute - Courts, if can hold such marriage void.

Under Sec.11 of the Hindu Marriage Act, 1955, any violation of Sec.5(iii) is not included as a void marriage, while so, there is no point in saying that there is no lacuna in the Hindu Marriage Act and courts have to decide that aspect that the marriage is void or voidable. It is not for the courts to intervene. It is the function of the legislature. Courts are always anxious to keep the marriage intact. While so, when the statute does not provide for nullity of a marriage or voidability of a marriage on such a ground, courts will not go to the extent of holding the marriage void on this ground.

[Para. 6]

S.D.N.Vimalanathan, for Appellant.

The Court delivered the following

JUDGMENT: This appeal is against the judgment in C.M.A.No.22 of 1988, in which the learned District Judge, Chengalpet, has reversed the finding of the trial court in H.M.O.P.No.53 of 1986 on the file of the Subordinate Judge, Kancheepuram. 2. The short facts of the case are as follows: The petitioner had filed a petition under Secs.5(iii), 11 and 12(1)(i) of the Hindu Marriage Act, seeking a declaration that the marriage between the parties is null and void on the ground that the respondent was a minor on the date of marriage, that the consent of the guardian was not obtained and on the ground that the respondent was an impotent person at the time of marriage. The petition was

opposed by the respondent and after enquiry, the learned Subordinate Judge has allowed the petition. Aggrieved by the same, the respondent has filed C.M.A.No.22 of 1988 before the learned District Judge, Chengalpet. On a consideration of the materials before him, the learned District Judge has found that none of the grounds on which the declaration is sought for are made out and dismissed the petition. Aggrieved by the same, the petitioner has come forward with this second appeal.

3. Mr. Vimalanathan, learned counsel appearing for the appellant, would submit that regarding impotency, the evidence of the Doctor is not helpful, that at an earlier point of time the petitioner sought for medical examination of the respondent, but because of the unwillingness expressed by the respondent, she was not sent for medical examination and that circumstance has not been taken proper note by the lower appellate court and the examination of the Doctor was done only after 7 years after the filing of the petition disproving impotency. He further submits that the Doctor who had conducted the scan on the respondent was not examined. Regarding the void or voidable nature of the marriage, the learned counsel would submit that as per the Hindu Marriage Act, the minority of any one of the parties to the marriage was either void or voidable and there is a lacuna in the Act and it is for the courts to interpret and fill up the lacuna. He would further submit that because of the amendment of Child Marriage Act, the question of getting consent of the guardian did not arise under that Act, and after the amendment repealing the section in the Child Marriage Act, no corresponding enactment has been made in the Hindu Marriage Act. It is his submission that thus the question of law arises in this regard.

4. I have carefully considered the submissions made by the learned counsel and I find none of the grounds can be sustained. Regarding impotency, Dr. Bhagyavathi who had examined the respondent has given a clear and categorical opinion that Sumitra Bai, namely, the respondent herein is capable of having sexual intercourse. The medical report given by her has also been marked in this case. In the report the Doctor has stated that Sumitra Bai was maintaining normal health and normal figure. Her breast was normal commensurate to her figure and her uterus was also normal and the ovaries are also normal. The Doctor has

very fairly pointed out that there was abnormal hair growth over chin, 2 cheeks in his report marked as exhibit. From the existence of some hair in those places, one cannot straightaway come to a conclusion that she must have been impotent and not capable to have sexual intercourse. No doubt, she was examined in 1992, but there is no evidence that she must have been impotent at an earlier point of time and only at a later point of time she must have become potent. No medical evidence is produced to prove the same.

5. Regarding the non-examination of the Doctor who had conducted the scan, I do not find any relevance. In a well considered judgment the trial court has dealt with this aspect of the case and decided against the petitioner. I do not find any ground whatsoever to interfere in this regard.

6. Regarding the void or voidable nature of the marriage, because the respondent was a minor at the time of marriage, the provisions of the Hindu Marriage Act do not provide to hold such marriage as void or voidable. As per Sec.5 which stipulates the conditions for a marriage, a marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely,

“(iii) the bridegroom has completed the age of (twenty-one years) and the bride the age of (eighteen years) at the time of the marriage.”

Under Sec.11, any violation of Sec.5(iii) is not included as a void marriage, while so there is no point in saying that there is lacuna in the Hindu Marriage Act and courts have to decide that aspect that the marriage is void or voidable. It is not for the courts to intervene. It is the function of the legislature. Courts are always anxious to keep the marriage intact. While so, when the statute does not provide for nullity of a marriage or voidability of a marriage on such a ground, I am clear that courts will not go to the extent of holding the marriage void on this ground. The learned counsel appearing for the appellant would place reliance upon the view of the learned author Ramesh Chandra Nagpal in his book ‘Modern Hindu Law’ published by Eastern Book Company, at page 116:

“*Kinds of Marriages*: There are three types of marriages under this Act, (i) valid, (ii) void and (iii) voidable. Section 11 deals with void marriages and Sec.12 with the voidable ones. But all other marriages which are not covered by these two sections are not valid. The drafting of the Act, from this point of view, is indeed

defective. The violation of Secs.7 and 15 also renders a marriage void or non-existent but neither those sections nor Secs.11 and 12 guide us explicitly as to this effect of the violation of the provisions of those sections.”

I do not agree with the learned author for the reasons stated above.

7. In view of the above, I do not find any question of law involved in this second appeal and hence it deserves to be dismissed and shall stand dismissed.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: K.S.Bakthavatsalam, J.

W.P.Nos.4455 to 4457 of 1993 9th March, 1993.

N.Palaniappan and others ...Petitioners
v.

The Regional Transport Authority, Madras
...Respondent.

Practice and Procedure - Learned Judge of High Court laying down a principle in law - Principle held - Applicable to cases of similar nature - Respondent expected to have understood the provision of law and implication of the order.

The petitioners applied to the Regional Transport Authority, Madras, for the grant of two contract carriage permits basing on the principle of law laid down by a learned Single Judge in W.P.No.1779 of 1992 on 19.11.1992, that the Regional Transport Authority was the proper authority to grant permits in such cases. The respondent returned the petitions on the ground that the order of the court would apply to the petitioner therein alone. They filed writ petitions to direct the respondent to dispose of the applications.

Held: When a learned Judge of this Court has laid down a principle in law, it is applicable to cases of similar nature under the Motor Vehicles Act. Hence, the respondent has to take up the

applications or file and dispose them of on merits and according to law. It is very unfortunate that the Regional Transport Authority is ignorant of the implication of court's order wherein the learned single Judge of this Court has laid down a proposition on a question of law in explicit terms as to who is the proper authority in granting permits. As a public authority the respondent is expected to have understood the provision of law and in implication of the order of the learned single Judge. If he has any doubt, he should have asked the Law Officers of the State. [Paras. 4 & 5]

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *mandamus* directing the Regional Transport Authority, Madras Central, Madras-31 to consider and dispose of the application of the petitioner in each of the petitions for the grant of two contract carriage permits on the application dated 13.11.1992 forthwith.

Dr.V.Subrahmanyam, for Petitioners.

M.M.Sundaresh, Government Advocate, for Respondent.

The Court made the following

ORDER: The prayers in all these writ petitions are one and the same, viz., for a direction to the respondent to dispose of the applications of the petitioners for the grant of two contract carriage permits dated 13.11.1992.

2. Learned counsel for the petitioners contends that the applications submitted by the petitioners to the respondent had been returned on the ground that the order of this court passed by Srinivasan, J., in W.P.No.17779 of 1992 on 19.11.92 will apply to the petitioner therein alone. According to the learned counsel the respondent has not applied its mind and it ought to have passed orders on merits as held by Srinivasan, J. in the application submitted by the petitioners.

3. Learned Government Advocate takes notice.

4. After going through the endorsement of return made by the respondent and on going through the affidavit filed in support of the writ petition, I am of the view that the respondent has understood the implication of the order passed by this Court in W.P.No.17779 of 1992, wherein Srinivasan, J. has held that the Regional Transport Authority is the proper authority to grant permit in such cases. Then a learned Judge of this Court has laid down

a principle in law, it is applicable to cases of similar nature under the Motor Vehicles Act. Hence I am of the view that the respondent has to take up the applications on file and dispose them of on merits and according to law within two weeks from the date of receipt of a copy of this order. The writ petitions are allowed. No costs.

5. It is very unfortunate that the Regional Transport Authority is ignorant of the implication of court's order wherein the learned single Judge of this Court has laid down a proposition on question of law in explicit terms as to who is the proper authority in granting permits. As a public authority, the respondent is expected to have understood the provision of law and the implication of the order of the learned single Judge. If he has any doubt he should have asked the Law Officers of the State and to return the said applications with such endorsement on such ground is bordering on contempt. It is expected of the respondent, atleast in future he will be more careful when construing an order of this Court, especially when it is given on a question of law.

B.S.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Janarthanam, J.*

W.P.No.8152 of 1984

8th March, 1993.

P.J.Vincent

...Petitioner

v.

Tamil Nadu Electricity Board represented by its Chairman and another

...Respondents.

Tamil Nadu Electricity Board Employees Discipline and Appeal Regulations, Regulation 8(f) - Initiation of disciplinary action against any employee by any officer in Class I or Class II without authorisation of competent authority - Effect - Entirety of proceedings, if vitiated.

Regulation 8(f) of the Tamil Nadu Electricity

Board Employees' Discipline and Appeal Regulations prescribes that the competent authority may authorise any officer in Class I or Class II service superior in the rank to the employee to initiate departmental proceedings and to hold enquiry against the employee. On the findings of that Officer, the competent authority may award punishment or otherwise give a decision. On the face of Regulation 8(f), it goes without saying that the initiation of the departmental proceedings and holding of inquiry thereof against any employee by any officer in Class I or Class II are not permissible except authorised by the competent authority. There is no pale of controversy that no authorisation had been issued by respondent, Board for initiation of departmental proceedings and holding of an enquiry against the petitioner-delinquent who is a Class II officer either to the Superintending Engineer, Rural Electrification or to the Superintending Engineer, Chengalpattu Electricity System, Kancheepuram or to the Chief Engineer (Inquiry Officer-Respondent 2). As such the initiation of the disciplinary proceedings and holding of inquiry as against the delinquent petitioner by all those authorities, as stated above is not warranted by any of the provisions adumbrated under the Regulations. In this view of the matter, to say that the the initiation of the disciplinary proceedings by the incompetent authorities is not vitiating the entirety of the proceedings cannot at all be countenanced, the consequence of which is that there is no other for this Court except to quash the impugned proceedings on this ground alone. [Para. 6]

Case referred to:

Union of India v. Mohd. Ramzan Khan, A.I.R. 1991 S.C. 471. [Para. 7]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the entire records in B.P.MS.(FB) No.1 (Administrative Branch), dated 20.1.1984 on the file of the 2nd respondent herein and quash the same by directing the respondents herein to reinstate the petitioner in the service of the 1st respondent-Board with full backwages and all other accrued benefits including seniority, promotion etc.

Peppin Fernando, for Petitioner.

C.S.Krishnamoorthy, for Respondents.

The Court made the following

ORDER: The petitioner P.J.Vincent, it is said, was functioning as Assistant Divisional Engineer in the services of the Tamil Nadu Electricity Board (respondent 1). While so functioning, he was served with a Memo No. SE/RE/ST/Cenfl. 20/82, dated 30.6.82 issued by the Superintending Engineer/Rural Electrification, Madras for initiation of disciplinary proceedings cataloguing various charges framed against him. Likewise the Superintending Engineer, Chengalpattu Electricity System Kancheepuram served a memo No. SEC/Adm.2/J A.1/DP.PJV/PR.448/83, dated 5.4.1983 on him cataloguing various charges.

2. Two set of charges, if proved are liable to be visited with penalty of removal or dismissal from service as stated above, were inquired into by the Chief Engineer Personnel, Tamil Nadu Electricity Board, Madras-600 002 (respondent 2) and after the conclusion of the inquiry, he submitted a report to respondent-Board holding the petitioner guilty of certain grave charges, though in respect of certain other charges, he held as not proved.

3. Respondent 1-Board, even without furnishing copy of the inquiry report to the delinquent - petitioner, dismissed him from service, accepting the findings of the Inquiring Officer by order in BP.Ms.(FB) No.1 (Administrative Branch) dated 20.1.1984. The operative portion of the order of the Board is couched in the following terms:

"The Tamil Nadu Electricity Board after careful consideration of the case with the connected records comes to the conclusion that he may be dismissed from the service of the Board. Accordingly, the Tamil Nadu Electricity Board hereby directs that Thiru P.J.Vincent, Assistant Divisional Engineer/Electrical be dismissed from the service of the Board from 28.12.83 FN., i.e. the date from which he has been continuously absent from duty unauthorisedly. 13. He is directed to acknowledge receipt of this Board Proceedings"

This order of the Board was stated to have been signed by respondent 2, Chief Engineer/Personnel (Inquiry Officer) by order of the Board, respondent 1, and thereafter communicated to the petitioner. The petitioner, aggrieved by the said order, resorted to the present action praying for issue of a writ of *certiorarified mandamus* to quash the said order and direct the respondents to reinstate him in service with

full backwages and attendant benefits therefor.

4. Learned counsel appearing for the petitioner would raise two contentions:

(1) Neither the Superintending Engineer/Rural Electrification, Madras, who issued the first set of charges; nor the Superintending Engineer, Chengalpattu Electricity System, Kancheepuram, who issued the second set of charges, to the delinquent petitioner, in their respective memos; nor respondent 2-Chief Engineer/Personnel, Tamil Nadu Electricity Board, Madras-600 002-Inquiry Officer had been authorised by respondent 1-Board either for framing of charges or for holding an inquiry-the various steps in the initiation of the disciplinary proceedings as against the delinquent petitioner and consequently such initiation of the disciplinary proceedings by such incompetent authorities vitiated the entirety of the proceedings and therefore, the impugned proceedings are liable to be quashed.

(2) The non-furnishing of the copy of the inquiry report to the delinquent petitioner before ever the final order of dismissing him from service by the Board was passed would tantamount to violating the principles of natural justice, in the sense of his not having been given adequacy of opportunity to rebut the findings of the Inquiry Officer and on this ground also, the impugned order is liable to be quashed.

5. Learned counsel appearing for the respondents would however admit that there was no authorisation by respondent 1-Board either to the Superintending Engineer/Rural Electrification, Madras or to the Superintending Engineer, Chengalpattu Electricity System, Kancheepuram to frame charges against the delinquent petitioner by serving memos; nor was there any authorisation to respondent 2-Chief Engineer/personnel by the Board to hold an inquiry into the various charges as framed against him by the aforesaid officers. But nonetheless, he would say that the impugned order is not at all liable to be quashed.

6. Regulation No.6 of Tamil Nadu Electricity Board Employees Discipline and Appeal Regulations (for short 'Regulations') prescribes authorities who may impose penalties on various classes and categories of employees of the Board. The employees of the Board under these Regulations

had been classified into four classes. The Assistant Divisional Engineer like the petitioner is an officer under Class II (C). For such an officer, the competent authority, who can inflict the punishment of dismissal from service is the Board. If the authority imposing the punishment happens to be the Board, there is no further appeal to the Appellate Authority, the reasons being the Board itself is the appellate authority. In all these cases, where punishment is imposed by any authority, other than the Board, it is appealable to the appellate authority, namely, the Board. Regulation 8(f) prescribes that the competent authority may authorise any officer in Class I or Class II service superior rank to the employee to initiate departmental proceedings and to hold enquiry against the employee. On the findings of that Officer, the competent authority may award punishment or otherwise give a decision. On the face of Regulation 8(f), it goes without saying that the initiation of the departmental proceedings and holding of inquiry thereof against any employee by any officer in Class I or Class II are not permissible except authorised by the competent authority. There is no pale of controversy that no authorisation had been issued by respondent-1, Board for initiation of departmental proceedings and holding of an enquiry against the petitioner-delinquent who is a Class II officer either to the Superintending Engineer, Rural Electrification or to the Superintending Engineer, Chengalpattu Electricity System, Kancheepuram or to the Chief Engineer (Inquiry Officer-Respondent 2). As such the initiation of the disciplinary proceedings and holding of inquiry as against the delinquent petitioner by all those authorities, as stated above is not warranted by any of the provisions adumbrated under the Regulations. In this view of the matter, to say that the initiation of the disciplinary proceedings by the incompetent authorities is not vitiating the entirety of the proceedings cannot at all be countenanced, the consequence of which is that there is no other go for this Court except to quash the impugned proceedings on this ground alone.

7. As respects the submission revolving on the question of non-furnishing of the inquiry report of respondent 2-Inquiry Officer to the delinquent petitioner, learned counsel for the petitioner placed implicit reliance upon the decision of the Supreme Court in *Union of India v. Mohd. Ramzan Khan*, A.I.R. 1991 S.C. 471. The Bench of the Apex

Court consisting of their Lordships Ranganath Mishra, C.J. P.B.Sawant and K.Ramaswamy, JJ., in a scintillating fashion, expressed their views on a similar question now posed in the case on hand in paragraphs 15 and 17:

“15. Deletion of the second opportunity from the scheme of Art.311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage inquiry in Art.311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the 42nd amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with the recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore be entitled to the supply of a copy thereof. The Forty-Second Amendment has not brought about any change in this position.

16.

17. There have been several decisions in different High Courts which, following the Forty-Second Amendment:

“have taken the view that it is no longer necessary to furnish a copy of the inquiry report to delinquent officers. Even on some occasions this Court has taken that view. Since we have reached a different conclusion the judgments in the different High courts taking the contrary view must be taken to be no longer laying down

good law. We have not been shown any decision of a coordinate or a larger Bench of this Court taking this view. Therefore, the conclusion to the contrary reached by any two-judge Bench in this Court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground”.

8. Learned counsel for the respondents would however submit that the ratio, as laid down by the Supreme Court in the aforesaid decision, is not at all applicable to the facts of the instant case, inasmuch as the punishment on the delinquent-petitioner had been imposed long before the judgment of the Supreme Court, which came into existence only on 20.11.1990. No doubt, this argument of learned counsel for the respondents is built upon the last portion of the sentence in paragraph 17, namely, “...but this shall have prospective application and no punishment imposed shall be open to challenge on this ground”. To this interpretation, as put by learned counsel for the respondents on the aforesaid portion of the judgment of the Supreme Court, I am unable to affix my seal of approval. What perhaps Their Lordships of the Supreme Court wanted to convey by the phraseology employed therein was that the punishment imposed on a delinquent employees once and for all concluded and set at rest is not liable to challenge by reference to writ proceedings subsequent to their decision. If such an arrangement is thrown open to challenge, it is nothing but opening of Pandora's box thereby making no end to litigations.

9. Since the petitioner had been removed from service by order dated 20.1.1984 with retrospective effect from 28.12.1982 FN., and the same thing had been agitated further by resortment to the present action, it cannot be stated that the ratio of the decision of the Supreme Court is not at all applicable.

10. For the reasons, as stated above, it goes without saying that this writ petition deserves to be allowed and the same is accordingly allowed as prayed for. Rule nisi issued is made absolute. There will, however, be no order as to costs in the circumstances of the case.

B.S.

Petition allowed.

**IN THE HIGH COURT OF JUDICATURE AT
MADRAS.**

[Special Original Jurisdiction]

Present: *K.S.Bakthavatsalam, J.*

W.P.No.465 of 1993

29th January, 1993.

C.Padma and others

...Petitioners

v.

**The Deputy Secretary to the Government
(Ex-officio), Department of Labour and
Co-operation, Government of Tamil Nadu and
others**

...Respondents.

*Land Acquisition Act (I of 1894), Board Standing
Orders No.90 of 32 - Land acquired - Possession
taken - Not used for purpose for which acquisition
was made - If should be returned to the original
owner - Land vested with Government for a long
time - Likely to be again required for public use -
Procedure.*

Under the provisions of the Land Acquisition Act, once the land is taken possession, it vests with Government free of all encumbrances. It is seen from the averments made in the affidavit and from the letters written by Amalgamation Company that the lands were given to the Company and that the said Company was taken over by another company later. As such the lands which were handed over to the company originally were resumed and were leased out to another company. Nobody can prevent that. From the records before this Court, it is seen that the lands were with the Government as Government lands even under the common law, the lands are vested with the Government nearly 28 years ago. It is settled law under S.O.90 of 32 that no land shall be disposed of to any person which is no longer required for the public purpose for which it was acquired and if the land relinquished are likely to be again required for public purposes, it should be merely leased out for such term as may be considered desirable in each case.

[Para. 4]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records of the Notifications issued in G.O.R.No.1392, Industries, Labour and Co-operation (Industries),

dated 18.9.1962 on the file of the 1st respondent herein and published in the Fort St.George Gazette, dated 17.10.1962 and quash the same, directing the respondents herein to hand over vacant possession of the land of an extent of 1.47 acres covered and comprised in Survey No.843 bearing patta No.322 situated in Madhavaram village, Chingleput District to the petitioner herein. *C.S.Prakasa Rao*, for Petitioner.

The Court made the following

ORDER: The prayer in the writ petition is to issue a writ of *certiorari mandamus* to call for the records of the notifications issued in G.O.R.No.1392, Industries, Labour and Co-operation (Industries), dated 18.9.1992 on the file of the first respondent herein and published in the Fort St.George Gazette, dated 17.10.1962 and quash the same, directing the respondents herein to hand over vacant possession of the land of an extent of 1.47 acres covered and comprised in Survey No.843 bearing Patta No.322, situate in Madhavaram village, Chingleput district to the petitioner herein. 2. It seems that certain lands were sought to be acquired for Reichhold Chemicals India Ltd., for the manufacture of synthetic resins and accordingly they were acquired in the year 1962, when the father of the petitioners herein was alive. After the death of the father of the petitioners herein, in the year 1985, the petitioners herein seem to have written a letter in the year 1992 to the first respondent calling for the respondents 1 and 2 to hand over the lands so acquired, since the lands were not utilised for the purpose for which they were acquired. The petitioners were replied that the company for which the lands were acquired had been taken over by UB Groups during the year 1988, that the lands so acquired were in the custody of Amalgamation Group and as such the petitioners were informed that they should write to Amalgamation Group Limited. Later, the petitioners' counsel issued a notice to Amalgamation Group and the petitioners were replied by M/s.Amalgations Limited, the third respondent herein, that the lands were acquired by the Government of Tamil Nadu and the acquisition had become final as early as 1964, that M/s.Simpson and General Finance Co. Ltd., took possession of the lands on 30.4.1964 and that by that time, the petitioners title to the said land had become extinguished once and for all. The petitioners were also informed that the lands in question were resumed

by the Government under the terms and conditions of the agreement between the Government and Simpson and General Finance Limited and that they were issued by the Government to Sri Rama Vilas Services Limited for the purpose of setting out their Transport Industry.

3. Mr.C.S.Prakasa Rao, the learned counsel for the petitioners contends that once the lands, which were acquired for certain purposes were not used for that purpose, the State Government cannot make use of the land by leasing out the same to third party and that the said lands should be returned to original owners. It is also stated by the learned counsel that the lands were acquired for Reichhold Chemicals India Limited, that when the company was not in existence, it is not open to the Government to lease out the lands to some other Company without authority of law that the action of the Government is illegal. It is also argued by the learned counsel then the petitioners are ready and willing to pay back the amount of compensation paid for the said land acquired.

4. After hearing the learned counsel for the petitioners and after going through the affidavit filed in support of the writ petition I am not able to accept the arguments of the learned counsel for the petitioner. Under the provisions of the Land Acquisition Act, once the land is taken possession, it vests with Government free of all encumbrances. The lands in question were acquired as early as 1964 and I do not think the petitioners can claim any interest in the said lands; nearly after 28 years and try to contend as if they are having title over the lands. Once the land is taken over and compensation is paid to the owner, the matter ends there itself. It is not in dispute that the petitioners' father had received compensation for the lands so acquired by the Government and the lands were vested with the Government thereafter. It is not clear from the affidavit or from the arguments of the learned counsel for the petitioners whether the lands were handed over to the company for the purpose, for which the lands were acquired. It is seen from the averments made in the affidavit and from the letters written by Amalgamation company that the lands were given to the company and that the said company was taken over by another company later. As such lands which were handed over to the company originally were resumed and were leased out to another company. Nobody can prevent that. From the

records before this Court it is seen that the lands were with the Government as Government lands. Even under the common law, the lands are vested with the Government nearly 28 years ago. I do not think the provisions of standing orders of the Board of Revenue, relied on by the learned counsel for the petitioner will apply to the facts of the case on hand. It is settled law under S.O.90 of 32 no land shall be disposed of, to any person, which is no longer required for the public purpose for which it was acquired and if the land relinquished is likely to be again required for public purposes, it should be merely leased out for such term as may be considered desirable in each case. There are no merits in this writ petition. Accordingly, it shall stand dismissed.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No.7967 of 1992

4th March, 1993.

J.Krishnamoorthy

...Petitioner

v.

The State of Tamil Nadu and another

...Respondents.

Motor Vehicles Act (LIX of 1988), Secs.74 and 88(8) - Exemption under - G.O.Ms.No.894, dated 29.5.1991 - Applicability - Basic permit issued to vehicle to operate within a radius of 2 Kms. from place of business of permit-holder - Holder, if can be considered holder of permit under Sec.74 - Special permit issued by State other than Tamil Nadu permitting vehicle to pick up passengers and get them down in State of Tamil Nadu - Exemption granted under G.O., if applicable to such vehicle.

The permit issued is very clear in its terms and it is mentioned in paragraph 6 that the vehicle is to operate within a radius of 2 Kms. from the place of business of the permit-holder. That is said to be

the radius/area for which the permit is valid. If the basic permit is not valid with reference to any area outside the radius of 2 Kms. from the place of business of the permit-holder, it goes without saying that under the provisions of Sec.88(8) of the Act, the petitioner cannot be considered to be a holder of the permit under Sec.74 of the Act for such area. Hence, for the purpose of G.O.Ms.No.894, dated 29.5.1991, the petitioner cannot be considered to be a valid special permit-holder under Sec.88(8) of the Act as he does not have any basic permit under Sec.74 of the Act with reference to any area outside the radius of 2 Kms. from the place of the business. In the present case, it is seen from the copy of the special permit produced by the petitioner that it is issued pursuant to the orders of the High Court of Andhra Pradesh in a writ petition and the permit has been granted to the permit holder to pick up passengers at Madras. If the special permit relied on by the petitioner permits him to pick up passengers and get them down in the State of Tamil Nadu and if such permit is issued by a State other than the State of Tamil Nadu, proviso (a) to G.O.Ms.No.894, dated 29.5.1991 will clearly govern and in the present case, there can be no doubt that proviso (a) is applicable. Consequently, the exemption granted by G.O.Ms.No.894, dated 29.5.1991 is not available to the petitioner. [Para. 1]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* forbearing the respondents herein and their subordinates from seizing the petitioner's vehicle TCW.5553 or the documents of the vehicle TCW.5553 or demand tax pursuant to G.O.Ms.No.894, Home (Transport-A) Department, dated 29.5.1991.

M.Sachidanandham, for Petitioner.

V.R.Rajasekaran, Government Advocate, for Respondents.

The Court made the following

ORDER: This matter is covered by my order dated 26.2.1993 in W.P.Nos.15923 of 1991 etc. (batch) (*K.V.Sekar v. The State of Tamil Nadu and others*). In those cases, I have held that the basic permit was only operative within a radius of 2 Kms. from the place of business of the permit holder and such basic permit would not enable the petitioner to claim the benefit of G.O.Ms.No.894,

dated 29.5.1991 by virtue of the special permit obtained by him under Sec.88(8) of the Motor Vehicles Act, for short "the Act". In the present case, it is argued by learned counsel for the petitioner that the basic permit refers to Sec.74 of the Act and it is the one issued under that section, with the result the provisions of Sec.88(8) of the Act are satisfied. Learned counsel refers to the caption at the top of the permit which reads as follows:

"Basic contract carriage permit issued under Sec.74 of the Motor Vehicles Act, 1988".

There is a fallacy in this contention. No doubt Sec.88(8) of the Act merely refers to permits granted under Secs.72, 74 and sub-sec.9 of Sec.88. But, Sec.74 which is the relevant section in this case prescribed that a Regional Transport Authority may, on an application made to it under Sec.73, grant a contract carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit; provided that no such permit shall be granted in respect of any area not specified in the application. It is not necessary to consider whether the petitioner had applied for a larger area or not. The permit issued is very clear in its terms and it is mentioned in paragraph 6 that the vehicle is to operate within a radius of 2 Kms. from the place of business of the permit holder. That is said to be the radius/area for which the permit is valid. If the basic permit is not valid with reference to any area outside the radius of 2 Kms. from the place of business of the permit holder, it goes without saying that under the provisions of Sec.88(8) of the Act, the petitioner cannot be considered to be a holder of the permit under Sec.74 of the Act for such area. Hence, for the purpose of G.O.Ms.No.894, dated 29.5.1991, the petitioner cannot be considered to be a valid special permit holder under Sec.88(8) of the Act, as he does not have any basic permit under Sec.74 of the Act with reference to any area outside the radius of 2 Kms. from the place of business. In the present case, it is seen from the copy of the special permit produced by the petitioner that it is issued pursuant to the orders of the High Court of Andhra Pradesh in a writ petition and the permit has been granted to the permit holder to pick up passengers at Madras. Proviso (a) to G.O.Ms.No.894, dated 29.5.1991 is as follows:

"the public service vehicles covered by special

permits granted under sub-section (8) of sec.88 of the Motor Vehicles Act, 1988 (Central Act 59 of 1988) by the transport authority of a State other than the State of Tamilnadu to pick up and get down passengers in the State of Tamil Nadu.”

If the special permit relied on by the petitioner permits him to pick up passengers and get them down in the State of Tamilnadu and if such permit is issued by a State other than the State of Tamil Nadu proviso (a) will clearly govern and in the present case, there can be no doubt that proviso (a) is applicable. Consequently, the exemption granted by G.O.Ms.No.894, dated 29.5.1991 is not available to the petitioner.

2. In the result, the writ petition is dismissed. There will be no order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Janarthanam, J.*

W.P.No.8125 of 1984 *1st March, 1993.*

V.Muthukumaran and another *...Petitioners*
v.

State of Tamil Nadu and others *...Respondents.*

(A) *Civil Procedure Code (V of 1908), O.33, Rule 11 (as amended in Madras) - Person instituting suit as a pauper dying - Legal representatives brought on record - Suit dismissed - Court fees, if can be recovered from legal representatives.*

From a careful perusal of O.33, Rule 11, Civil Procedure Code as amended in Madras, it is rather crystal clear that where the plaintiff fails in the suit in the sense of the suit meriting dismissal, the court shall order the plaintiff or any other person added as co-plaintiff to the suit to pay the court-fees. In the instant case, the petitioner had been

added as co-plaintiff in the suit consequent on the death of their father as his legal representatives. In such a situation, to contend that the petitioners are not liable to pay the court-fees either personally or from out of their properties and if at all they are liable only to the extent of the estate of the deceased available in their hands as contended by learned counsel for the petitioner cannot at all be countenanced.

[*Para. 10*]
(B) *Civil Procedure Code (V of 1908), O.33, Rule 14 - Revenue Recovery Act (1890) - Limitation Act (XXXVI of 1963), Art.136 - Person instituting suit as indigent dying - Legal representatives brought on record - Suit dismissed - Court ordering recovery of court-fees from the legal representatives - Copy of decree forwarded to Collector for recovery - Collector taking proceedings for recovery more than twenty years after decree - Proceedings, if sustainable.*

From O.33, Rule 14, Civil Procedure Code, it is clear that the court-fees payable is recoverable as if it is an arrear of land revenue without prejudice to any other mode of recovery under Art.136 of the Limitation Act, the period prescribed for exemption of any decree other than a decree granting a mandatory injunction or order of any civil court is 12 years when the order or decree becomes enforceable. The suit in C.S.No.114 of 1960 on the file of this Court was dismissed by judgment dated 6.3.1963 requiring the plaintiffs in the suit to pay the court-fees due to the Government. Twelve years calculated from the said date of dismissal of the suit, the exemption proceedings ought to have been taken on or before 5.3.1975. Of course, no proceedings for exemption of the decree been taken before the civil court. But what has been done in this case is to recover the court-fees dues payable by the institution of the proceedings. Under the Revenue Recovery Act, as already stated, Rule 14 of O.33, Civil Procedure Code, makes it abundantly clear that recovery of court-fees is permissible by resorting to the provisions of the said Act without prejudice to any other mode of recovery. At this juncture, it has to be borne in mind that under the said Act, there is no provision at all prescribing any period of limitation for the recovery of moneys to be realised as if such recovery is an arrear of land revenue. The fact that there is no period of limitation prescribed under the said Act does not mean the authorities can sleep over the matter for any length of time, as in the instant case, for about more than two decades in seeking to

recover such dues. In such circumstance the recovery attempts made therefor by the authorities concerned has to face dismissal/failure purely on the ground of laches on their part. [Para. 13]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* forbearing the respondents from taking action against the petitioners under Revenue Recovery Act in pursuance of the final notice dated 7.4.1984 in C2/15826/73 by respondent No.3. T.K.Seshadri, for Petitioners.

V.Raghupathy, Additional Government Pleader, for Respondents.

The Court made the following

ORDER: One N.P.Venkatachala Mudaliar instituted a suit on the file of the Original Side of this Court against the Imperial Tobacco Company of India Limited for recovery of a sum of Rs.1,46,000 with interest at 6%. When he presented the plaint, he also sought permission to institute the said proceedings *in forma pauperis* and filed an application No.187 of 1960 seeking leave to institute the proceedings *in forma pauperis* under the provisions of O.33, Rule 1, C.P.C. read with O.14, Rule 10 of O.S.Rules. Learned Master of this Court appeared to have passed an order dated 27.7.1960 declaring the said Venkatachala Mudaliar as indigent person and leave was granted to him to sue as a pauper.

2. The suit was numbered as C.S.No.114 of 1960 (pauper). During the pendency of the suit he appeared to have died on 28.1.1961 leaving behind him the petitioner, namely, V.Muthukumaran and V.Satyanarayanan and others as his heirs. An application No.637 of 1961 had been filed for bringing the L.Rs. on record and the said application appeared to have been allowed and they were impleaded as plaintiffs. On trial the suit was dismissed by judgment dated 6.3.1962. While dismissing the suit, learned Judge however did not order costs, but required the plaintiffs in the suit to pay the court-fee due to Government. For the recovery of the amount of court-fees this Court appeared to have caused a copy of the decree to be forwarded to the second respondent-Collector of Madras pursuant to the provision adumbrated under O.33, Rule 14, C.P.C.

3. The second respondent-Collector did not appear to have proceeded further in the matter

with due diligence and in the year 1984, the third respondent-the Tahsildar, Purasawalkam-Perambur Taluk, Clements Road, Madras-7 appeared to have required the petitioners by letter C.1/15826/78, dated 7.4.1984 to pay a sum of Rs.10,950 failing which the amount would be recovered from them under the provisions of the Tamil Nadu Revenue Recovery Act II of 1864 (hereinafter referred to as 'the Act').

4. On receipt of the said letter the petitioners caused a legal notice to be given through their counsel dated 24.5.1984 disputing their liability to pay the amount on three grounds, namely, (1) They had been impleaded as L.Rs. of N.P.Venkatachala Mudaliar, who instituted the suit *in forma pauperis* and consequently they cannot be mulcted with liability for the payment of court-fees either from their person or out of the properties belonging to them and if at all such recovery is permissible from out of the State available in their hands; (2) The claim is barred by limitation in the sense of more than 12 years lapse since the passing of the decree, and (3) Even otherwise the laches on the part of the authorities concerned since all were sleeping well over a period of about two decades is certainly a factor which ought to be taken into account in the process of arriving at a decision. Even after the receipt of notice by respondents 2 and 3 they made an attempt to initiate proceedings under the Act to attach their personal properties for the amount due by way of court-fees. The petitioners, therefore, resorted to the present action praying for issuance of a writ of *mandamus* forbearing the respondents from taking action against the petitioners under the Act pursuant to the proceedings in C2/15826/78, dated 7.4.1984.

5. Learned counsel appearing for the petitioners would raise three contentions:

(i) The petitioners, after all having been impleaded as L.Rs. of the deceased plaintiff N.P.Venkatachala Mudaliar, who instituted the suit as a pauper, cannot at all be mulcted with liability for the payment of court-fees due by the dismissal of the suit from out of their person or properties belonging to them and if at all the estate belonging to late N.P.Venkatachala Mudaliar alone, if any, available in their hands may be proceeded for the realisation of the court-fees due.

(ii) The proceedings for the recovery of the

court-fees due by resorting to the provisions of the said Act is a mode of execution of the decree and since such proceedings had been initiated for beyond the period of 12 years from the dismissal of the suit, the same is barred by limitation as per the sanguine provisions adumbrated under Art.136 of the Limitation Act.

(iii) Even otherwise there is lethargy and inaction on the part of the authorities concerned in not resorting to take action for the recovery of the court-fees due for well over a period of two decades. Such lapses on their part will denude them of their right to recover the dues, if there is any.

6. Learned Additional Government Pleader would however repel those submissions.

7. There is no pale of controversy that this suit had been initially instituted by N.P.Venkatachala mudaliar on the original side of this Court for the recovery of certain dues payable to him by the Imperial Tobacco Company of India Limited and he had been allowed to sue as a pauper. The other admitted fact is that while the suit was pending he died and the petitioners herein and others had been impleaded as his L.Rs. The suit was allowed to be proceeded and the same got dismissed by judgment dated 6.3.1963. While dismissing the suit, learned Judge, though not ordered for costs, required the plaintiffs in the suit to pay the court-fees due to the Government and the court-fees so ordered to be recovered from the plaintiffs was sought to be recovered or the first time in 1984 by the impugned proceedings.

8. The main question that falls for determination from the rival submissions of either counsel is as to whether the court-fees due is recoverable from out of the person or personal properties of the petitioners herein or from the estate of the deceased plaintiff N.P.Venkatachala Mudaliar available in their hands by resorting to initiation of proceedings under the Act.

9. In understanding the implications of such a question, reference has to be necessarily made to the sanguine provisions adumbrated under O.33, Rule 11, C.P.C. There is a Madras Amendment to the said Rules and such amended rule dealing with "Procedure where pauper fails" is couched in the following terms: "Where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or where part of the claim is abandoned or

where the suit is dismissed-

a. because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fees or postal charges (if any) chargeable for such service, or

b. because the plaintiff does not appear when the suit is called on for hearing the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fee and in the case of abandonment of the part of the claim the proportionate court-fee, which would have been payable by the plaintiff if he had not been permitted to sue as a pauper.

In cases where the plaintiff is dispaupered the court may, instead of proceeding under the previous paragraph, order the plaintiff to pay the requisite court-fee within a time to be fixed by it and in default dismiss the suit and make an order for the payment of court-fee as in the previous paragraph.

"Where the court finds that the suit has been instituted unreasonably or improperly by a next friend on behalf of a minor plaintiff on a cause of action which accrued during the minority of such plaintiff, the court may order the next friend to personally pay the court-fee."

10. From the careful perusal of what has been extracted above, it is rather crystal clear that where the plaintiff fails in the suit in the sense of the suit meriting dismissal, the court shall order the plaintiff or any other person added as co-plaintiff to the suit to pay the court-fees. In the instant case the petitioners had been added as co-plaintiffs in the suit consequent on the death of their father N.P.Venkatachala Mudaliar as his Legal Representatives. In such a situation to content that the petitioners are not liable to pay the court-fees either personally or from out of their properties and if at all they are liable only to the extent of the estate of the deceased available in their hands as contended by learned counsel for the petitioners cannot at all be countenanced.

11. O.33, Rule 14, C.P.C. provides for the recovery of the amount of court-fees. It reads as under:

"Where an order is made under Rule 10, Rule 11 or Rule 11A, the court shall forthwith cause a copy of the decree or order to be forwarded to the Collector, who may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person

or property liable for the payment as if it were an arrear of land revenue."

12. From the provision as extracted above, it is clear that the court-fees payable is recoverable as if it is an arrear of land revenue without prejudice to any other mode of recovery. Under Art.136 of the Limitation Act, the period prescribed for execution of any decree other than a decree granting a mandatory injunction or order of any civil court is 12 years whether the order or decree becomes enforceable. As adverted to earlier the suit in C.S.No.114 of 1960 on the file of this Court was dismissed by judgment dated 6.3.1963 requiring the plaintiffs in the suit to pay the court-fees due to the Government. Twelve years calculated from the said date of dismissal of the suit, the execution proceedings ought to have been taken on or before 5.3.1975. Of course no proceedings for execution of the decree had been taken before the civil court.

13. But what had been done in this case is to recover the court-fees dues payable by the institution of the proceedings under the said Revenue Recovery Act. As already stated Rule 14, O.33, C.P.C. makes it abundantly clear that the recovery of court-fees is permissible by resorting to the provisions of the said act without prejudice to any other mode of recovery. At this juncture it has to be borne in mind that under the said Act there is no provision at all prescribing any period of limitation for the recovery of moneys to be realised as if such recovery is an arrear of land revenue. The fact that there is no period of limitation prescribed under the said Act does not mean the authorities can sleep over the matter for any length of time, as in the instant case, for about more than two decades in seeking to recover such dues. In such circumstance the recovery attempts made therefor by the authorities concerned has to face dismal failure purely on the ground of laches on their part.

14. In this view of the matter, the writ petition deserves to be allowed and is accordingly allowed. *Rule nisi* issued is made absolute. There will, however, be in the circumstances of the case, no order as to costs.

B.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Mishra, J.*

W.P.No.4067 of 1984

9th November, 1992.

Jayarama Naidu and others

...*Petitioners*

v.

The State of Tamil Nadu and another

...*Respondents.*

(A) Land Acquisition Act (I of 1894), Secs.4(1) and Rule 3 under Sec.5-A - Publication of primary notification under Sec.4(1) and publication of substance of such notification at convenient places in the locality - If mandatory - Notice in Form I in Rule 3 under Sec.5-A containing substance of notification whether would satisfy the requirement of publication of substance of notification.

It has been settled by now that there is no ambiguity of any kind in the principle that publication of primary Notification under Sec.4(1) of the Land Acquisition Act is mandatory and not only the publication in the official gazette but publication of the substance of such notification at convenient places in the locality is also mandatory. [Para. 5] *(B) Land Acquisition Act (I of 1894), Sec.4(1) - Notification under - Publication of - Some defect in notice - Court thinking that mandatory requirement of publication of substance of notification has not been complied with - Effect - If automatically nullifies acquisition proceedings.*

In case where there is some defect in the notice of a sort that a Court may think that the mandatory requirement of the publication of the substance of the notification under Sec.4(1) has not been complied with, the Court shall not for the reason of non-compliance of this requirement alone nullify any acquisition proceedings unless it is shown that the petitioners have suffered for want of notice in the sense that they lost the opportunity to participate in the enquiry under Sec.5(1) of the Act for the reason of want of notice or could not make any representation in the case of urgency acquisition to the proper authorities to show that it was not a case for the acquisition of their lands. No remedy is extended unless it is required to redress an injury. Unless such injury is sustained, no remedy is required. The court may not, for the reason of a

mere non-compliance with the requirement of a mandatory provision like to interfere with a concluded proceeding unless the petitioners without such interference have suffered any legal injury.

[Para. 9]

Cases referred to:

Deepak Patwa v. Lt. Governor of Delhi, (1984) 4 S.C.C. 308: A.I.R. 1984 S.C. 1721. [Para. 7]

Jagat Ram v. State of Haryana, A.I.R. 1971 S.C. 1033. [Para. 7]

Kasi Reddy Papaiah v. Government of Andhra Pradesh, A.I.R. 1975 A.P. 269. [Para. 7]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records in G.O.Ms.No.2556, Social Welfare, dated 13.10.1983 on the file of the 1st respondent herein and published in supplement Part II, Section 2 of Tamil Nadu Government Gazette dated 9.11.1983 at Page 47 and the proceedings of the 2nd respondent, the Special Tahsildar (A.W.), Tindivanam in 2686/83 and dated 20.11.1983 and its subsequent notice issued by the 2nd respondent under Secs.9(3) & 10 of the Land Acquisition Act 1 of 1984 dated 12.3.1984 quash the proceedings as illegal, incompetent and without jurisdiction and further direct the respondents herein not to proceed further in regard to the Land Acquisition Proceedings in respect of R.S.No.64/3B an extent of 0.20 hectares R.S.No.64/4B of an extent of 0.39 hectares in Irumbai village, Vanoor Taluk, South Arcot District belonging to the petitioners herein.

V.Raghavachari, for Petitioners.

M.Liagat Ali, Government Advocate, for Respondents.

The Court made the following

ORDER: First and second petitioners (two brothers), third petitioner (son of the first petitioner) and 4th and 5th (minor daughters of the first petitioner) have filed the instant petition praying

"I state that proposals for the requisition of the following lands in Irumbai village for provision of house sites to Adi-Dravidars was sent to District Adi Dravidar Welfare Officer.

S.No.64/3 Govt. Dry 0.22.0 Hectares out of 0.70

S.No.64/4 Govt. Dry 0.40.0 Hectares out of 0.44

S.No.64/5 Govt. Dry 0.89.5 Hectares

Total 1.85.5 Hectares"

to quash the proceedings for acquisition of lands to provide house sites to Adi Dravidas of Irumbai village in South Arcot District. They have stated that their lands in R.S.Nos.64/3B and 64/4B in Irumbai village have been notified in G.O.Ms.No.2556, Social Welfare, dated 13.10.1983 and published in Part 3, Sec.2 of Tamil Nadu Government Gazette, dated 9.11.1983. In the said notification, Government only mentioned names of the first petitioner and third petitioner, that the names of the other petitioners have been omitted and not mentioned and,

"There was no proper publication of Sec.4 notification in the village or in the vicinity of lands sought to be acquired. There was no issue of notice under Rule 38 of the Land Acquisition Rules framed under Land Acquisition Act to the Social Welfare Department at the time of Sec.5-A enquiry. In the issue of Sec.5-A notice, the name of Sundaramoorthy has been omitted and it is incumbent upon the Tahsildar and it is statutory obligation cast on him under Sec.5-A of Land Acquisition Act, to issue notice on each and every person interested in the lands and invite their objections and the failure or omission to do renders Sec.6 notification *invalid and void ab initio*."

2. There are several other facts stated in the affidavit, since, however, learned counsel for the petitioners has attached the acquisition mainly on the ground of (1) non-compliance of the mandatory requirement of the publication of the substance of the notification under Sec.4(1) of the Land Acquisition Act, for short 'the Act' at convenient places in the locality and (2) non-compliance of the requirement of Rule 38 of the Rules framed under the Act upon the third petitioner, I have not referred to other facts.

3. The above, however, has been replied to in the counter-affidavit filed on behalf of the respondents in these words:

The proposals were initiated after inspection by the then Special Tahsildar (ADW), Tindivanam on 20.6.1983. The abovesaid lands were selected for acquisition after examining the merits and demerits of the lands surrounding the colony. The proposals approved by the Collector, South Arcot District and authorised the Special Tahsildar (ADW), Tindivanam for acquiring the lands and proposals were sent by the Collector to the Government for approval in Collector's ref.W/16/194111/83, dated 21.7.1983. The same was approved by the Government in G.O.Ms.No.2656, SWD, dated 13.10.1983 and it was published in the Tamil Nadu Government Gazette, dated 9.11.1983, Part II, Section 2, Page 47. Accordingly notice in Form I under Rule 3, under Sec.5-A was issued on 21.11.1983 fixing the date of enquiry on 16.12.1983 after allowing a clear interval of 15 days after the date of service of the notices. The following persons appeared for enquiry and given their statements: 1. Jayarama Naidu, S/o.Devarajulu, 2. Subbarayalu, S/o.Devarajulu, 3. Poongavanam, S/o. Rangan, 4. Natesan, S/o.Poongavanam, 5. Subramanian, S/o.Poongavanam. The land owners of R.S.No.64/5 have given their consent to acquire their land for providing house sites to Adi Dravidars. The land owners in R.S.No.64/3 have protested for the acquisition on the following grounds:

1. It is undivided property among them and if it is partitioned each will get a share of one acre of land which will not suffice their needs.
2. That sufficient poramboke lands are available for the provision of house sites to Adi Dravidars.
3. That a main electric line passes through the proposal field.
4. That he has formed about 1400 feet cement pipeline to irrigate water to the lands now proposed for acquisition.

These objections were considered and held baseless.

"I state that after conducting 5-A enquiry D.D. under Secs. 6 and 7 of the Land Acquisition Act were submitted to the District Adi Dravidar Welfare Officer and it was sent to the Government by the Collector in the Ref.W16/194111/83, dated 11.1.1984 through the Commissioner, Land Administration, Madras-5. The Government approved to the DD proposals in G.O.Ms.No.920, SWD, dated 7.3.1984 and published in the Tamil Nadu Government

Gazette dated 12.3.1984. After observing usual formalities, "notice under Secs.9(1) and 10 of the Land Acquisition Act I of 1894 were issued on 12.3.1984 fixing the date for award enquiry on 28.3.1984. After completion of award enquiry, to award was passed by the then Special Tahsildar (ADW), Tindivanam. Due to the non-appearance of the land owners for the award enquiry the entire compensation of the above lands under acquisition is ordered to be deposited in the Court under Sec.31(2) of the Land Acquisition Act of 1894. The compensation amount of Rs.8,825, Rs.5,550 & Rs.3,013.29, for the lands in R.S.No.64/3B, 64/4B and 64/5 respectively was deposited in the Sub Court, Tindivanam under Sec.31(2) in this office Ref.A.2686/83, dated 7.4.1984 (in 3 references) and O.P.Nos. are awarded from the Sub Court, Tindivanam."

"With reference to the averments made in paras 5 and 6 of the affidavit, I submit that the lands in R.S.No.64/3 stands registered in the name of Venkatasamy Naidu in R.S.No.706. But the land is under possession and enjoyment of Jayarama Naidu, S/o.Devaraja Naidu. Local enquiry reveals he has a son named by Sundaram. Hence the name of Jayarama Naidu and his sons have been included in the Schedule of 4(1) Notification and published. But at the time of 5-A enquiry the above persons and his borth Subbarayalu Naidu were enquired and obtained statements. The names of the above persons and other interested persons have been included in the "Schedule under Secs.6 & 7 of the Land Acquisition Act (*sic.*) not published. Hence, the petitioner's plea that non-publishing the name of the 3rd petitioner Sundaramoorthy in the 4(1) notification is not correct."

4. It is thus to be seen that R.S.Nos.64/3-B and 64/4-B appear to fall in S.Nos.64/3, 64/4 and 64/5 totalling 1.85.5 hectares of land are sought to be acquired for providing house-sites to Adi Dravidars. After the publication in the Government Gazette, dated 9.11.1983 and notice in Form I under Rule 3, under Sec.5-A of the Act issued on 21.11.1983 fixing the date of enquiry on 16.12.1983, when enquiry commenced the first petitioner Jayarama Naidu and his brother the second petitioner appeared besides others and the objections that were raised were confined to R.S.No.64/3-B

only in which undivided property belonging to the petitioner is said to fall.

5. It has indeed been settled by now and there is no ambiguity of any kind in the principle that publication of Primary Notification under Sec.4(1) of the Act, is mandatory and not only the publication in the Official Gazette but publication of the substance of such notification at convenient places in the locality is also mandatory. It is conceded that petitioners 1 and 2 were fully represented in the enquiry under Sec.5-A of the Act. They could not be present in the said enquiry unless they were given notice of the notification under Sec.4(1) of the Act involving their lands. The first petitioner Jayarama Naidu alone was competent to represent Padmajothi and Geetha, his minor daughters and thus when Jayaraman Naidu has participated in the enquiry he has participated for self as well as Padmajothi and Geetha, fourth and fifth petitioners. It is shown that the name of the first petitioner is included in the Schedule to 4(1) notification and his name has been published accordingly. If there has been such publication of the notification so as to reach Jayarama Naidu the first petitioner and his brother Subbarayalu Naidu, the second petitioner, in the absence of a case that Sundaramurthy (third petitioner) lived separately from Jayarama Naidu, it is not possible to give any credit to the allegation that he had no notice of the notification under Sec.4(1) of the Act and he thus got no adequate opportunity to participate in the enquiry under Sec.5-A. It is also shown that the land in R.S.No.64/3 stood in the name of Venkataswamy Naidu. The revenue records thus did not show the names of any of the petitioners. When, however, it was found that the land was in possession and enjoyment of the first petitioner and his family members and local enquiries revealed he had a son named Sundaramoorthy the third petitioner, their names were also included in the Schedule to 4(1) notification. Thus, there is no gainsaying if it is said that Sundaramurthy, his son had no notice and he was prejudiced because he could not as a person interested, file objections and participate in the enquiry under Sec.5-A of the Act. It is needless here to say that the petitioner's attempt to show any prejudice to Sundaramurthy is ignoring the fact that a joint family of several owners is represented by one of them, who is called '*kartha*' and knowledge to him, of the proceedings under Sec.5-A must be deemed to be

knowledge to all of them.

6. But the thrust of the argument of the learned counsel for the petitioners with respect to the requirement of the publication of the substance of the notification under Sec.4(1) of the Act is that since this requirement is mandatory and it is not shown by the respondents that there has been a publication of the substance of the notification under Sec.4(1) in the locality the proceedings for acquisition must fall to the ground. This he has submitted ignoring the statement in the counter-affidavit that notice in Form I in Rule 3 under Sec.5-A was issued on 21.11.1983 only days after the gazette notification under Sec.4(1) of the Act on 9.11.1983 and if this notice contained the substance of the notification it did stand in compliance with the mandatory requirement of the publication of the substance of the notification.

7. Courts have held that the requirements of simultaneous publication of the notification in the Official Gazette as well as public notice of substance of such notification are the essential elements of Sec.4(1) and explained that simultaneous publication does not mean publication at the same time but also not at such distance of time that the very purpose of the public notice is defeated. For, unless full notice of the intention to acquire the land is given to the person interested in the land he is likely to suffer and could not in the case of ordinary acquisition file his objections within the prescribed period of limitation under Sec.5-A of the Act and in the case of acquisition after invoking the urgency clause the opportunity to make representations to persons concerned. The principle in this behalf has been fully stated in the judgments of the Supreme Court including in the case of *Deepak Patwa v. Lt. Governor of Delhi*, (1984) 4 S.C.C. 308; A.I.R. 1984 S.C. 1721, in these words:

"It may be noticed at once that Sec.4(1) does not prescribe that public notice of the substance of the notification should be given in the locality simultaneously with the publication of the notification in the Official Gazette or immediately thereafter. Publication in the Official Gazette and public notice in the locality are two vital steps required to be taken under Sec.4(1) before proceeding to take the next step of entering upon the land under Sec.4(2). The time factor is not a vital element of Sec.4(1) and there is no warrant for reading

the words 'simultaneously' or 'immediately thereafter' into Sec.4(1). "Publication in the Official Gazette and public notice in the locality are the essential elements of Sec.4(1) and not the simultaneity or immediacy of the publication and the public notice. But since the steps contemplated by Sec.4(1) cannot be undertaken unless publication is made and public notice given as contemplated by Sec.4(1), it is implicit that the publication and the public notice must be contemporaneous though not simultaneous or immediately after one another. Naturally contemporaneity may involve a gap of time and by the very nature of the things, the publication in the Official Gazette and the public notice in the locality must necessarily be separated by a gap of time. This does not mean that the publication and the public notice may be separated by a long interval of time. What is necessary is that the continuity of action should not appear to be broken by a deep gap. If there is publication in the Gazette and if there is public notice in the locality, the requirements of Sec.4(1) must be held to be satisfied unless the two are unlinked from each other by a gap of time so large as may lead one to the *prima facie* conclusion of lack of *bona fides* in the proceedings for acquisition."

"If the notification and the public notice are separated by such a large gap of time it may become necessary to probe further to discover if there is any cause for the delay and if the delay has caused prejudice to anyone."

"We may consider here an argument which is usually advanced against any time gap between the publication in the Official Gazette and the public notice in the locality. Sec.5-A provides that any person interested in the land which has been notified under Sec.4(1) may object to the acquisition of the land or of any land in the locality within 30 days after the issue of the notification. It is, therefore, suggested that if the publication of the notification in the Gazette is not immediately followed by a public notice in the locality, it may lead to a denial to the person interested of an opportunity to object to the acquisition. We think, that this is too narrow an interpretation of Sec.5-A. Notice to interested persons of a proposed acquisition of land is given by publishing a notification to the effect that land in any

locality is needed or is likely to be needed for any public purpose in two ways-first, by causing publication of the substance of the notification to be given at convenient places in the locality. There is no reason to confine the period of 30 days prescribed by Sec.5-A to one mode. The period of 30 days may be reckoned from either the date of publication in the Gazette or the date of the public notice of the substance of the notification in the locality, whichever is later. In our view, that is the only reasonable and practical way of construing Sec.5-A, so as to advance the object of the provision, which is to provide a reasonable opportunity to interested persons to oppose the acquisition. We particularly notice that Sec.5-A does not refer either to the date of public notice of the substance of the notification in the locality. It speaks of the issue of the notification. This we consider is significant and in the context, the words 'the issue of the notification' can only signify the completion of the prescribed process-rather the twin process that of notifying the interested public of the proposed acquisition in the manner provided for by Sec.4(1), that is by publication in the Official Gazette and giving public notice in the locality."

And when urgency clause under Sec.17(4) of the Act is invoked in these words:

"The other ground of attack is that if regard is had to the considerable length of time spent on inter-departmental discussion before the notification under Sec.4(1) was published, it would be apparent that there was no justification for invoking the urgency clause under Sec.17(4) and dispensing with the enquiry under Sec.5-A. We are afraid, we cannot agree with this contention. Very often persons interested in the land proposed to be acquired make various representations to the concerned authority against the proposed acquisition. This is bound to result in a multiplicity of enquiries, communication and discussions leading to delay in the execution of even urgent projects. Very often the delay makes the problem more and more acute and increases the urgency of the necessity for acquisition. It is, therefore, not possible to agree with the submission that mere pre-notification delay would render the invocation of the urgency provisions void. We, however, wish to say nothing about

post-notification delay. In *Jagat Ram v. State of Haryana*, A.I.R. 1971 S.C. 1033, this Court pointed out "the fact that the State Government or the party concerned was lethargic at an early stage is not very relevant for deciding the question whether on the date on which" the notification was issued there was urgency or not". In *Kasi Reddy Papaiah v. Government of Andhra Pradesh*, A.I.R. 1975 A.P. 269, it was held, "delay on the part of the tardy officials to take further action in the matter of acquisition is not sufficient to nullify the urgency which existed at the time of the issue of the notification and to hold that there was never any urgency." In the result, both the submissions of the learned counsel for the petitioners rejected...."

8. If publication of the substance of the notification is a ritual there is no reason to think that it has not been complied with by the notice in Form I under Rule 3 issued by the respondent on 2.11.1983, fixing the date of enquiry on 16.12.1983. If it is a provision of substance in the sense that as noticed by the Supreme Court it has been introduced to ensure that persons know well in time that the Government has intended to acquire the land and for that reason the requirement of public notice is mandatory, can it be said in the instant case that for want of such notice the petitioners have suffered any legal injury. The answer is that the petitioners have suffered no legal injury at all. They participated in the enquiry through the first petitioner and the second petitioner and their objections have been fully taken into account.

9. In the instant case, I have not found any defect in the publication of the notification. I intend, however, to observe that in case where there is some defect in the notice of a sort that a court may think that the mandatory requirement of the publication of the substance of the notification under Sec.4(1) has not been complied with the court shall not for the reason of non-compliance of this requirement alone nullify any acquisition proceedings unless it is shown that the petitioners have suffered for want of notice, in the sense that they lost the opportunity to participate in the enquiry under Sec.5(1) of the Act for the reason of want of notice or could not make any representation in the case of urgency acquisition to the proper authorities to show that it was not a case for the acquisition of their lands. No remedy is

extended unless it is required to redress an injury. Unless such injury is sustained no remedy is required. The court may not for the reason of a mere non-compliance with the requirement of a mandatory provision like to interfere with a concluded proceeding unless the petitioners without such interference have suffered any legal injury.

10. Learned counsel for the petitioners however, has drawn my attention to some Government Orders, one among them being G.O.Ms.No.620, Housing and Urban Development Department, Madras dated 29.6.1990 which has quoted several Government Orders previously issued. They appear to intend to convey to the officers proceeding to acquire lands that the temple lands should not be acquired for any purpose except in cases where it is accepted by the H.R. & C.E. Department that the temples do not derive any benefit from such lands and land belonging to poor persons with meagre land holdings need not generally be acquired unless otherwise inevitable for the purpose of maintaining proximity and vicinity to the main village, that the lands belonging to scheduled castes/tribes should not be acquired except where it becomes absolutely inevitable, and that the wet lands should not be acquired for housing scheme, except in unavoidable circumstances etc. It has not been shown by learned counsel for the petitioners as to whether these Government Orders have any force of a statute. It is also not shown by learned counsel for the petitioners that these Government Orders are in the form of executive instructions in lieu of a statute. In the absence of anything showing that these Government Orders do not interfere in the field occupied by the Land Acquisition Act and the Rules, framed thereunder, it is not possible to take any judicial notice of these Government Orders. Even assuming that these Government Orders have a legal sanction they do not appear to show that the Government ever intended to make these instructions mandatory or binding on all concerned. There is nothing in the writ petition to show that necessary precautions were not taken by the concerned authorities and that they just pounced upon the lands of the petitioners although there were other lands available, except in general terms stating that they were/are other lands available which the respondents could acquire for the public purpose of house sites for the Adi Dravidars. In my opinion, the writ petition has no merit and it must fail for

the reasons aforementioned. Accordingly, it is dismissed. On the facts of this case, I am inclined to award costs. Hearing fee Rs.250.

B.S. ----- Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

S.A.No.887 of 1982 11th January, 1993.

Sundara Rajan and another ...*Appellants*
v.

Sundaramoorthy ...*Respondent.*

(A) *Transfer of Property Act (IV of 1882), Sec.111(g) - Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.11 - Defendant tenant of site let into possession by Vendor of plaintiff - Putting up super-structure on site - Plaintiff seeking for declaration of title and possession - Defendant setting up sale agreement in his favour - Lease, if determined in the absence of notice.*

(B) *Transfer of Property Act (IV of 1882), Sec.109 - Original lessor assigning his interest - No agreement between assignee and tenant of original lessor - Fresh attornment by tenant to assignee, if necessary.*

(C) *Tamil Nadu City Tenants' Protection Act (III of 1922), Secs.9 and 11 - Landlord suing for declaration of title and possession - Tenant filing application under Sec.9 to purchase suit property - Contending in written statement in suit that suit was not maintainable for want of valid notice - Notice under Sec.11, whether necessary - It can be considered to have been waived by implication.*

Held: The claim on the footing that the defendant is an agreement-holder for purchasing the suit property may be a denial of landlord and tenant relationship. Such a repudiation of the said relationship may also entail forfeiture under Sec.111(g) of the Transfer of Property Act. But the said Sec.111 which deals with the modes of determination of tenancy says in the said clause (g) that in the

case of such forfeiture, for the determination of the lease, landlord should also, give notice determining the lease. No such notice has been given in the present case. It may also be pointed out that it has also been held that denial of title of an assignee of the original lessee would not work forfeiture of the lease. [Para. 3-A]

On the assignment of the interest of the original lessor in favour of the plaintiffs, in view of Sec.109 of the Transfer of Property Act, even in the absence of any fresh agreement between the plaintiffs and the defendant, the assignee-plaintiffs became entitled to the rights which the original lessor (vendor of the plaintiffs) possessed; a fresh attornment by the defendant to the assignees-plaintiffs is not necessary. [Para. 3-D]

This Court has held in more than one decision that filing of application under Sec.9 of the Act would amount to such a waiver of notice under Sec.11 of the Act. It has also been held that even the written statement which claims right under Sec.9 could be treated as such an application. In the present case, it is found that even in the original written statement filed by the defendant, the following plea was raised in paragraph 4: 'In any event, the suit is not maintainable for want of valid notice'. It cannot be held that there is a waiver of notice under Sec.11 by implication. Sec.11 notice is necessary even in the present case. [Paras. 4, 5 & 9]

Cases referred to:

Bhargaravakula v. Arunachala, (1990)1 L.W. 46. [Paras. 3, 3-B, 3-D]

Subba Rao v. Krishna Rao, A.I.R. 1989 S.C. 2187. [Para. 3]

Bhargavakula v. Chakravarthi, (1992)2 M.L.J. 83. [Para. 3]

Brij Kishore v. Mushtari Khatoon, A.I.R. 1976 All. 399. [Para. 3-A]

Abdullah v. Mohd. Muslim, A.I.R. 1926 Cal. 1205. [Para. 3-A]

Brij Bihari v. Deoki Devi, A.I.R. 1978 Pat. 117 (D.B.). [Para. 3-D]

Vedachala Naicker v. Durai Mudaliar, (1950)1 M.L.J. 732. [Paras. 4, 5]

Natesa Naicker v. Vedagiri, (1975)1 M.L.J. 301. [Para. 4]

Balasubramania Iyer v. S.P. Muthu Kumaraswamy Devasthanam, (1983)1 M.L.J. 280. [Para. 4]

Sri Agatheeswarar P.V. Perumal Devasthanam v. Narasimhan, (1982)2 M.L.J. 70 (D.B.). [Para. 5]

Lakshmi Narayan Guin v. Niranjana Modak, (1985)1

S.C.C. 270. [Para. 5]

Abdul Shukur Sahib v. Geethammal, 1977 T.L.N.J. 125. [Para. 8]

V.Natarajan, for Appellants.

K.Sampath, for Respondent.

The Court delivered the following

JUDGMENT: Plaintiffs are the appellants in this second appeal. They filed the suit O.S.No.1951 of 1978, on the file of the District Munsif of Cuddalore, for declaration of their title to the suit property and for possession thereof. They claim title under Ex.A-3 sale deed dated 23.8.1977. The trial Court has upheld their title and also held that the alleged prior sale agreement in relation to the suit property between the defendant-respondent and the plaintiffs' vendor Krishnamoorthy Rao, is not true and that the defendant is a tenant of the suit property. So saying, the trial Court decreed the suit for declaration of title and possession and directed the defendant to remove the superstructure put up by him on the suit land within two months.

2. However, in the appeal filed by the defendant, viz., A.S.No.122 of 1981 on the file of Sub Court, Cuddalore, the defendant was allowed to file additional written statement. There, he pleaded that he became a tenant of the suit site under the above said Krishnamoorthy Rao and put up the superstructure thereon. He also claimed benefits under the Tamil Nadu City Tenants Protection Act (hereinafter referred to as 'the Act') and sought to purchase the suit site under Sec.9 of the Act. In view of the said additional written statement, the following fresh issues were framed in the appeal:

1. Whether the defendant is entitled to claim the benefits under City Tenants' Protection Act?
2. Whether the defendant's claim for such benefits under City Tenants' Protection Act is in time?
3. Whether the defendant is entitled to the value of the superstructure and if so to what extent?

The lower appellate court, after stating that the parties did not let in fresh oral evidence on the said issues, came to the following conclusions: The defendant is a tenant of the suit site, let into possession by the abovesaid Krishnamoorthy Rao in 1968 and he put up the superstructure therein in 1968-69. The suit is not maintainable since the notice prescribed under Sec.11 of the Tamil Nadu

City Tenants Protection Act, has not been given by the plaintiffs to the defendant before filing the suit. The claim for the benefits under the said Act is in time. The abovesaid third issue does not arise.

2-A. The first appellate court has thus held that the plaintiffs are not entitled to get possession, though they are entitled to the declaration of their title. The result is that the first appeal has been allowed in part, granting only a decree for declaration of title and not possession. Since possession decree was not given, the plaintiffs have preferred this second appeal.

3. The learned counsel for the plaintiffs-appellants has initially contended that the defendant has denied the title of the plaintiffs to the suit property by setting up a sale agreement in his favour and that hence he is not entitled to the benefits of the abovesaid Act. He also cited the decisions in *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46, *Subba Rao v. Krishna Rao*, A.I.R. 1989 S.C. 2187 and *Bhargaraavakula v. Chakravarthi*, (1992)2 M.L.J. 83 in this regard.

3-A. I shall first deal with this contention. The claim on the footing that the defendant is an agreement holder for purchasing the suit property, may be a denial of landlord and tenant relationship. Such a repudiation of the said relationship may also entail forfeiture under Sec.111 (g) of the Transfer of Property Act. In *Brij Kishore v. Mushtari Khatoon*, A.I.R. 1976 All. 399, also it was so held. But the said Sec.111, which deals with the modes of determination of tenancy, says in the said Clause (g) that in the case of such forfeiture, for the determination of the lease, landlord should also give notice determining the lease. No such notice has been given in the present case. I may also point out that it has also been held that denial of title of an assignee of the original lessee would not work forfeiture of the lease (*vide: Abdullah v. Mohd. Muslim*, A.I.R. 1926 Cal. 1205).

3-B. But the question here is not whether the lease in favour of the defendant has been determined in accordance with Sec.111 of the Transfer of Property Act, but whether the setting up of the abovesaid case under a sale agreement would disentitle the defendant from claiming the benefits of the City Tenants' Protection Act, when in the first appeal, he has impliedly at least, given up his original case and accepted the position that he is only a tenant. *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46 (D.B.), has held, taking into account the relevant

definition of the term 'tenant' under the abovesaid Act, that the tenant who wants to claim the benefits of the abovesaid Act must be a person liable to pay rent and such a liability should be under a tenancy agreement, express or implied. No doubt, as per his original plea, in his original written statement, the defendant would not fulfil the above requirements mentioned in *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46 (D.B.). But, by filing the abovesaid additional written statement, he has given up his said original stand and accepted the position that he is a tenant. An appeal is only a continuation of the suit. In the first appeal, the above different plea taken up by him, had been allowed to be raised and the first appellate court proceeded with the case further, only on the footing of the abovesaid altered plea. Yet, can it be said that in view of his original plea, he cannot have the benefits of the said Act, relying on the abovesaid decisions, including *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46 (D.B.)?

3-C. No doubt, in this connection, the learned counsel for the appellants also argues that the abovesaid additional written statement should not have been entertained since the defendant, by the said statement, sought to set up a different and inconsistent case. But, I am unable to agree with this contention since the very plea of the plaintiffs themselves is that the defendant is a tenant and so, the defendant has only adopted the case of the plaintiffs and sought to claim the benefits of the abovesaid Act on the footing that he is a tenant.

3-D. In this connection, I may also deal with one other argument of the learned Counsel for the respondent, in reply to the argument of the learned Counsel for the appellants, that, because of denial of title, the defendant cannot claim the benefits of the said Act. The said reply argument is that in the present case, the plaintiffs are not the original lessors of the defendant, but they are subsequent purchasers of the suit property from the said original lessor and that there is no estoppel with reference to such a purchaser under Sec.116 of the Evidence Act, when the defendant has not attorned the tenancy in favour of the plaintiffs. Therefore, according to the said counsel for the respondent, the abovesaid decisions like *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46 (D.B.), cannot be relied on by the plaintiffs to contend that the defendant is not entitled to claim the benefits of the abovesaid Act. Though initially I was inclined

to accept this argument, later, on a deeper investigation, I have to hold that this argument cannot be accepted. On the assignment of the interest of the original lessor in favour of the plaintiffs, in view of Sec.109 of the Transfer of Property Act, even in the absence of any fresh agreement between the plaintiffs and the defendant, the assignees-plaintiffs became entitled to the rights, which the original lessor (vendor of the plaintiffs) possessed; a fresh attornment by the defendant to the assignees-plaintiffs, is not necessary (*vide Briji Bihari v. Deoki Devi*, A.I.R.1978 Pat. 117 (D.B.)). Therefore, I am of the view that the abovesaid decisions like *Bhargaravakula v. Arunachala*, (1990)1 L.W. 46 (D.B.) cannot be said to have no application to the present case. Anyway, since the defendant has impliedly at least given up his original plea in his original written statement, and admitted in his additional written statement that he is a tenant under the plaintiffs, as pleaded by the plaintiffs themselves, I think he cannot be denied the right to claim benefits of the abovesaid Act.

4. Next, as already pointed out, the lower appellate Court has dismissed the suit solely on the ground that the abovesaid Sec.11 notice was not given by the plaintiffs to the defendant prior to the filing of the suit. In this connection I posed the question to the learned counsel for the respondent whether it cannot be construed that there is a waiver by the defendant of the abovesaid notice, in view of the fact that he has chosen to file the abovesaid additional written statement, claiming to purchase the suit land under Sec.9 of the abovesaid Act. This Court has held in more than one decision that filing of application under Sec.9 of the Act would amount to such a waiver of notice under Sec.11 of the Act (*vide Vedachala Naicker v. Durai Mudaliar*, (1950)1 M.L.J. 732 and *Natesa Naicker v. Vedagiri*, (1975) 1 M.L.J. 301). No doubt, in the present case, there is no application as such, filed under Sec.9 of the Act. But, since it has also been held that even the written statement which claims right under Sec.9 could be treated as such an application, the question in the present case is whether there is a waiver of Sec.11 notice by the defendant, by his claiming the right under Sec.9 in his abovesaid additional written statement. It has also been held in *Balasubramania Iyer v. S.P.Muthu Kumaraswamy Devasthanam*, ((1983)1 M.L.J. 280, that since the abovesaid notice under Sec.11 is for the benefit of the tenant, he could waive the said

notice.

5. In answer to my abovesaid question, the learned counsel for the respondent drew my attention to *Sri Agatheeswarar P.V.Perumal Devasthanam v. Narasimhan*, (1982)2 M.L.J.70 (D.B.) and *Lakshmi Narayan Guin v. Nuranjan Modak*, (1985)1 S.C.C. 270. In *Sri Agatheeswarar P.V.Perumal Devasthanam v. Narasimhan*, (1982)2 M.L.J. 70, also it was held that notice contemplated by Sec.11 could be waived by the tenant either expressly or impliedly by his conduct. In the said case, there was an application under Sec.9 to purchase the suit site therein. But that was preceded by filing a written statement, questioning the maintainability of the suit without a proper notice by the landlord. In that context, the said decision distinguished the abovesaid decisions in *Vedachala Naicker v. Duraiswami Mudaliar*, (1950)1 M.L.J. 732 and *Natesa Naicker v. Vedagiri*, (1975)1 M.L.J. 301, on the ground that in those two cases, application under Sec.9 was there "without any demur as regards the non-compliance with Sec.11." In *Sri Agatheeswarar P.V.Perumal Devasthanam v. Narasimhan*, (1982)2 M.L.J. 70 (D.B.), in the written statement that preceded Sec.9 application, the question of maintainability of the suit without proper notice, had been raised; the Division Bench held that there was no waiver. In the present case also I find that even in the original written statement filed by the defendant, the following plea was raised in paragraph 4:-

"In any event, the suit is not maintainable for want of valid notice."

Therefore, I think *Sri Agatheeswarar P.V.Perumal Devasthanam v. Narasimhan*, (1982)2 M.L.J. 70 (D.B.) applies to the present case and I cannot hold that there is waiver of notice under Sec.11, by implication.

6. No doubt, the said learned Counsel also points out that in the same *Sri Agatheeswarar P.V.Perumal Devasthanam v. Narasimhan*, (1982)2 M.L.J. 70 (D.B.), it has also been held that waiver is a question of fact and ought to be pleaded and proved, but that there is no plea by the plaintiff regarding the said waiver. But, as already stated, there is plea by the defendant in his additional written statement that he is entitled to the benefits of the abovesaid Act and he is willing to purchase the site at a value that may be fixed by the Court. However, despite this plea, I have already held that there is no waiver by implication.

7. The other decision cited by the learned Counsel for the defendant, viz., *Lakshmi Narayan Guin v. Niranjan Modak*, (1985)1 S.C.C. 270 does not actually deal with the question of waiver at all. There was also no claim at all to purchase the suit site. The case arose under West Bengal Premises Tenancy Act. How far the said Act is similar to the abovesaid Tamil Nadu City Tenants Protection Act is also not quite clear since the said Act as such was not produced before me. However, paragraphs 6 to 9 of the said judgment were relied on by the said counsel. In these paragraphs, no doubt, it was observed that where the decree for eviction is passed by the trial Court against the tenant under the provisions of the Transfer of Property Act and the statute giving protection to tenants against eviction is extended to the concerned area during the pendency of appeal against the decree for eviction, the appellate court is bound to take into account the change of law and extend its benefits to the tenant and consequently set aside the decree of the trial court and dismiss the suit. Sec.13 of the said West Bengal Act is said to provide for a qualified protection to the tenant against eviction inasmuch as it injuncts the court from passing an order or decree in landlord's suit for recovery of possession except on the limited grounds detailed in sub-sec.(1) thereof and that sub-sec.(6) therein provides that no suit for the recovery of possession of any of the grounds mentioned in sub-sec.(1) can be filed by the landlord unless he has given to the tenant one month's notice expiring with the month of tenancy. The High Court therein found that the notice for eviction given was only of less than one month and that, therefore, there was no compliance with the abovesaid Sec.13(6). Consequently, the High Court held that the suit was incompetent. The said decision of the High Court was no doubt approved by the Supreme Court. But, as already stated by me, the question of waiver was not considered at all by the Supreme Court in the said case, nor was there any claim to purchase the suit site in the said case. So, that decision will have no application to the abovesaid question posed by me, based on the claim for purchase of the suit site, made by the defendant.

8. No doubt, the learned counsel for the appellant also argues that no notice under Sec.11 at all is necessary since the suit was filed even prior to Act 2 of 1980 which amended the parent Act. (City

Tenants Protection Act). In this connection, he cited the decision in *Abdul Shukur Sahib v. Geethammal*, 1977 T.L.N.J. 125. No doubt, there, the tenant resisted the landlady's suit for ejectment on the ground that the landlady has not issued to him the abovesaid Sec.11 notice. The courts below therein rejected the contention and decreed the suit, which was instituted in 1972. The abovesaid Act was extended to the municipal town in question therein on 8.1.1973 and the argument was that the suit though pending on 8.1.1973 should nevertheless have been dismissed, the moment the notification rendered Sec.11 applicable to the property. In this connection, Sec.10 of the said Act was also pointed out which rendered applicable some of the beneficial provisions of the Act even to pending suits. However, Balasubramaniam, J., who heard the said case, did not accept the said argument and held that in view of the fact that the abovesaid notification came into force only pending the suit, the abovesaid required notice was not necessary. In that connection the learned Judge also observed thus:

"We cannot imagine the section saying, expect you to have complied with the conditions even earlier". That would be asking landlords to ride the Time Machine backwards, to recapture moments which are past recapturing. The law does not require, or even expect any man or woman to do the impossible. On a reading of Sec.11 of the Act and the Government Notification in this case it would not be held the suit by the landlady to be not maintainable."

9. However, the learned Counsel for the respondent, in reply, relies on the above referred to observations (*vide* paragraph 7) in *Lakshmi Narayan Guin v. Niranjan Modak*, (1985)1 S.C.C. 270, itself and argues that in view of *Lakshmi Narayan Guin v. Niranjan Modak*, (1985)1 S.C.C. 270, *Abdul Shukur Sahib v. Geethammal*, 1977 T.L.N.J. 125, is no longer good law. At any rate, I am bound by the Supreme Court decision and so I have to hold that Sec.11 notice is necessary even in the present case. When admittedly such a notice has not been given, the appellants cannot have possession decree.

10. Accordingly the present second appeal is dismissed. However, in the circumstances of the case, no costs.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra and S.M.Ali Mohamed, JJ.*

O.S.A.No.261 of 1986

9th February, 1993.

Soopi Haji and others
v.

...Appellants

R.M.Ramanathan Chettiar

...Respondent.

Civil Procedure Code (V of 1908), O.17, Rules 2 and 3 and Explanation to Rule 2 (as amended by Act CIV of 1976) - One of the parties absent on date of hearing - Suit can be disposed of only under Rule 2 - Rule 3 not attracted in the absence of party - Evidence of party not taken at all or some evidence taken but substantial portion of evidence of that party yet remains to be taken - Party absent - Court, if can proceed with the case.

Held: The clear words, 'if the parties are, or any of them is absent, proceed under Rule 2' in Rule 3 of O.17, leave no manner of doubt that in all cases of the absence of the party, the order has to be passed under Rule 2 and not under Rule 3. The words in Rule 2 'or make such order as it thinks fit' do not mean that the Court may proceed to dispose of the suit in the absence of the party under Rule 3. Rule 3 is not attracted at all in the case of the absence of a party and thus 'or make such other order as it thinks fit' must mean an order other than to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 of the Code, but surely not to dispose of the suit on merits. 'Such other order' may be a further adjournment to enable the party which is absent to appear or to regulate the proceedings in some other manner. It is also relevant to take notice of the language in the explanation that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear, that is, if a party's evidence is already on the record or substantial portion of the evidence of that party has already been taken and only a negligible part of the evidence is left out and such party has failed to appear, the court may proceed with the case as if that party were present. If evidence of a party has not been taken at all and if some evidence has been taken, but substantial portion of the evidence of that party is yet to be taken and that party is absent, the explanation shall not enable the court to

proceed with the case in the absence of that party but to proceed to dispose of the suit in one of the modes directed in that behalf by O.9, or to make such other order, that is to say, adjourn again for another date or take such steps as would ensure the appearance of the parties and their evidence.

[Para. 6]

Cases referred to:

Chandramati Ammal v. Narayanaswami Aiyar, (1910) I.L.R. 33 Mad. 241. [Paras. 1, 2]

Naganada Iyer v. Krishnamurthi Iyer, (1911) I.L.R. 34 Mad. 97. [Paras. 1, 2]

Pichamma v. Sreeramulu, 34 M.L.J. 24: A.I.R. 1918 Mad. 143(2). [Para. 1]

Gaudan v. Kamakha Rama Chetti, (1916) 33 I.C. 660. [Para. 2]

Knatulla v. Jiben Mohan Roy, A.I.R. 1914 Cal. 360. [Para. 2]

M.S.Khalsa v. Chiranji Lal, A.I.R. 1976 All. 290. [Para. 2]

Rama Rao v. Shantibai, A.I.R. 1977 M.P. 222. [Para. 7]

Dakshinamoorthi v. Ponnuswami, (1948) 1 M.L.J. 65: 61 L.W. 63: 1948 M.W.N. 38: A.I.R. 1949 Mad. 78. [Para. 7]

C.P.Corers v. Government of Pondicherry, (1975) 1 M.L.J. 155. [Para. 7]

In re. Ramineni Suryanarayana, A.I.R. 1980 A.P. 129. [Para. 7]

Basalingappa v. Shidramappa, A.I.R. 1943 Bom. 321. [Para. 7]

Appeal under Clause 15 of the Letters Patent against the Order of Singaravelu, J. dated 3.2.1984 and made in the exercise of the Ordinary Original Jurisdiction of the High Court in Application No.26 of 1984 in C.S.No.608 of 1980.

Mrs.Pushpa Sathyanarayanan for
M/s.T.R.Rajagopalan and *T.R.Rajaraman*, for Appellants.

N.S.Varadachari, for Respondents.

The Judgment of the Court was delivered by *Mishra, J.*: A learned single Judge of this Court has disposed of a suit in purported exercise of power under O.17, Rule 3 of the Code of Civil Procedure and has dismissed the application for setting aside the *ex parte* decree saying:

"The respondent-plaintiff filed the suit for return of the advance amount of Rs.1,18,650 paid by the plaintiff to the defendants. the suit was filed in 1980 and the defendants filed their written statements only in March, 1982. Issues

were framed and the suit came up in the list for trial. The defendants were not ready and three weeks adjournment was granted as a matter of negligence. Again on the adjourned date, the defendants were absent and since the defendants filed written statements, evidence was let in on the plaintiff's side and the defendants' counsel cross-examined the witness. No further evidence was let in on the side of the defendants, though time was granted. The defendants are not set *ex-parte* and the suit was disposed of on merits. Hence, the proper course for the defendants is only to file appeal and not to invoke O.9, Rule 13 of the Code of Civil Procedure. In other words, it is a judgment on merits and therefore this application is not maintainable".

After holding that the application is not maintainable, learned Judge has also said that,

"...in the affidavit filed in support of this application, no sufficient reasons were forthcoming and therefore their absence was deliberate and wilful. Ample indulgence was shown to them to defend the claim, but they were bent upon to protract the proceedings and in fact succeeded in drawing on the suit for three years taking advantage of the fact that they are the residents of Kerala".

It is rather unfortunate that in a trial on the Original Side of this Court, when such was the situation that the plaintiffs were present and defendants were absent, attention of the court was not drawn to Rules 2 and 3 of O.17, particularly the amendment by the Amendment Act, 104 of 1976. O.17, which contains rules as to adjournments, has existed too long for any person not knowing the true effect of the rules under it, various interpretations by the leading judgments of the courts, High Court amendments to the rules therein and the amendment by the Parliament to set at rest any controversy as to the interpretation of the rules therein. Rules 2 and 3 of this Order before 1976 Amendment read as follows:

"Rule 2: Where, on any day of which the hearing of the suit is adjourned, the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O.9 or make such other order as it thinks fit.

Rule 3: Where any party to a suit to whom time has been granted fails to produce his evidence,

or to cause the attendance of his witnesses, or to perform any other set necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith".

A Bench of this Court in the case of *Chandramati Ammal v. Narayanaswami Aiyar*, (1910) I.L.R. 33 Mad. 241, took the view that Sec.157 of the Old Code of Civil Procedure (equivalent to Rule 2 in the present Code before 1976 amendment) dealt with cases of absence of parties and Sec.158 of the old code of Civil Procedure (Equivalent to Rule 3 of the present Code before 1976 amendment) with failure to do what was ordered. A contrary view, however, was expressed by another Bench of the Court in *Naganada Iyer v. Krishnamurthi Iyer*, (1911) I.L.R. 34 Mad. 97, where it was held that absence of a party on the date of the adjourned hearing did not preclude the court from dealing with the case under Sec.158 of the old Code. The matter thus came on reference by a learned single Judge of the Court before a Full Bench in the case of *Pichamma v. Sreeramulu*, 34 M.L.J. 24: A.I.R. 1918 Mad. 143(2). This was a reference in suit instituted first in the Court of the District Munsif of Kovvur and afterwards transferred to that of the Additional District Munsif. In the latter Court, the plaintiff examined most of his witnesses and on the application of the defendants, the suit was adjourned to 7th of February, 1916. On that date, neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on 8th February, 1916. When it was placed before a learned single Judge Abdur Rahim, J., he noticed as follows:

There is, in my opinion, a conflict of rulings in this Court as to whether Rule 2 or Rule 3, O.17, applies to facts like these. In *Naganada Iyer v. Krishnamurthi Aiyar*, (1910) I.L.R. 34 Mad. 97, which was a judgment of Manro. J. and myself, it was held that Sec.158 of the old Code empowers the Court in circumstances such as those in their case to decide the suit on the merits, whether the party at whose instance

- the adjournment was granted was present or not at the date fixed for hearing.

2. If the parties or any of them fail to appear on the fixed date, it is open to the court to proceed either under Sec.157 or Sec.158. If there are no materials

before the court on which to come to a proper decision on the merits, it would ordinarily deal with the case under Rule 2, otherwise under Rule 3. In the case of *Naganada Iyer v. Krishnamurthi Aiyar*, (1910) I.L.R. 34 Mad. 97, on earlier decision of this Court reported in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241, to which the present learned Chief Justice and Krishnaswami Ayyer, J., were parties, was not noticed. There it was held that Sec.158 old Civil Procedure Code, which corresponds to Rule 3, O.17 of the new Code, would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling, Sec.157 old Code, corresponding to Rule 2, O.17, of the present Code, would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Gaudan v. Kamakha Rama Chetti*, (1916) 33 I.C. 660, while the view propounded in *Naganada Iyer v. Krishnamurthi Aiyar*, (1910) I.L.R. 34 Mad. 97, appears to be the same as that taken in *Knatulla v. Jiben Mohan Roy*, A.I.R. 1914 Cal. 360.

Leading judgment in the Full Bench was delivered by Kumaraswami Sastri J. and the same was concluded with these words:

"I am of opinion that the decision in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241, which if I may say so with respect, is a well considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing. The decision of the question must depend on the express language of O.17, Rules 2 and 3. As pointed out in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241, Sec.157 (Rule 2) deals with cases of absence of parties and Sec.158 (Rule 3) with failure to do what was ordered. If the party fails to appear Sec.157 (Rule 2) applies and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of Sec.158 (Rule 3). I think the correct rule is to treat Rule 3 as applying only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the

point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241, has been a safe and uniform guide to courts. The construction, moreover, is one that suggests itself on a consideration of the plain language of Rules 2 and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241 ought to be followed". Wallis C.J., who recorded a separate opinion, however, had been more specific in this behalf, saying as follows:

"Under the Code, where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing O.9, Rule 6(1) or on any day to which the hearing of the suit is adjourned O.17, Rule 2 read with O.9, Rule 6(1), the Court, if it is proved that the summons was duly served, may proceed *ex parte*. In either case, where the court has disposed of the case *ex parte* and passed a decree against the absent defendant, he may, under O.9, Rule 13, move to set aside the decree on the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent and the Court resolves to proceed against him *ex parte* there is nothing, in my opinion, to prevent the court from applying the provisions, of O.17, Rule 3, and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be, nonetheless both in fact and in law, *ex parte*, and the decree will be liable to be set aside by the defendant under O.9, Rule 13. If the *ex parte* decree is set aside and the case restored and the defendant appears, it will still be open to the court to apply the provisions of O.17, Rule 3, after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is, I think, no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramati Ammal v. Narayanaswami Iyer*, (1910) I.L.R. 33 Mad. 241, that the two rules must be read as mutually exclusive I think we went too far". This authority of the full

Bench of this Court has almost always found a reference in almost every judgment of the High Courts, when question whether Rule 3 of O.17, would apply or Rule 2 thereof would apply has been posed. Some Courts on account of conflicts emerging in the views of the Judges of the High Courts as to when and how Rule 3 or Rule 2 should be applied resorted to the amendments. The Andhra Pradesh High Court added the following explanation to Rule 2.

"The mere presence in Court of a party or his counsel not duly instructed shall not be considered to be an appearance of the party within the meaning of this Rule". (27.4.1961).

and added at the end of Rule 3, the following proviso:

"Provided that in a case where there is default under this rule as well as default of appearance under Rule 2, the court will proceed under Rule 2".

The Allahabad High Court amended Rule 2 by adding the following:

"Where the evidence, or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear on such day, the court may in its discretion proceed with the case as if such party were present; and may dispose of it on the merits.

Explanation: No party shall be deemed to have failed to appear if he is either present or is represented in Court by agent or pleader, though engaged only for the purpose of making an application".

and added in Rule 3, a comma, after the first word 'where' and inserted thereafter the words 'in a case to which Rule 2 does not apply' to make the rule read as follows:

"Where in a case to which Rule 2 does not apply any party to a suit to whom time has been granted fails to produce his evidence..."

We shall presently see that the Allahabad amendment in Rule 2 has almost been adopted in the 1976 amendment to the said rule by the Parliament and the Andhra Pradesh Proviso in Rule 3 has formed the basis of the 1976 amendment by the Parliament in the said Rule. The controversy as to the application of Rule 2 to a case in which Rule 2 of O.17 would apply or a case in which Rule 3 would apply, however, has been so acute that one could find any number of cases decided by the courts in support of one or the other view and

when such a large number of cases in conflict were found creating confusion in the matter of administration of justice. The Allahabad High Court constituted a Full Bench of five Judges, which, however, disposed of the matter by a majority judgment of 3, 2, holding as follows: in *M.S. Khalsa v. Chiranji Lal*, A.I.R. 1976 All 290:

"An analysis of Rule 2 will show that it would be attracted to cases-(i) which come up for hearing on a date which was fixed after adjournment of the suit on a previous day:

(ii) The parties or any one of them fail to appear on the date so fixed;

(iii) where the evidence or substantial portion of evidence of any party has already been recorded on a previous day and such party if fails to appear on the day so fixed a court can use its discretion to proceed with the case and may dispose of it on the merits treating that such party was present;

(iv) A party which is present and does not do anything else, will be treated as not having failed to appear; and

(v) A party represented in court by an agent or pleader, though engaged only for the purpose of making an application will also be deemed not to have failed to appear.

3. Rule 2 substantially concerns itself when a party or any one of them fails to appear on the adjourned date. When both the parties or any one of them is absent on the adjourned date, Rule 2 squarely will apply and Rule 3 will be excluded. It follows, therefore, that when any party to a suit, to whom time had been granted, fails to produce its evidence or to produce its witnesses or fails to perform any other act necessary to the further progress of the suit for which time had been allowed, is absent on the adjourned date, Rule 3 will not apply.

4. The difficulty, however, arises when a party which is treated or deemed as present and does not do anything or engages a counsel for the purpose of making any application on the adjourned date will its case fall out of the ambit of Rule 2 and the court will have no power to dispose of the suit in one of the modes directed in that behalf by O.9. The amendment made by the Court is clear in one respect that the court at its discretion can dispose of a suit if the party which is absent has already adduced its evidence wholly or substantially either in one of the modes allowed by O.9, C.P.C. or can

make any other order it thinks fit. In such a case also Rule 3 will not apply as it would be covered by Rule 2.

5. If, however, a party is present but does not do anything, it cannot be said to have failed to appear that is, it cannot be said to be absent on the adjourned date and it is a party to whom time had not been granted to do anything as envisaged by Rule 3, its case then poses a problem. Since it is not absent and thus has not failed to appear, strictly speaking, the court cannot proceed to dispose of the suit in one of the modes directed in that behalf by O.9 or make such other order as the court thinks fit. Likewise, will be the case of the party which is represented by a counsel only to make an application, who then withdraws and does not do anything else for the furtherance of the suit and which party has also not taken time to do any of the acts envisaged by Rule 3.

6. The situation described above in the case of a party gives rise to a conundrum. Since the party is not absent and has not failed to appear, it can be said to fall out of Rule 2 but at the same time Rule 3 would not be attracted as it is not a party which had taken time to do any of the acts envisaged by Rule 3. It is this situation which has defied solution and the situation calls for reconsideration and framing of clear and precise rules since it is out amendments which have created the impasse.

7. So long as Rules 2 and 3 stand as they are, defectively though,

(1) Rule 3 cannot be resorted to where the parties or any of them is absent even though on the previous date the hearing of the suit was adjourned for granting to both or to any one of them time to produce evidence or witnesses or perform any other act necessary to the further progress of the suit. Such a case would squarely be covered by Rule 2, the parties or any one of them having failed to appear.

(2) Rule 3 can only be resorted to when the party, to whom time was given to produce evidence or to cause attendance of the witnesses or to perform any other act necessary for further progress of the suit, is actually present on the adjourned date of hearing but fails to do any of the acts for which the time was granted. For this purpose the fictional presence envisaged by the Explanation to Rule 2 is not to be taken into consideration. It is only the factual presence which is to be taken into

account.

The Full Bench would recommend that the courts below in their anxiety to dispose of the suit should not readily proceed to decide the suit on the merits under Rule 3 for they have the discretion not to proceed to decide the suit forthwith under that rule. It is only in exceptional cases that this be done in order to penalise a really negligent or cantankerous party. I would leave the matter at that.

The author of the majority judgment in his detailed judgment, however, answered the question referred to the Full Bench. Whether a case in which the defendant obtains an adjournment on the date of final hearing of the suit and fails to appear on the adjourned date would be covered by Rule 2 of O.17 of the Code of Civil Procedure and whether the court has jurisdiction to pass an order under Rule 3 of O.17 of the Code of Civil Procedure, saying as follows:

“The answer to the question.... is that the mentioned case is covered by Rule 2 of O.17 and an application under O.9, Rule 13, will lie even if the Court professes to act under Rule 3. Rule 3 applies only when a party is present or is deemed to be present and has defaulted in doing the acts mentioned in Rule 3”.

The court gave this answer in a case in which a Civil Judge had held that on a date fixed for final hearing, when defendants moved an application for adjournment on ground of illness and the prayer was allowed, but on the adjourned date again another application was moved, which was rejected by the Court, and the counsel for defendants stated that he had no further instructions and was therefore withdrawing from the case. The majority judgment of the Allahabad High Court has opined in 1976 what has squarely been stated by a Full Bench of our court in a judgment reported in 1918 that, Rule 2 applies to all cases of absence of parties and Rule 3 in cases of failure to do what was ordered and, the correct rule is to treat Rule 3 as applying only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do. The consistent view, however, of the Madhya Pradesh High Court is expressed in a Full Bench consisting of five Judges in the case of *Rama Rao v. Shantibai*, A.I.R. 1977 M.P. 222, which is not different from the view expressed by this Court in

its judgment of the year 1918. It has said as follows:

“The plain and unambiguous language of the two provisions; the deliberate departure made in the phraseology of the two Rules; the undisputed need to construe Rule 3 strictly; the consequences which necessarily follow as a result of the construction made and the heading of the two Rules, are factors which lead us without any hesitation to the conclusion that Rule 2 applies to all cases of default in appearance of all or any of the parties with the result that Rule 3 does not apply to any of those cases. This conclusion also enables the defaulting party to have the order made under O.9, C.P.C. set aside in the manner provided for that purpose in the code by showing that there was valid reason for default appearance on the date fixed. This is done in the manner prescribed by the Code. We also think that the expression, ‘such other order as it thinks fit’ used in Rule 2 permits disposal of the suit and not a decision thereof on merits contemplated by Rule 3 in a mode other than that provided in O.9, example by an order of adjournment. A contrary conclusion would result in several needless difficulties. In the first place, that would permit an order of the type contemplated by Rule 3 even in the case of a default in appearance of any of the parties which is a construction not acceptable to us for the reasons already given. That apart, it would permit the making of an order contemplated by Rule 3 within the ambit of Rule 2 itself so that such a construction would render Rule 3 superfluous. It is settled that unless it is unavoidable, a construction which renders a provision superfluous must be rejected. All these reasons impel us to take the view that the expression ‘or make such other order as it thinks fit’ used in Rule 2 does not include within its ambit a decision falling within the ambit of Rule 3. As for Rule 3, it follows that this Rule presupposes the presence of all parties and then the failure of the party at whose instance and for whose benefit the hearing was adjourned on the previous date to perform the act necessary to the further progress of the suit. It is only to this class of cases that Rule 3 applies and it has no application to cases falling within the ambit of Rule 2. In our opinion, whenever, such a question arises, it has first to be seen whether Rule 2 applies to the facts of

a case since on Rule 2 being attracted, the operation of Rule 3 would be automatically excluded. It is only when there is no default in appearance of all any of the parties that the question of applying Rule 3 would arise to the facts of a case, provided the requirements laid down in Rule 3 are fulfilled". The Allahabad Judgment, however, had the advantage of the Allahabad High Court's amendment to the Rules. The Madhya Pradesh Judgment, above cited, has considered the amended Rule. We have the advantage of the 1976 Amendment to the two Rules. Before we proceed further we may extract the amended Rule in full;

Rule 2: Procedure if parties fail to appear on day fixed where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit on one of the modes directed in that behalf by O.9 or make such other orders as it thinks fit.

Explanation: Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

Rule 3: Court may proceed notwithstanding either party fails to produce evidence, etc. where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default--

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2".

The clear words, "if the parties are, or any of them is absent proceed under Rule 2", thus leave no manner of doubt that in all cases of the absence of the party, the order has to be passed under Rule 2 and not under Rule 3. The words in Rule 2, 'or make such other order as it thinks fit' do not mean that the court may proceed to dispose of the suit in the absence of a party under Rule 3. Rule 3 is not attracted at all in the case of the absence of a party and thus 'or make such other order as it thinks fit'

must mean an order other than to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 of the Code but surely not to dispose of the suit on merits. 'Such other order' may be a further adjournment to enable the party, which is absent to appear or to regulate the proceedings in some other manner. There is some scope to take a view as taken by the Full Bench of the Allahabad High Court in the case of *M.S.Khalsa v. Chiranji Lal*, A.I.R. 1976 All. 290, for the reason of the language in the Explanation to Rule 2, that there is a discretion to dispose of a suit in the absence of a party on merits, which although will be an order under Rule 2, will not be different from the disposal under Rule 3. We, however, have no reason to think that the Courts shall not exercise constraint, respect the judicial verdicts in this behalf and in this Court all the binding precedents shall not be followed, inasmuch as the Allahabad Full Bench in *M.S.Khalsa v. Chiranji Lal*, A.I.R. 1976 All. 290, has said.

"The courts below in their anxiety to dispose of the suit should not readily proceed to decide the suit on the merits under Rule 3 for they have the discretion not to proceed to decide the suit forthwith under that rule. It is only in exceptional cases that this be done in order to penalise a really negligent or cantankerous one party"

It is also relevant to take notice of the language in the Explanation that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear, that is, if a party's evidence is already on the record or substantial portion of the evidence of that party has already been taken and only a negligible part of the evidence is left out and such party has failed to appear, the court may proceed with the case as if that party were present. If evidence of a party has not been taken at all and if some evidence has been taken, but substantial portion of the evidence of that party is yet to be taken and that party is absent, the Explanation shall not enable the Court to proceed with the case, in the absence of that party, but to proceed to dispose of the suit in one of the modes directed in that behalf by O.9 or to make such other order, that is to say, adjourn again for another date or take such steps as would ensure the appearance of the parties and their evidence. In the instant case, since we have not intended to make a digest of the

case law in our judgment, we have not referred to many judgments, including a judgment of a Bench of this Court in *Dakshinamoorthi v. Ponnuswami*, A.I.R. 1949 Mad. 78, a judgment of a learned single Judge of this Court in *C.P. Corers v. Government of Pondicherry*, (1975) 1 M.L.J. 155; a judgment of a learned single Judge of the High Court of Andhra Pradesh in the case of *In re. Ramineni Suryanarayana*, A.I.R. 1980 A.P. 129 and a decision of a Full Bench of the High Court of Bombay in the case of *Basalingappa v. Shidramappa*, A.I.R. 1943 Bom. 321, which appear to take a contrary view; but the views expressed in these judgments obviously stand in conflict with the express language of the 1976 Amendment and consistent view of this Court on the subject, right from the Full Bench judgment in the case of *Pichamma v. Sreeramulu*, A.I.R. 1918 Mad. 143(2). When we come to the facts of this case, we have no hesitation in holding that the learned single judge has committed clear error of law in holding that the application under O.9, Rule 13 of the Code to set aside the decree in the suit passed in the absence of the party as well as its counsel is not maintainable. We held that the impugned judgment, for the said reason, has to be set aside; and the application for setting aside the decree restored for hearing and disposal in accordance with law. It is obvious that any finding that no sufficient reasons were forthcoming and that absence was deliberate and wilful, has to come after such enquiry, as has been envisaged for the purpose under O.9, Rule 13 of the Code of Civil Procedure and not without that, the observations in the impugned judgment in this behalf are obviously not correct.

8. In the result, the Appeal is allowed; the impugned judgment is set aside and the case, that is to say, Application No.26 of 1984 is restored and remitted to the trial Court for disposal in accordance with law. On the facts of this case, there shall be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: Srinivasan, J.

W.P.No.12935 of 1992 15th December, 1992.

S.Manimudi ...Petitioner
v.

State of Tamil Nadu and others ...Respondents.

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960, as amended by Act XXIII of 1973) - Object of - Provisions of Act if should protect only tenants.*

As per the preamble to the Act, it is one to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Tamil Nadu. It is seen from the preamble itself that the Act is not merely confined to prevention of unreasonable eviction of tenants. It is also intended to consolidate the law relating to the letting of buildings and control of rents. Even the expression 'unreasonable eviction' is significant. The Act does not prevent 'reasonable eviction'. It cannot be said that the Act is intended to protect only the tenants. The Legislature has taken care to protect the interests of the landlord also. The contention that the provisions of the Act should protect only the tenants and no benefit shall be conferred on the landlord is, to say the least, preposterous. The Legislature has, in its wisdom, balanced between the rights of the landlord and the rights of the tenants and brought about the present measure to hold the scales even. [Para. 5]

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.11 - Scope and object of - If runs counter to the object of the Act.*

Sec.11 of the Act is enacted with a view to prevent defaulters from continuing the possession of the property taking advantage of the pendency of an application for eviction without performing their own part of the obligations. It should be noted that Sec.10(2)(i) of the Act recognises the duty on the part of the tenant to pay or tender the rent due by him within a particular time. Under that

sub-section, it shall be paid or tendered within fifteen days after the expiry of the time fixed in the agreement of tenancy or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable. The Act has not absolved the tenant from the liability to pay the rent within the prescribed time. If the tenant chooses to commit default wilfully, that itself will give a cause of action to the landlord to file an application for eviction. Even after the filing of the petition for eviction, the tenant is duty-bound to fulfil his obligation to pay the rent regularly within the prescribed time. The tenant should not fail to pay the rent and take advantage of the pendency of the proceedings; nor should he indulge in delaying tactics in order to protract the proceeding. The section is intended only to prevent the tenant from failing to fulfil his obligations and protracting the proceedings for eviction.

[Para. 19]

(C) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Secs.10(2)(i) and 11 - Sections if inconsistent with such other.*

The order in Sec.11 has nothing to do with the order in the main proceedings. If during the pendency of the proceeding, the tenant fails to comply with the order passed under Sec.11 of the Act, he is liable to be evicted immediately and there is no question of the tenant claiming the benefit of the proviso to Sec.10(2)(i) of the Act in such cases. Hence, there is no inconsistency between the two provisions.

[Para. 21]

(D) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.11 - Section whether bad for not containing guidelines.*

There is no substance in the contention of the petitioner that the section does not contain any guidelines. The language of the section is very clear and there is no necessity for any further guidelines. It is for the courts to understand the section and act accordingly. This is not a case of any delegated legislation to warrant prescription of guidelines by the legislature itself. [Para. 26]

(E) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.11 - Section enabling collection of the rent, the recovery of which is barred by limitation - It's unconstitutional on that ground.*

There is no substance in the contention that

because the section enables collection of rent, the recovery of which, under the general law is barred by limitation, the section is unconstitutional.

[Para. 26]

(F) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.11 - If violative of provisions of Constitution of India.*

Art.38 of the Constitution has no application.

Art.31 has been deleted with effect from 20.6.1979.

Hence, there is no question of Sec.11 of the Act violating the provisions of Art.31(2) or Art.38 of the Constitution of India. Sec.11(4) of the Act is valid and not violative of any of the provisions of the Constitution of India. [Paras. 27 & 30]

Cases referred to:

Raja Chetty v. Jagannatha Das Govindas, (1949)2 M.L.J. 694. [Para. 6]

Irani v. Chidambaram Chettiar, (1952)2 M.L.J. 221. [Para. 7]

Dr.K.C.Nambiar v. State of Madras, (1953)1 M.L.J. 49. [Para. 7]

Aiyannah Chetty v. Maddukishnayya and Company, (1956)2 M.L.J. 54. [Para. 9]

P.J.Irani v. State of Madras, (1962)1 M.L.J. 92 (S.C.). [Para. 10]

Kangu v. Ahmed Unnissa Begum, (1963)1 M.L.J. 97. [Para. 11]

R.Venkataswami Naidu v. Narasaram Naraindas, (1966)1 M.L.J. 1 (S.C.). [Para. 12]

M/s.Raval and Company v. Ramachandran, (1966)2 M.L.J. 68. [Para. 13]

K.R.Saraswathi v. Vadivelu Chettiar, (1967)2 M.L.J. 81. [Para. 14]

Nanda Rao v. Lakshmanaswami Mudaliar, (1966)1 M.L.J. 153. [Para. 15]

Gulabibai Jain v. District Munsif, Poonamallee, (1969)2 M.L.J. 303. [Para. 16]

Kewal Singh v. Lajwanti, A.I.R. 1980 S.C. 161. [Para. 17]

S.K.Verma v. Industrial Tribunal-cum-Labour Court, New Delhi, (1980)4 S.C.C. 443; (1981)1 S.C.W.R. 89; 1981 Ser.L.J. 107; (1981)1 Lab.L.J. 388; (1981)1 S.C.R. 789; 1980 Lab.I.C. 1292; A.I.R. 1981 S.C. 422. [Para. 18]

Lalappa Lingappa v. Laxmi Vishnu Textile Mills, 1981 Lab.I.C. 307; (1981)1 Lab.L.J. 308; (1981)2 S.C.C. 238; 1981 Ser.L.J. 430; A.I.R. 1981 S.C. 852. [Para. 18]

Janakamma v. Rangaraj, (1960)1 M.L.J. 362.

[Paras. 20, 21]

Perumal v. Muthuswami, (1962)2 M.L.J. 218: A.I.R. 1962 Mad. 447. [Para. 22]

Kaluram v. Baidyanath, (1965)2 S.C.J. 145: A.I.R. 1965 S.C. 1909. [Para. 23]

Lachiram v. Kumaresan, (1979)2 M.L.J. 135. [Para. 24]

Kesava Naickerv. Sivagnana Mudaliar, A.I.R. 1980 Mad. 225. [Para. 25]

Om Prakash Gupta v. Dr. Rattan Singh, (1963)2 S.C.J. 475. [Para. 25]

Moothalayandum Chettiar v. Renganathan and Company, 81 L.W. 383. [Para. 26]

Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir, A.I.R. 1978 S.C. 287. [Para. 26]

Curven v. Milburn, (1889)42 Ch.D. 424. [Para. 26]

Bombay Dyeing and Manufacturing Company Limited v. The State of Bombay, A.I.R. 1958 S.C. 328. [Para. 26]

Ram Nandan Sharma v. Mt. Maya Devi, A.I.R. 1975 Pat. 283. [Para. 26]

S. Sundaram v. V.R. Pattabhiraman, A.I.R. 1985 S.C. 582. [Para. 28]

Janaki Animal v. Natarajan, (1988)1 L.W. 416. [Para. 29]

Arputham v. Singarayan Nadar, (1988)2 L.W. 245. [Para. 29]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of declaration declaring that Sec.11(4) of the Tamil Nadu Buildings Lease and Rent Control Act is unconstitutional being repugnant to the very object of the Tamil Nadu Act 18 of 1960, as amended upto date and pass all consequential orders that are necessary in the subject matter.

S.K. Sundaram, for Petitioner.

V.R. Rajasekaran, Government Advocate, for Respondent No.1.

V. Raj Narayanan, for Respondent No.2.

The Court made the following

ORDER: This is a petition to declare that Sec.11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as 'the Act'), is unconstitutional, being repugnant to the very object of the Act.

2. The petitioner is admittedly a tenant under the second respondent of premises No.8, Thulukanam Street, Varadarajapuram, Madras-2. On a rent of Rs.50 per mensem. The second respondent filed R.C.O.P.No.64 of 1983 under Sec.10(2)(i) of the

Act for eviction of the petitioner on the ground of wilful default in payment of rent. An application was filed by the second respondent under Sec.11 of the Act for a direction to the petitioner to pay the arrears of rent and in default to stop the proceedings. An order was passed by the Rent Controller directing the tenant to pay the rent and as he did not comply with the same, an order was passed under Sec.11(4) of the Act on 8.4.1985 directing him to put the second respondent in possession of the building. The second respondent filed E.P.No.177 of 1988 for executing the order. The petitioner contested the same and filed M.P.No.852 of 1988 under Sec.47 of the Code of Civil Procedure for dismissal of the execution proceeding. One of the contentions raised by the petitioner was that the premises fell within an area declared to be slum area by the Government in G.O.No.1528, dated 4.12.1971, under the Tamil Nadu Slum Clearance and Improvement Act, 1971. The tenant paid a sum of Rs.2,000 towards arrears on 6.1.1989 and another sum of Rs.2,350 on 7.3.1989. The second respondent did not press the E.P. and it was dismissed on 7.3.1989. A fresh E.P. was filed in E.P.No.312 of 1991. In the meanwhile, a writ petition was filed challenging the validity of the Notification under the Tamil Nadu Slum Clearance and Improvement Act in this Court and the same was allowed. The Notification was held to be null and void. Again, the petitioner filed M.P.No.577 of 1991 under Sec.47 of the Code of Civil Procedure raising the same contentions. That petition was dismissed on 7.1.1992. The petitioner filed an appeal against the said order. The petitioner also filed M.P.No.138 of 1992 under Sec.47 of the Code of Civil Procedure. That was dismissed on 27.4.1992. The petitioner filed R.C.A.No.572 of 1992 against the said order. That appeal was dismissed on 28.8.1992.

3. The petitioner filed this writ petition on 20.8.1992 and got an interim stay of eviction. In this proceeding the petitioner challenges the constitutional validity of Sec.11(4) of the Act in order to contend that the order of eviction passed against him is consequentially null and void. The grounds urged by the petitioner in support of his petition.

(1) The section is against the object of the Act, which is a beneficial enactment intended to protect the tenants. Hence, the provision for eviction on failure to pay or deposit the arrears of rent, even before the disposal of the main

petition for eviction runs counter to the object of the Act.

(2) The section is ambiguous. The meaning of the expression "arrears of rent" is not made clear as to whether it would refer to the arrears accrued prior to the filing of the petition or arrears accrued after the filing of the petition and during the pendency of the main proceeding.

(3) There are no guidelines prescribed by the section on the basis of which the court should act. A view has been taken in some cases that even time barred arrears can be directed to be paid or deposited under the section. That will place an unreasonable burden on the tenant.

(4) The operation of the section is not confined to a proceeding for eviction on the ground of wilful default. Whatever may be the ground urged in the main petition for eviction, Sec.11 is made applicable to such proceeding. That again causes an unreasonable burden on the tenant.

(5) The section is opposed to principles of equity and natural justice.

(6) There are 45 lakhs of tenants in the City of Madras and only 4 lakhs of landlords. The section confers benefits on the landlords who form a small group when compared with the number of tenants. Hence, the section violates Arts.31(2) and 38 of the Constitution of India.

4. Before considering the various contentions raised by the petitioner as stated above, it is better to refer to the object of the Act. The Rent Control legislation was first introduced in the State as a temporary measure to meet an emergency brought about by the Second World War. It was expressly stated on the floor of the Legislature Assembly that the Act was purely a temporary measure and if the pressure as a result of the World War was over, it would not continue on the statute book. The fore-runner to the present Act was introduced in 1946. That was Act XV of 1946. Subsequently, it was substituted by Act XXV of 1949, which was replaced by Act XVIII of 1960. That was amended extensively by Act 23 of 1973. The Act was then made permanent.

5. As per the preamble to the Act, it is one to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of

unreasonable eviction of tenants therefrom in the State of Tamil Nadu. It is seen from the preamble itself that the Act is not merely confined to prevention of unreasonable eviction of tenants. It is also intended to consolidate the law relating to the regulation of the letting of buildings and control of rents. Even the expression "unreasonable eviction" is significant. The Act does not prevent "reasonable eviction". It cannot be said that the Act is intended to protect only the tenants. The Legislature has taken care to protect the interests of the Landlord also. The contention that the provisions of the Act should protect only the tenants and no benefit shall be conferred on the landlord is, to say the least, preposterous. The Legislature has, in its wisdom, balanced between the rights of the landlord and the rights of the tenants and brought about the present measure to hold the scales even.

6. The object of the Act has been considered in several decisions of this Court and the Supreme Court. In *Raja Chetty v. Jagannathadas Govindas*, (1949) 2 M.L.J. 694, a Division Bench of this Court observed as follows:

"This Act was primarily intended to prevent unreasonable eviction of tenants and to regulate the letting of residential and non-residential buildings and to control the rents of such buildings. Though most of the provisions of the Act are obviously thus intended to safeguard the rights of tenants, there are provisions which, so far as they go, are in favour of the landlord also. Now Sec.7(2)(1) is one of such provisions which gives a right to the landlord to pray for the eviction of the tenant on default of due payment of rent."

7. Another Division Bench of this Court in *Iranu v. Chidambaram Chettiar*, (1952) 2 M.L.J. 221, dealt with the object of the Act and the scope of the preamble. The following passage is relevant:

"It is common ground that as the preamble to the statute shows the object of the Legislature is to regulate the letting out of residential and non-residential buildings alike and to control the rent of such buildings and to prevent unreasonable eviction of tenants therefrom in the State of Madras. It is common ground too that the preamble which is said to be a good means of finding out the meaning of the statute and, as it were, a key to the understanding of it may legitimately be consulted to solve any

ambiguity or to find the meaning of words which may have more than one or to keep the effect of the Act within its real scope whenever the enacting part is in any of these respects open to doubt. (*Vide Maxwell, on the interpretation of statutes, Ninth Edn., by Sir Gillat Jackson, page 46.*)”

8. In *Dr.K.C.Nambiar, v. State of Madras, (1953)1 M.L.J. 49*, Subba Rao, J. pointed out that the Act was really a restriction on the rights of the landlord which existed prior thereto and it created certain rights in the tenant. The following passage in the judgment is very instructive:

“The contention was that Sec.13 is an unreasonable restriction on the petitioner’s right to hold a property. So stated, the argument appears plausible, but ignores the nature of the right, the circumstances under which it was created and the underlying purpose of the restriction imposed. Before the Act became law, the landlords and tenants were governed by the contract and the provisions of the Transfer of Property Act. If it was a monthly tenancy, the tenant could be asked to quit after notice for the prescribed period was given. But the Act evolved a scheme imposing restrictions on the landlord. While the main object of the Act was to prevent the arbitrary eviction of the tenants, it took good care to see that interests of the landlords were protected within reasonable limits. A statutory tenant the creation of the Act, with certain rights and restrictions cannot accept the rights and complain of the restrictions. No question of unreasonable restriction on his part would arise as the statute itself created that right “subject to restrictions”. He acquired the right not to be evicted except under certain circumstances and one of those circumstances is when the Government exempts a particular building from all or particular provisions of the Act. His right to the user of the properties therefore is not an absolute one, but is circumscribed by the provisions of the Act itself.”

9. A similar view was expressed by Somasundaram, J. in *Aiyannah Chetty v. Maddukishnayya & Co., (1956)2 M.L.J. 54*, in the following terms:

“The Madras Buildings (Lease and Rent Control) Act curtails, abridges and modifies the ordinary law relating to landlord and tenant and the Act has, therefore, to be construed

strictly. No doubt, the policy of the Legislature was that the right of the tenants should not be affected unreasonably but subsequent experience showed that some benefits be conferred on the landlord also. It was with that object in view, that an amendment was introduced in 1951 by the Madras Act VIII of 1951 by which certain rights coupled with certain duties and liabilities were given to the landlord. It cannot be said that this law was intended mainly for the benefit of the tenants and therefore, every section in the statute must be construed only in favour of the tenant and against the landlord. The Act has to be taken as not merely conferring certain benefits on the tenant but also affording protection to the landlord. In short, the ordinary rule of interpretation which has to be applied to enactments, namely, that the provisions of the statute are to be strictly construed are not in any way affected by policy of this enactment.”

10. In *P.J.Irani v. State of Madras, (1962)1 M.L.J. 92 (S.C.)*, the Supreme Court held that the Act was enacted for achieving three purposes: (1) The regulation of letting, (2) The control of rents and (3) The prevention of unreasonable eviction of tenants from residential and non-residential buildings and observed that though the enactment conferred rights on tenants it was possible that the statutory protection could either have caused great hardship to a landlord or was the subject of abuse by the tenant himself and therefore the power of exemption conferred on the State Government under Sec.13 of Act XXV of 1949 was constitutionally valid.

11. In *Kangu v. Ahmed Unnissa Begum, (1963)1 M.L.J. 97*, Veerasami, J. emphasised that the Act protected the tenant only against unreasonable eviction.

12. In *R.Venkataswami Naidu and another v. Narasaram Naraindas, (1966) 1 M.L.J. 1 (S.C.)*, the Supreme Court observed that a preamble is a key to the interpretation of a statute, but is not ordinarily an independent enactment conferring rights or taking them away and cannot restrict or widen the enacting part which is clear and unambiguous.

13. In *M/s.Raval and Co. v. Ramachandran, (1966)2 M.L.J. 68*, a Full Bench of this Court held that the Act of 1960 and the amending Act of 1964 are valid and not violative of the provisions of the Constitution. Referring to the purposes of the Act, the

Bench observed that the Legislature intended to regulate the letting of buildings and the control of rents and prevent the unreasonable eviction of tenants in the context of spiralling inflation in respect of urban rent for building, conditions of scarce accommodation and perhaps considerable hardship to tenants occasioned by evictions strictly under the law.

14. In *K.R. Saraswathi v. Vadivelu Chettiar*, (1967) 2 M.L.J. 81, Ramaprasada Rao, J. pointed out that the *sine qua non* of the Act was that tenants ought not to be unreasonably evicted by landlords and the Act created inroads into the rights of ownership of immovable properties. He observed that it cannot be presumed that the rights vested in landlord could be curtailed by mere surmises.

15. In *Nanda Rao v. Lakshmanaswami Mudaliar*, (1969) 1 M.L.J. 153, Natesan, J. observed that the guiding line in the interpretation of the Act must be that it is intended to confer personal security on a tenant in respect of his home or his business premises and at the same time, the landlord is protected and the Act provides for his securing a fair return for his investment.

16. In *Gulabibai Jain v. District Munsif, Poonamallee*, (1969) 2 M.L.J. 303, a Division Bench of this Court held that the preamble to the Act does not control the statute and it is not unreasonable to evict a tenant within the scope of Sec.14(1)(b) of the Act.

17. In *Kewal Singh v. Lajwanti*, A.I.R. 1980 S.C. 161, the Supreme Court while considering the provisions of the Delhi Rent Control Act, 1958, observed as follows:

"Before discussing the relevant provisions of the Act it may be necessary to observe that the Rent Control Act is a piece of social legislation and is meant mainly to protect the tenants from frivolous evictions. At the same time, in order to do justice to the landlords and to avoid placing such restrictions on their right to evict the tenant so as to destroy their legal right to property certain salutary provisions have been made by the legislature which give relief to the landlord. In the absence of such a legislation a landlord has a common law right to evict the tenant either on the determination of the tenancy by efflux of time or for default in payment of rent or other grounds after giving notice under the Transfer of Property Act. This broad right has been curtailed by the Rent

Control Legislation with a view to give protection to the tenants having regard to their genuine and dire needs. While the rent control legislation has given a number of facilities to the tenants it should not be construed so as to destroy the limited relief which it seeks to give to the landlord also. For instance one of the grounds for eviction which is contained in almost all the Rent Control Acts in the country is the question of landlord's *bona fide* personal necessity. The concept of *bona fide* necessity should be meaningfully construed so as to make the relief granted to the landlord real and practical."

18. An analysis of the above rulings will clearly show that there is no substance in the contention of the petitioner that the object of the Act is to protect only the tenants and the provisions of Sec.11 of the Act are running counter to the said object inasmuch as they enable the landlord to get an order of eviction even before the disposal of the main petition for eviction. Learned counsel for the petitioner relied on the judgments of the Supreme Court in *S.K. Verma v. Industrial Tribunal-cum-Labour Court, New Delhi*, A.I.R. 1981 S.C. 422; (1980) 4 S.C.C. 443; (1981) 1 S.C.W.R. 89; 1981 Ser.L.J. 107; (1981) 1 Lab.L.J. 388; (1981) 1 S.C.R. 789; 1980 Lab.I.C. 1292 and *Lalappa Lingappa v. Laxmi Vishnu Textile Mills*, A.I.R. 1981 S.C. 852; 1981 Lab.I.C. 307; (1981) 1 Lab.L.J. 308; (1981) 2 S.C.C. 238; 1981 Ser.L.J. 430. In both the cases, the Court held that welfare statutes must, of necessity, receive a broad interpretation and where the legislation is designed to give relief against certain kinds of mischief, the court should not make inroads by making etymological excursions, and a rule of beneficial construction should be adopted.

19. Neither of the rulings will have any bearing in the present case. As pointed out already, the Act is not intended to protect the tenants exclusively against any eviction. As stated clearly in the preamble, the tenants are protected only from unreasonable eviction. Sec.11 of the Act is enacted with a view to prevent defaulters from continuing in possession of the property taking advantage of the pendency of an application for eviction without performing their own part of the obligations. It should be noted that Sec.10(2)(i) of the Act recognises the duty on the part of the tenant to pay or tender the rent due by him within a particular

time. Under that sub-section, it shall be paid or tendered within fifteen days after the expiry of the time fixed in the agreement of tenancy or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable. The Act has not absolved the tenant from the liability to pay the rent within the prescribed time. If the tenant chooses to commit default wilfully, that itself will give a cause of action to the landlord to file an application for eviction. Even after the filing of the petition for eviction, the tenant is duty bound to fulfil his obligation to pay the rent regularly within the prescribed time. The tenant should not fail to pay the rent and take advantage of the pendency of the proceeding; nor should he indulge in delaying tactics in order to protract the proceeding. The Section is intended only to prevent the tenant from failing to fulfil his obligations and protracting the proceedings for eviction.

20. The purpose and scope of the section have been considered in several decisions. In *Janakamma v. Rangaraj*, (1960)1 M.L.J. 362, Ganapatia Pillai, J. considered the scope of Sec.7-A(4) of the old Act 25 of 1949, which corresponds to the present Sec.11(4). The learned Judge pointed out that the order passed under the section had nothing to do with the original default in payment of rent on which the application for eviction was based. The following passage in the judgment is relevant:

"It will be seen that Sec.7-A(4), of the Rent Control Act deals with payment of arrears as a condition precedent to the hearing of the tenant on the objection raised by him. The Act empowers the Rent Controller in a case in which eviction is sought on the ground of default in payment of rent to give an opportunity to the tenant to pay off all the arrears up-to-date. Non-compliance of this order results in a termination of the proceeding and making an order directing the tenant to put the landlord in possession of the building. This has nothing to do with the original default on which the application for eviction is based."

21. The above ruling gives an answer to the contention raised by learned counsel for the petitioner incidentally in the course of arguments. Learned counsel submitted that under the proviso to Sec.10(2)(i) of the Act, the Controller may give the tenant a reasonable time not exceeding fifteen days to pay or tender the rent due by him to the

landlord, if he is satisfied that the tenants default to pay or tender rent was not wilful. Learned counsel submitted that the proviso contains a *non obstante* clause and the power given to the Controller can be exercised notwithstanding anything contained in Sec.11 of the Act. It was argued that while Sec.11 of the Act enables the Controller to pass an order of eviction on the failure of the tenant to pay or deposit the rent as directed by the Controller, the proviso to Sec.10(2)(i), of the Act enables the Controller to grant further time after the conclusion of the main proceeding for eviction. According to learned counsel, the two provisions are contrary to each other and they cannot stand together. There is no substance in this contention. As pointed out in *Janakamma's case*, (1960)1 M.L.J. 362, the order in the present Sec.11 corresponding to old Sec.7-A has nothing to do with the order in the main proceeding. If during the pendency of the proceeding the tenant fails to comply with the order passed under Sec.11 of the Act, he is liable to be evicted immediately and there is no question of the tenant claiming the benefit of the proviso to Sec.10(2)(i) of the Act in such cases. Hence, there is no inconsistency between the two provisions.

22. In *Perumal v. Muthuswami*, (1962)2 M.L.J. 218: A.I.R. 1962 Mad. 447, a Full Bench of this Court considered the provisions of Sec.7-A of the old Act of 1949 and observed that the Section enabled the Rent Controller or the Appellate Authority to direct the tenant to deposit the rents and it had no reference to the determination of the disputed questions in the main petition, as it was intended only to prevent defaulters from continuing in possession of the property taking advantage of the pendency of an application without at the same time performing their own obligations.

23. In *Kaluram v. Baidyanath*, (1965)2 S.C.J. 145: A.I.R. 1965 S.C. 1909, a similar provision in the West Bengal Premises Tenancy Act was considered by the Supreme Court and it was observed that the object obviously appeared to be that when a suit or proceeding had commenced between the landlord and tenant for ejectment and the tenant had received notice of it, the payment of rent should be made in Court to avoid any dispute in that behalf.

24. In *Lachiram v. Kumaresan*, (1979)2 M.L.J. 135, Ramaprasada Rao, C.J., observed as follows:

"A proceeding under Sec.11(4) of the Act is

intended to accelerate the long-drawn proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. As eviction is possible in a case where the tenant commits wilful default in the payment of rents and particularly, after the recent amendment in 1973 explaining wilful default as meaning non-payment or tender of rent after the issue of a notice calling for such payment of rent by the landlord, the importance of sec.11(4) has to be brought to light and in its true light. Sec.11(4) is, therefore, intended to make the tenant alert during the entirety of the proceedings and be conscious of his obligations and statutory duties in the matter of payment of rents. Even here, the Legislature has provided that the Rent Controller in a case where an application under Sec.11 is taken by the landlord should enquire into the dispute as to the amount of rent to be paid by the tenant and make such enquiry as he deems necessary and summarily determine the rent so to be paid or deposited. Such enquiry should not be long drawn as in the case with the main proceedings. They are intended to be summary and they have to be disposed of at least within four weeks from the date when such applications are filed. This would be therefore, a directive to the lower court to see that applications under Sec.11(4) are heard and decided within two months from the date of presentation of such applications. There is absolutely no justification to keep such applications beyond such time."

25. In *Kesava Naicker v. Sivagnana Mudaliar*, A.I.R. 1980 Mad. 225, Ratnam, J. held that the applicability of the section is not confined to cases where there is an admission of the tenancy or a prior adjudication as regards tenancy. It is pointed out that a tenant could get over the provisions of the section by raising a frivolous contention denying the title of the landlord or relationship of landlord and tenant. The learned Judge held that the simple denial of the relationship of landlord and tenant cannot oust the jurisdiction of the authorities under the Act and it is necessary to find out whether the denial is *bona fide*. The learned Judge quoted in extenso from the judgment of the Supreme Court in *Om Prakash Gupta v. Dr. Rattan Singh*, (1963) 2 S.C.J. 475 and upheld the orders of the Rent Controller and Appellate Authority who found that the relationship of landlord and tenant

did exist between the parties and passed orders under Sec.11 of the Act.

26. There is no substance in the contention of the petitioner that the section does not contain any guidelines. The language of the section is very clear and there is no necessity for any further guidelines. It is for the Courts to understand the Section and act accordingly. This is not a case of any delegated legislation to warrant prescription of guidelines by the legislature itself. There is also no substance in the content that the section is bad because time-barred debts could also be collected by enforcing the provisions of the Section. It is held in *Moothalayandum Chettiar v. Renganathan & Co.*, 81 L.W. 383, that the expression "arrears" used in the section would imply all arrears due to the landlord irrespective of any bar of limitation. It was pointed out that the provisions of the Limitation Act would only bar the remedy of the creditor and do not extinguish the debt. The same view was taken by the Apex Court in *Khadi Gram Udyog Trust v. Shri Ram Chandarji Virajman Mandir*, A.I.R. 1978 S.C. 287, while considering a similar provision in Sec.20(4) of the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act (13 of 1972). It was held that the words "entire amount of rent due" used in Sec.20(4) of that Act would include rent which had become time-barred. The decision of the Allahabad High Court was affirmed. Reliance was also placed by the Court on the following observations of Cotton, L.J. in *Curven v. Milburan* (1889), 42 Ch. D. 424.

"Statute-barred debts are dues, though payment of them cannot be enforced by action."

Reference was made to an earlier decision of the Court in *Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay*, A.I.R. 1958 S.C. 328. A similar view taken by a Full Bench of the Patna High Court in *Ram Nandan Sharma v. Mt. Maya Devi*, A.I.R. 1975 Pat. 283 was approved by the court. Hence, there is no substance in the contention that because the section enables collection of rent, the recovery of which under the general law is barred by limitation, the section is unconstitutional. There is no substance in the other contentions urged by learned counsel for the petitioner. They are stated only to be rejected.

27. The last contention that there are only four lakhs of landlords as against 45 lakhs of tenants in Madras City has no merit whatever. Art.38 of the Constitution has no application. Art.31 has been

deleted with effect from 20.6.1979. Hence, there is no question of Sec.11 of the Act violating the provisions of Arts.31(2) or Art.38 of the Constitution of India.

28. Reliance is also placed by learned counsel on the judgment of the Supreme Court in *S.Sundaram v. V.R.Pattabhiraman*, A.I.R. 1985 S.C. 582. The Court had to consider only the expression "wilful default" found in Sec.10(2) of the Act. The ruling has nothing to do whatever with the contentions raised in the present case.

29. Learned counsel also referred to the rulings in *Janakiammal v. Natarajan*, (1988)1 L.W.416 and *Arputham v. Singarayan Nadar*, (1988)2 L.W. 245. In the former case, I considered the provisions of the Partition Act and observed whether Sec.4 thereof curtailed the rights of a Person which are normally appended to ownership of property should continue in the statute book in the wake of modern progression is a matter for the Parliament to ponder. I have pointed out that so long as the section continues to exist in the statute book, the court has to give effect to the same. In the latter case, I have rejected the argument that the Rent Controller should pass a separate order in the first instance in the interlocutory application under Sec.11 of the Act and then pass another consequential order in the main proceedings. I have held that if the tenant fails to deposit as directed by the Rent Controller, an order under Sec.11(4) of the Act would automatically follow and the Rent Controller is not in error in passing such an order. Neither of the decisions helps the petitioner in present case.

30. I have no hesitation to hold that Sec.11(4) of the Act is valid and not violative of any of the provisions of the Constitution of India.

31. The writ petition fails and is dismissed with costs. Counsel's fee Rs.500 to each counsel.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Special Original Jurisdiction*]

Present: *Janarthanam, J.*

W.P.No.6509 of 1984

20th January, 1993.

R.Sarojini

...*Petitioner*

v.

Suprintending Engineer, World Bank Circle, Tamilnadu Housing Board and another

...*Respondents.*

Constitution of India (1950), Art.226 - Discretionary jurisdiction under - Exercise of - Petitioner is guilty of suppression of material facts - Furnishing of misleading statements - Whether entitled to relief under discretionary jurisdiction.

The petitioner got allotted two house sites, suppressing material facts and furnishing misleading statements. Subsequently, the allotment was cancelled. The petitioner approached the High Court with a petition under Art.226 of the Constitution of India for the issue of a writ of *certiorari* and quash the orders of cancellation of allotment of one plot. In her writ, she suppressed the fact that she filed two applications assured that her family was allotted three and not four plots and also stated that her husband and his second wife gave a letter dated 25.10.1982 voluntarily withdrawing from the allotment.

Held: In the present case, inasmuch as the petitioner not only suppressed material facts, furnished misleading statements to the authorities but also, in a dexterous fashion executed such a fear before this Court also in the affidavit filed in support of the application, in order to put forward a case of violation of principles of natural justice and obtained successfully interim relief with the oblique motive of squatting over the property all along, that is to say for ten years from 7.10.1982, the date on which the impugned order was passed. Since the petitioner revelled in suppression of material facts and furnished misleading statements, merits whatever she may have, cannot at all be looked into especially when the discretionary jurisdiction of this Court under Art.226 of the Constitution of India is based on justice, equity and good conscience.

Cases referred to:

Asiatic Engg. Co. v. Achhru Ram, A.I.R. 1951 All. 746 (F.B.). [Para. 10]

Rex v. Kensington Income Tax Commissioner, (1917)1 K.B. 486. [Para. 10]

Charanji Lal v. Financial Commissioner, A.I.R. 1978 P. & H. 326. [Para. 11]

KIng v. General Commissioner, (1917)1 K.B. 486. [Para. 11]

G.A.Pillai v. Government of India, A.I.R. 1970 Ker. 110 (F.B.). [Para. 12]

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Superintending Engineer, World Bank Circle, Tamilnadu Housing Board, Madras-40 the first respondent herein made in his letter No.AS 5/14843/81, dated 7.10.1982 cancelling the allotment of plot 3/173 in Villivakkam sites and services scheme and quash the order therein dated 7.10.1982.

G.Desappan, for Petitioner.

S.Doraisamy, for Respondents.

The Court made the following

ORDER: The present action by R.Sarojini, the petitioner herein, is under Art.226 of the Constitution of India, for issue of a writ of *certiorari*, calling for the records connected with the order of the Superintending Engineer, World Bank Circle, Tamil Nadu Housing Board, Madras-40, the first respondent herein, in Letter No.AS 5/14843/81, dated 7.10.1982, cancelling the allotment of plot No.3/173 in Villivakkam Sites and Services Scheme and quash the order therein dated 7.10.1982.

2. The Tamil Nadu Housing Board in collaboration with Madras Metropolitan Development Authority floated a scheme with the assistance of the World Bank to provide house sites together with semi-structure for the benefit of the economically weaker sections of people. The scheme was taken up at Kodungaiyur Village and Villivakkam area and was called Villivakkam Sites and Services Scheme Phase-I. According to the scheme and the rules in force, it is said, only one, either the husband or the wife in other words in only family is entitled for only one allotment, provided the applicant being a resident of Madras City for more than ten years, and does not own a house site or houses within the limits of Chengalpattu and Madras Districts. As per the scheme, a lot will be drawn for

the allotment of plots and the eligible applicants will be favoured with allotments, subject to certain conditions. One of the conditions of allotment in clause 11 thereto prescribes that allotment is liable for cancellation if any information given by the applicant is found to be false.

3. The petitioner, it transpires, submitted two applications viz. 28,620 and 24,722 for allotment of plots on 10.11.1981 and 6.11.1981 respectively. In Application No.28620, she indicated her husband's name as I.Veeraraghavan profitably employed as Supervisor in M/s.Sakthi Builders, Madras-18 getting a monthly salary of Rs.500. In Application No.24722 she did not indicate her husband's employment and income but indicated her income as Rs.250 per month, as a clerk in the very same concern, M/s.Sakthi Builders. She is said to have been favoured with allotments in both applications and Plots 3/173 and 6/14 'A' type in Villivakkam were allotted. The petitioner's husband, Veeraraghavan, filed Application No.34294 in Kodungaiyur scheme mentioning that he was Job Typist in the High Court. The petitioner's husband's second wife Tmt.Sargunalakshmi filed Application No.28352 for allotment in Kodungaiyur. Both were allotted plots in Nos.4/26 and 3/232 in Kodungaiyur.

4. The same address viz. No.20, Muthukrishnan Street, Kondithope, Madras-1, was stated to have been furnished in all the applications submitted by the petitioner and her husband, thereby indicating that both of them were living together as members of one family. However, the petitioner's husband's second wife gave her address as C/o.N.Balakrishnan, Plot No.1482, 13th West Cross Street, Housing Board Colony, Vyasarpadi. All the four applications were stated to have been affixed with photo prints of the members of the family, thereby pointing out with certainty that all applications related to the members of one family. Thus, in effect, the petitioner's family was favoured with four allotments.

5. On coming to know about the allotments secured by suppression of facts and false declarations, the first respondent cancelled allotment of Plot No.3/173 in favour of the petitioner with forfeiture of earnest money deposit with interest, giving rise to the present action.

6. She obtained interim relief of stay of cancellation of allotment on the ground of violation of principles of natural justice inasmuch as no notice

was given prior to cancellation.

7. Subsequent to the present action, it is said, on 4.1.1993 allotment of Plot No.6/14 in favour of the petitioner had been cancelled. However, the other two allotments, Plot Nos.4/26 and 2/307, in favour of the petitioner's husband and her husband's second wife respectively are still in tact. During the course of arguments on a direction from this court, the files relating to the various applications by the petitioner, her husband and her husband's second wife, had been produced for perusal by court and the facts as stated above had been culled out from the said files.

8. In the affidavit filed in support of the petitioner in the present action, she suppressed the material fact of her filing two applications which were favoured with allotments, and she also made a misleading statement in paragraph 5 that the family was favoured with only three and not four allotments, taking advantage of the inherent mistake committed by the first respondent in the impugned communication. She also stated falsely that her husband and his second wife gave a letter dated 25.10.1982 to the first respondent voluntarily withdrawing from the allotment.

9. The question that crops up for consideration in the background of the facts of the case is whether the petitioner, would be entitled to the relief prayed for in the writ petition.

10. The earliest Indian decision on the point is by Malik, C.J. in *Asiatic Engg. Co. v. Achhru Ram*, A.I.R. 1951 All. 746 (F.B.), wherein learned Chief Justice referred to the following observations of Scrutton, L.J. in *Rex v. Kensington Income Tax Commissioner*, (1917)1 K.B. 486:

"It has been for many years the rule of the court and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts--facts, not law, the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement."

Thereafter, the Full Bench went into the fact in great detail and stated thus in Paragraph 51:

"A person obtaining an *ex parte* order or a *rule nisi* by means of a petition for exercise of the

extraordinary powers under Art.226 of the Constitution must come with clean hands, must not suppress any relevant facts from the court, must refrain from making misleading statements and from giving incorrect information to the court. courts, for their own protection, should insist that persons invoking these extraordinary powers should not attempt, in any manner, to misuse this valuable right by obtaining *ex parte* orders by suppression, misrepresentation or misstatement of facts. Applying this principle to the present case, we feel, that, in this case, the petitioner-company has disentitled itself to ask for a writ of prohibition by material suppressions, misrepresentations and misleading statements which have been found by us above."

11. In *Charanji Lal v. Financial Commissioner*, A.I.R. 1978 P. & H. 326, it was alleged that there was "A calculated and designed suppression of material facts in order to secure admission and interim relief". The Court was satisfied on facts that there was a calculated suppression of material facts, which if disclosed would have disentitled the petitioners to the extraordinary remedy, or in any case would have materially affected the merits on both the interim and ultimate relief claimed. The Full Bench after referring to *King v. General Commissioner*, (1917)1 K.B. 486 and some other decisions and in agreeing with a long line of precedents and affirming a rule which appeared hoary by usage, held that the writ petitioners had by their own conduct disentitled themselves to the relief which they sought to claim.

12. A similar view was taken in *G.A.Pillai v. Government of India*, A.I.R. 1970 Ker. 110 (F.B.), wherein the petitioner had not made a 'full and true disclosure of the facts but has' in order to put forward his case of a violation of the principles of natural justice, chosen to suppress his representation and adverse order thereon.

13. The principle evolved in various decisions referred to above is applicable on all fours to the case on hand inasmuch as the petitioner has, as adverted to earlier, not only suppressed material facts, furnished misleading statements to the authorities, but also in a dexterous fashion executed such a feat before this court also in the affidavit filed in support of the application, in order to put forward a case of violation of principles of natural justice and obtained successfully

interim relief with the oblique motive of squatting over the property all along, that is to say for ten years from 7.10.1982, the date on which the impugned order was passed. Since the petitioner revelled in suppression of material facts and furnished misleading statements, merits whatever she may have, cannot at all be looked into especially when the discretionary jurisdiction of this court under Article 226 of the Constitution of India is based on justice, equity and good conscience.

14. In the circumstances, the writ petition, as such, deserves to be dismissed. The *rule nisi* issued is, therefore, discharged and the writ petition is dismissed. No costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *AR.Lakshmanan, J.*

W.P.No.3388 of 1988 16th September, 1992.

The Management of M/s Air France, New Delhi.
...*Petitioner*

v.
The Deputy Commissioner of Labour (Appeals), Madras and others
...*Respondents.*

Tamil Nadu Shops and Establishments Act (XXXVI of 1947), Secs. 4(1)(a) and 5 - Applicability of Act - Exclusion of certain categories of employees and establishments by Sec. 4(1)(a) - State Government issuing orders making Act applicable to those categories by virtue of power under Sec. 5 - Sec. 5 if invalid for excessive delegation.

Under Sec. 4 of the Tamil Nadu Shops and Establishments Act, 1947 exemption has been granted in respect of certain persons employed in establishments. But for the exemptions, the category of 'persons employed' and 'establishment' would be governed by the provisions of the Act. Sec. 5 of the Act has been given overriding effect as it opens with *non obstante* clause. Therefore, the provision

of Sec. 4 of the Act is subject to the provisions of Sec. 5 excepting in regard to establishments mentioned in Clauses (c) and (f) of sub-sec. (1) of Sec. 4 of the Act. The State Government has been further empowered to modify or cancel any notification made under Sec. 5 of the Act. A reading of the various provisions of the Act makes it clear that the enactment not only provides for regulation of conditions of work in shops and commercial establishments but also provides the grounds of termination of services of employees and gives right of appeal against the arbitrary and illegal termination of services of persons employed. The expression 'persons employed' and 'establishment' has been defined in sub-clauses (12) and (6) of Sec. 2 respectively.

[Para. 18]

Sec. 5 of the Act does not run counter to the essential features of the Act or policy of the enactment. By withdrawing the exemption granted under Sec. 4 of the Act, the essential features and policy of the enactment are not in any way changed. On the other hand, the coverage of Act is widened.

[Para. 19]

The provision of Sec. 5 of the Act is valid and does not suffer from the vice of excessive delegation as contended by the learned counsel for the petitioner. The State Government has not usurped the functions of the State Legislature. Further, Sec. 5 does not contravene any constitutional provision. It is not the case of the petitioner that Sec. 5 of the Act contravenes any of their fundamental rights or *ultra vires* the powers of the State. Since the exemption contained in Sec. 4 is subject to the provisions of Sec. 5, the delegated authority by issuing the notification withdrawing the exemption is not altering the statute or acts contrary to the statute. Sec. 5 limits the powers of the delegated authority and the power of the State Government is defined clearly. Delegated power under Sec. 5 of the Act cannot extend to the withdrawal of exemption granted under clauses (c) and (f) of sub-sec. (1) of Sec. 4 and sub-sec. (2) of Sec. 4 of the Act.

[Paras. 24 & 26]

Further the Act has to be construed liberally, being a social welfare legislation and it is also a preconstitutional enactment. Legislative policy is contained in Secs. 4 and 5 of the Act, standards and guidelines are discernible from the various provisions and schemes and object of the Act. Therefore, Sec. 5 is valid and legal.

[Paras. 27 & 29]

Cases referred to:

In re. Art. 143, Constitution of India, etc., A.I.R. 1951 S.C. 332: 1951 S.C.J. 527: 1951 S.C.R. 747.

[Para. 15]

Harishankar Bagla v. The State of M.P., (1955) 2 M.L.J. 211: 1954 S.C.J. 637: 1954 M.W.N. 749: (1955) 1 S.C.R. 380: 55 Cr.L.J. 1322: A.I.R. 1954 S.C. 465. [Para. 15]

Hamdard Dawakhana v. The Union of India, A.I.R. 1960 S.C. 554. [Para. 15]

Makhan Singh Tarsikka v. The State of Punjab, A.I.R. 1964 S.C. 381: 1964 Cr.L.J. 262. [Para. 15]

Harakchand Ratanchand Banthia v. Union of India, A.I.R. 1970 S.C. 1453. [Para. 15]

Pandit Banarsi Das Bhanot v. The State of Madhya Pradesh, A.I.R. 1958 S.C. 909. [Paras. 16, 20]

The Tata Iron and Steel Company Ltd., In re., (1950) 2 L.L.J. 1043. [Paras. 16, 30]

The Management of Blue Star & Company Ltd. v. The Assistant Commissioner of Labour, Madras, (1989) 2 L.L.J. 233. [Paras. 16, 22]

Mohamedalliv. Union of India, (1964) 1 S.C.J. 329: 24 F.J.R. 221: A.I.R. 1964 S.C. 980. [Paras. 16, 22]

State Bank of Travancore v. Deputy Commissioner of Labour, Coimbatore, (1981) 1 L.L.J. 393. [Paras. 16, 31]

Basant Kumar Sarkar v. The Eagle Rolling Mills Ltd., A.I.R. 1964 S.C. 1260: (1964) 2 S.C.J. 586. [Para. 16, 24]

M/s. Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha, 29 F.J.R. 468: (1966) 2 Lab.L.J. 546: (1967) 1 S.C.C. 189: A.I.R. 1967 S.C. 691: (1967) 1 S.C.R. 15. [Para. 16]

The Edward Mills Company Ltd. v. The State of Ajmer, A.I.R. 1955 S.C. 25: (1955) 1 S.C.R. 735. [Paras. 16, 21]

Bhikusa Yamasa Kshatriya (P) Ltd. v. The Union of India, A.I.R. 1963 S.C. 1591: (1963) 1 Lab.L.J. 270: (1963-64) 24 F.J.R. 429. [Para. 16]

Syed Mohamed & Company v. State of Madras, (1952) 2 M.L.J. 598: 54 Cr.L.J. 277: A.I.R. 1953 Mad. 105: 1952 M.W.N. 847. [Paras. 16, 21]

Registrar of Co-operative Societies, Trivandrum v. K.Kunhambu, A.I.R. 1980 S.C. 350: (1980) 2 S.C.R. 260. [Paras. 23, 25]

M/s. Harihar Polyfibres v. Regional Director, E.S.I. Corporation, (1984) 4 S.C.C. 324. [Para. 27]

S. Govind Swaminathan, Senior Advocate, for M/s. N.S. Sivam and K. Madhavan, for Petitioner. A.L. Somayaji of M/s. Aiyar and Dolia, for Respondent No. 2.

P. Shanmugham, Additional Government Pleader,

for Respondent Nos. 1 and 3.

The Court made the following

ORDER: The petitioner abovenamed has filed the present writ petition for the following relief: To issue a writ of *certiorari* or any other writ, order or direction, calling for the records of the 1st respondent culminating in the order dated 20.11.1987 in T.S.E.A.No.27 of 1987 and quash the same.

2. In brief, the relevant facts of the case are as follows: Air France has an office at Madras and the 2nd respondent was the District Manager, along with five other employees. The petitioner management decided to close its Madras office for economic reasons. In compliance with the requirements of Sec. 25 FFA, under which a statutory notice of sixty days to various authorities of the State and the affected parties has to be given, by letter dated 8.1.1987, the notice intimating the management's intention to close its Madras office with effect from 31.3.1987 was sent to all the authorities prescribed under the Act as well as to the affected parties. The services of the workmen were terminated in accordance with law and they were offered their full terminal compensation.

3. The conditions of service of the supervisory and managerial staff are governed by regulations and conditions of service agreed by the parties. In terms of Clause 8.1 of the said Regulations, by letter dated 27.2.1987, the services of the 2nd respondent were terminated with effect from 31.3.1987. But, as the 2nd respondent has averred that the said letter reached him only on 6.3.1987, the petitioner management paid him his salary for April, 1987 also, in effect, his services stand terminated from 1.5.1987. The 2nd respondent was admittedly the District Manager of the Madras office of the petitioner and therefore, Sec. 4(1)(a) of the Tamil Nadu Shops and Establishments Act, 1947 (hereinafter referred to as the Act) excludes its applicability to the 2nd respondent. The above section has been included in the Act by the competent Legislative Assembly of the State of Tamil Nadu. The power to legislate for State vests in the State Legislative Assembly and that the State Legislative Assembly alone is competent to amend, modify or repeal any substantive provision of the Act. There is no change made in Sec. 4(1)(a) of the Act by the State Legislative Assembly.

4. However, the 2nd respondent contended in his reply affidavit before the 1st respondent/Deputy

Commissioner of Labour (Appeals) that by G.O.Ms.No.4074, Industries, Labour and Housing (Labour), dated 5.10.1966, all the provisions of the Act have been made applicable to class of persons mentioned in Clause (a) of sub-sec.(1) of Sec.4 of the Act. The aforesaid G.O., was issued by the Governor of Tamil Nadu in exercise of the powers conferred by Sec.5 of the Act. According to the petitioner, Sec.5 of the Act has delegated powers to the State to apply the provisions to any class of persons by notification, but the power does not go and cannot go to the extent of allowing the delegate (in this case the State) to amend or change a substantive provision of the Act itself. This is a function which can be done only by the State Legislative Assembly. That apart, Sec.4(1) (a) of the Act deliberately excludes the applicability of the Act to persons employed in any establishment in a position of management. It is settled law that conditions of service of management employees are governed by the conditions of service entered into by the parties under the common law of master and servant. In the circumstances, it is submitted by the petitioner/management that even if it is assumed that Sec.4(1)(a) of the Act has lost its force by virtue of the above mentioned notification of the State Government, the said notification will be hit by Art.251 of the Constitution of India and be void to the extent of its repugnancy in its application to managerial or supervisory officers whose conditions of service are governed by agreements entered into by the employees and employers under the Contract Act, which is a Central Act.

5. According to the petitioner/management, the termination of service of the 2nd respondent is in full conformity with Rule 8.1 of the Regulations and Conditions of Service entered into by the parties, which is extracted hereunder

"8. Termination of employment.

8.1 Resignation-Discharge.

After the expiry of the probationary period, an employee who resigns must give one month's notice, otherwise the Company shall be entitled to deduct one month's salary in lieu from his last salary. Conversely, the Company may not discharge any employee, except in case of misconduct, without giving one month's notice, or paying one month's salary."

6. Thus, according to the petitioner/management, it is obvious that the clause recognises the rights of

either party to terminate the service by giving one month's notice or in lieu of notice, on paying a month's salary in the case of the employer, and in the case of the employee, to surrender one month's salary. The word 'except' in case of misconduct, refers to Clause 13 of the terms and conditions of service under which the employer can dismiss an employee without notice in a case of misconduct. It is further submitted that Clause 8.2 of the conditions of service only lays down the age on which the employer normally terminates. It does not confer any right on any employee to work till the age of 60. In any event, it is submitted that Sec.41(2) of the Act only requires that the termination will be bad in case where there is no notice and no reasonable cause for termination and it is admitted that notice was given in this case before termination of the services of the 2nd respondent.

7. The 1st respondent, who heard the appeal (T.S.E.No.27 of 1987) by his judgment dated 20.11.1987, allowed the appeal and set aside the order of termination dated 27.2.1987 of the service of the 2nd respondent. The said judgment and the reasons for rejection of the contentions raised on behalf of the management are void and without jurisdiction. Therefore, the said judgment is liable to be quashed. The petitioner/management has, therefore, filed the above writ petition for the relief asked for therein.

8. The petitioner has also filed two W.M.Ps., during the pendency of the writ petition viz., W.M.P.Nos.25907 and 25908 of 1991 to implead the State of Tamil Nadu represented by the Secretary, Labour Department as 3rd respondent in the above writ petition and also to permit the petitioner/management to raise additional grounds in the writ petition that Sec.5 of the Act is invalid and void and has to be struck down as *ultra vires*. The following are the additional grounds raised in W.M.P.No.25908 of 1991:

"5. That the petitioner desires to raise an additional ground that Sec.5 of the Tamil Nadu Shops and Establishment Act, 1947, hereinafter called the Act, itself is invalid and void as it suffers from the vice of excessive delegation.

6. That as the validity of the provision of Sec.5 of the Act is being challenged, it is necessary to implead the State of Tamil Nadu also as a party in the said writ petition."

9. The 2nd respondent has filed his counter affidavit dated 11.4.1988. According to the 2nd

respondent, the petitioner, without any justification and in blatant violation of the mandatory requirement of Sec.41 of the Act, terminated the services with effect from 31.3.1987, purporting to be under Clause 8 of the Staff Regulation, under a communication dated 27.2.1987. Aggrieved by the same, he filed an appeal under Sec.41(2) of the Act before the 1st respondent. The petitioner/management filed a counter and contested the said appeal. The 1st respondent found that by virtue of G.O.Ms.No.4074, Industries, Labour and Housing (Labour), dated 5.10.1966, the provisions of the Act have been made applicable to class of persons mentioned in Sec.4(1)(a) of the Act and therefore, the appeal filed by the 2nd respondent was maintainable in law. It was further held by the 1st respondent that the contract between the employer and the person employed cannot override the express statutory provisions. It was the further finding of the 1st respondent that the petitioner/management is obliged to mention the reasonable cause in the order of termination for enabling him to apply his mind to determine the reasonableness of the reason for termination. It is untenable to contend that the District Manager like the 2nd respondent has no jurisdiction to entertain an appeal. Persons in the position of management are specifically brought within the purview of the Act in exercise of the statutory powers. Sec.5 of the Act is an overriding provision as could be seen from the opening lines of the said section. G.O.Ms.No.4074, Industries, Labour and Housing (Labour), dated 5.10.1966 is not in conflict with the unwritten law of master and servant. The provisions of the Act themselves make an inroad into the ordinary law of master and servant. The effect of an order made by the Appellate Authority setting aside an order of termination is that the order of termination is *non est* and never existed and that the employee who was removed from service continues in employment without any interruption or break. For the reasons aforementioned, the 2nd respondent has prayed that the writ petition may be dismissed.

10. The petitioner/management filed a reply affidavit. As the 2nd respondent was occupying a managerial post, the Act did not apply in his case and his appeal under Sec.41 of the Act was misconceived and not maintainable in law. Sec.5 of the Act only delegate certain powers to the State and the State, as delegate, cannot efface a

substantive provision of the Act by a notification under Sec.5 of the Act. Even assuming for arguments sake that the language of Sec.5 of the Act is so wide as to include the powers to change Sec.4 of the Act itself, Sec.5 of the Act itself will be invalid in law as it will hit by the vice of excessive delegation. The Constitution has granted the power to the State Legislature to legislate on the topic. Excessive delegation of power is not permissible in law and the Legislative body has to exercise some control over delegated legislation. In any event, the law of master and servant is a Central Law and conditions of service between employers and employees occupying managerial post are governed by the Central Law and therefore, any State provision of Law in conflict with the Central Law will be void to the extent of the conflict.

11. I have heard the elaborate arguments of Mr.S.Govind Swaminathan, learned Senior Advocate on behalf of M/s.N.S.Sivam and K.Madhavan, for the petitioner and Mr.A.L.Somayaji of M/s.Aiyar and Dolia, learned counsel for the 2nd respondent.

12. W.M.P.No.25908 of 1991 has been filed by the petitioner during the pendency of the writ petition seeking permission to raise the additional ground that Sec.5 of the Act is invalid and void and has to be struck down as *ultra vires* and the said petition was ordered by S.Ramalingam, J., on 10.12.1991. In the affidavit filed in support of the above W.M.P., it is stated that Sec.5 of the Act is invalid and void because it suffers from the vice of excessive delegation.

13. Mr.S.Govind Swaminathan, learned Senior Advocate for the petitioner, has raised the contention that power to withdraw the exemption granted under Sec.4 of the Act could be exercised only by the Legislature itself and the said power to withdraw the exemption cannot be delegated. In other words, it is the contention of Mr.S.Govind Swaminathan, that the delegation of the power under Sec.5 of the Act is an unconstitutional delegation of Legislative power.

14. *Per contra*, Mr.A.L.Somayaji, learned counsel for the 2nd respondent, would submit that the delegation of the power under Sec.5 of the Act to remove the exemption granted is in accordance with law the accepted legislative practice and is not unconstitutional.

15. In support of his contention, Mr.S.Govind Swaminathan would invite my attention to the

following decisions, reported in *In re. Art.143, Constitution of India, etc.*, 1951 S.C.J. 527: 1951 S.C.R. 747: A.I.R.1951 S.C. 332 - paragraph 74 at page 355; *Harishankar Bagla v. The State of Madhya Pradesh*, (1955)2 M.L.J. 211: 1954 M.W.N. 749: 1954 S.C.J. 637: (1955)1 S.C.R. 380: 55 Cr.L.J. 322: A.I.R. 1954 S.C. 465 - Head-note (c) at page 466 and paragraph 9 at page 468, *Hamdard Dawakhana v. The Union of India*, A.I.R. 1960 S.C. 554 paragraph 29 at page 556 and paragraphs 34 and 35 at pages 567 and 568, *Makhan Singh Tar-sikka v. The State of Punjab*, A.I.R. 1964 S.C. 381: 1964 Cr.L.J. 262 paragraph 38 at page 400 and *Harakchand Ratanchand Banthia v. Union of India*, A.I.R. 1970 S.C. 1453 paragraph 17 at page 1464.

16. Mr.A.L.Somayaji, learned counsel for the 2nd respondent would invite my attention to the following decisions in support of his contention that Sec.5 of the Act is valid and constitutional. They are reported in *Pandit Banarsi Das Bhanot v. The State of Madhya Pradesh*, A.I.R. 1958 S.C. 909, *The Tata Iron and Steel Co. Ltd. In re.*, (1950)2 L.L.J. 1043, *The Management of Blue Star & Co. Ltd. v. The Assistant Commissioner, Madras-6*, (1989)1 L.L.J. 233, which in turn followed *The Tata Iron and Steel Co. Ltd. In re.*, (1950)2 L.L.J. 1043, *Mohmedalli v. Union of India* A.I.R. 1964 S.C. 980: 24 F.J.R. 221: (1964)1 S.C.J. 329, *State Bank of Travancore v. Deputy Commissioner of Labour, Coimbatore*, (1981)1 L.L.J. 393, *Basant Kumar Sarkar v. The Eagle Rolling Mills Ltd.* A.I.R. 1964 S.C. 1260: (1964)2 S.C.J. 586, *M/s.Jalan Trading Co. Private Ltd. v. Mill Mazdoor Sabha*, A.I.R.1967 S.C. 691: 29 F.J.R.468: (1966)2 Lab.L.J. 546: (1962)1 S.C.C. 189: (1967)1 S.C.R. 15, *The Edward Mills Co. Ltd., Beawar v. The State of Ajmeer*, A.I.R. 1955 S.C. 25: (1955)1 S.C.R. 735, *Bhikusa Yamasa Kshatriya (P.) Ltd. v. Union of India*, A.I.R. 1963 S.C. 1591: (1963)1 Lab.L.J. 270: (1963-64)24 F.J.R. 429 and *Syed Mohamed & Co. v. State of Madras*, A.I.R. 1953 Mad. 105: (1952)2 M.L.J. 598: 54 Cr.L.J. 277: 1952 M.W.N. 847.

17. In order to appreciate the respective contentions of the parties, it is necessary to extract the provisions of Sections 4 and 5 of the Act.

"4. Exemptions: (1) Nothing contained in this Act shall apply to-

- (a) persons employed in any establishment in a position of management;
- (b) persons whose work involves travelling;

and persons employed as canvassers and caretakers;

(c) establishments under the Central and State Governments, local authorities, the Reserve Bank of India, a railway administration operating any railway as defined in clause (20) of Art.366 of the Constitution and cantonment authorities;

(d) establishments in mines and oil fields;

(e) Establishments in bazaars, in places where fairs or festivals are held temporarily for a period not exceeding fifteen days at a time;

(f) establishments which, not being factories within the meaning of the Factories Act, 1948, are in respect of matters dealt with in this Act, governed by a separate law for the time being in force in the State.

(2) Nothing contained in Sec.7 or Sec.13, as the case may be, shall apply to—

(a) hospitals and other institutions for the treatment or care of the sick, the infirm, the destitute or the mentally unfit;

(b) such chemists' or druggists' shops as the State Government may, by general or special order, specify;

(c) clubs and residential hotels, hostels attached to schools or colleges, and establishments maintained in boarding schools in connection with the boarding and lodging of pupils and resident masters;

(d) stalls and refreshment rooms at railway stations, docks, wharves or ports.

5. Power of Government to apply Act to exempted persons or establishments: Notwithstanding anything contained in Sec.4, the State Government may, by notification, apply all or any of the provisions of this Act to any class of persons or establishments mentioned in that Section, other than those mentioned in Clauses (c) and (f) of sub-sec.(1), and modify or cancel any such notification."

18. Under Sec.4 of the Act, exemption has been granted in respect of certain persons employed in establishments. But, for the exemption, the category of 'persons employed' and 'establishment' would be governed by the provisions of the Act. Sec.5 of the Act has been given overriding effect as it opens with *non obstante* clause. Therefore, the provision of Sec.4 of the Act is subject to the provisions of Sec.5 excepting in regard to establishments mentioned in Clauses (c) and (f) of

sub-sec.(1) of Sec.4 of the Act. The State Government has been further empowered to modify or cancel any notification made under Sec.5 of the Act. A reading of the various provisions of the Act makes it clear that the enactment not only provides for regulation of conditions of work in shops and commercial establishments, but also provides the grounds of termination of services of employees and gives right of appeal against the arbitrary and illegal termination of services of persons employed. The expression "persons employed" and "establishment" has been defined in sub-clauses (12) and (6) of Sec.2 respectively.

19. The Legislative policy is very clear that the exemption granted in respect of persons and establishment except in regard to establishments enumerated in clauses (c) and (f) of sub-sec.(1) of Sec.4 of the Act is subject to the provisions of Sec.5 of the Act. Sec.5 of the Act does not run counter to the essential features of the Act or policy of the enactment. By withdrawing the exemption granted under Sec.4 of the Act, the essential features and policy of the enactment are not in any way changed. On the other hand, the coverage of the Act, in my opinion, is widened.

20. The contention raised by Mr.S.Govind Swaminathan, learned Senior Counsel for the petitioner was that under Sec.5 of the Act, there is an unconstitutional delegation of legislative power. The Apex Court had occasion to consider a similar question in the case reported in *Pandit Banarsi Das Bhanot v. The State of Madhya Pradesh, A.I.R. 1958 S.C. 909*. That case arose under the Central Provinces and Berar Sales Tax Act, 1947. Sub-sec.1 of Sec.6 of the said Act provided that no tax shall be payable under this Act on the sale of goods specified in the second column of Schedule II and sub-section 2 of the said section provided that the State Government may, after giving notice by notification amend the Schedule and thereupon such Schedule shall be deemed to be amended accordingly. The contention raised in that case was, that the power conferred on the State Government by Sec.6(2) of the said Act to amend the schedule relating to exemption was unconstitutional because it amounts to delegation of legislative power and that it is impermissible in law. This contention was repealed by the Apex Court in the following terms:

"We are, therefore, of the opinion that the power conferred on the State Government by

Sec.6(2) to amend the schedule relating to exemption is in consonance with the accepted legislative practice relating to the topic, and is not unconstitutional.

21. While taking the above view, the Apex Court had referred to with approval the judgment of our High Court reported in *Syed Mohamed & Co. v. State of Madras, A.I.R. 1953 Mad. 105*. In that case, the Madras High Court has held that the delegation of authority under Sec.5(vi) of the Madras General Sales Tax Act to the rule making authority to determine at which single point in the series of sales by successive dealers, the tax should be levied, was within the permissible constitutional limits. In the decision reported in *The Edward Mills Co. Ltd. Beawar v. The State of Ajmeer, A.I.R. 1955 S.C. 25*, the Supreme Court upheld the power given to the State Government under the Minimum Wages Act, 1948 to add to the list of employment mentioned in the schedule and extend the Act to that employment.

22. In the decision reported in *Mohmedalli v. Union of India, A.I.R. 1964 S.C. 980*, the Supreme Court upheld the provisions of Sec.1(3) of the Employees' Provident Funds Act, 1952, authorising the Central Government to bring within the purview of that Act such establishment as it might specify under sub-clauses (a) and (b) of sub-section (3) of Sec.1 of the said Act, applying to factories and establishments specified therein in which 20 or more persons are employed. Hence, Sec.1(3)(a) and (b) of the said Act excludes from its purview factories and establishments in which less than 20 persons are employed. But, under the Proviso to Sec.1(3), the Central Government is given the power to apply the provisions of the Act, by notification, to any establishments employing less than 20 persons. The above provision has been upheld by the Supreme Court and it has been observed as follows:

"It has been contended (1) that Sec.1(3)(b) under which the notification including restaurants and hotels were brought under the operation of the Act, is invalid because it confers uncontrolled and uncanalised power on the Government; (2) that the Act was intended to apply to mere wage-earners and not to salaried people and that, therefore, the two notifications as a result of which the petitioners' employees have been brought within the purview of the Act are bad inasmuch as they are

salaried employees and not mere wage-earners, and (3) that the scheme is bad under Article 14 of the Constitution because it is discriminatory.... By Sec.4, the Central Government has been authorised to add to the Schedule any other industry in respect of the employees whereof it is of opinion that a provident fund scheme should be framed under the Act, and when such a notification is issued, the industry so added shall be deemed to be an industry specified in the Schedule. The general rule as to the application of the Act has been laid down in that sub-section. By way of exception to that general rule, the Appropriate Government has been authorised by Sec.17 to exempt from the operation of all or any of the provisions of any scheme framed under the Act. The scheme is to be framed by the Central Government, under Sec.5 for the establishment of provident fund under the Act for employees or any class of employees, in pursuance of the provisions of the Act."

23. In the case of *Registrar of Co-operative Societies, Trivandrum v. K. Kunhambu*, A.I.R. 1980 S.C. 350: (1980)2 S.C.R. 260, the Supreme Court upheld Sec.60 of the Madras Co-operative Societies Act, 1932, which gave power to the State Government to grant exemption to any society from any of the provisions of the Act, as well as the power to apply the provisions of the Act to any specific society, and it has been observed as follows:

"The policy of the Act is there and so are the guidelines, why the legislation? 'To facilitate the formation and working of Co-operative Societies'. Co-operative Societies, for what purpose? 'For the promotion of thrift, self-help and mutual aid'. Amongst whom? 'Among agriculturists and other persons with common economic needs'. To what end? 'To bring about better living, better business and better methods of production'. The objectives are clear; the guidelines are there. There are numerous provisions of the Act dealing with registration of societies, rights and liabilities of members, duties of registered societies, privileges of registered societies, property and funds of registered societies, inquiry and inspection, supersession of committees of societies, dissolution of societies, surcharge and attachment, arbitration etc. We refrain from referring to

the details of the provisions except to say that they are generally designed to further the objectives set out in the preamble. But, numerous as the provisions are, they are not capable of meeting the extensive demands of the complex situations which may arise in the course of the working of the Act and the formation and the functioning of the societies. In fact, the too rigorous application of some of the provisions of the Act may itself occasionally result in frustrating the very objects of the Act instead of advancing them. It is to provide for such situations that the Government is invested by Sec.60 with a power to relax the occasional rigour of the provisions of the Act and to advance the objects of the Act. Sec.60 empowers the State Government to exempt a registered society from any of the provisions of the Act or to direct that such provision shall apply to such society with specified modifications. The power given to the Government under Sec.60 of the Act is to be exercised so as to advance the policy and objects of the Act, according to the guidelines as may be gleaned from the preamble and other provisions which we have already pointed out, are clear. We are therefore of the view that Sec.60 is not void on the ground of excessive delegation of legislative power. We so declare and otherwise dismiss the appeal.

24. Sec.1(3) of the Employees' State Insurance Act, 1948, was held to be valid as an example of conditional legislation in the decision reported in *Basant Kumar Sarkar v. The Eagle Rolling Mills Ltd.*, A.I.R. 1964 S.C. 1260 and the law has been stated in the following terms:

"Sec.1(3) is not an illustration of delegated legislation; it is what can be properly described as conditional legislation. Sec.3(1) of the Act purports to authorise the Central Government to establish a corporation for the administration of the scheme of Employees' State Insurance by a notification. In other words, when the notification should be issued and in respect of what factories it should be issued, has been left to the discretion of the Central Government and that is precisely what is usually done by conditional legislation. Assuming that there is an element of delegation, the plea that the discretion conferred by Sec.1(3) is not guided by any legislative provision is

unsustainable, because there is enough guidance given by the relevant provisions of the Act and the very scheme of the Act itself. In the very nature of things, it would have been impossible for the legislature to decide in what areas and in respect of which factories the Employees' State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once. Such beneficial measures which need careful experimentation have sometimes to be adopted by stages and in different phases, and so, inevitably, the question of extending the statutory benefits contemplated by the Act has to be left to the discretion of the appropriate Government. The course adopted by modern legislatures in dealing with welfare scheme has uniformly conformed to the same pattern. The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the Government concerned to decide when, how and in what manner the scheme should be introduced. That cannot amount to excessive delegation. (S) *The Edward Mills Company Ltd. v. The State of Ajmer*, A.I.R. 1955 S.C. 25 and A.I.R. 1963 S.C. 306 and *Bhikusa Yamasa Kshatriya (P) Ltd. v. The Union of India*, A.I.R. 1963 S.C. 1591 Rel. on. I.L.R. 40 Pat. 193, Affirmed."

Hence, I am of the view, that the provision of Sec.5 of the Act is valid and does not suffer from the vice of excessive delegation as contended by the learned Senior Counsel for the petitioner.

25. The Act in question being a welfare legislation, the court should lean in favour of wider delegation of legislative power as observed by the Supreme Court in the case reported in *Registrar of Co-operative Societies, Trivandrum v. K. Kunhambu*, A.I.R. 1980 S.C. 350; (1980) 2 S.C.R. 260, which is as follows:

"A good deal of latitude has been held to be permissible in the case of taxing statutes and on the same principle a generous degree of latitude must be permissible in the case of welfare legislation, particularly those statutes which are designated to further the Directive Principles of State Policy."

26. The State Government has not usurped the functions of the State Legislature. Further, Sec.5 of the Act does not contravene any constitutional

provision. It is not the case of the petitioner that Sec.5 of the Act contravenes any of their fundamental rights or *ultra vires* the powers of the State. I have found already that Sec.5 of the Act does not suffer from the vice of excessive delegation. As already mentioned, the Legislature has enacted Secs.4 and 5 with clarity. Sec.5 overrides the provisions of Sec.4. Since the exemption contained in Sec.4 is subject to the provisions of Sec.5, the delegated authority, by issuing the notification withdrawing the exemption, is not altering the statute or acts contrary to the statute. Sec.5 limits the powers of the delegated authority and the power of the State Government is defined clearly. Delegated power under Sec.5 of the Act cannot extend to the withdrawal of exemption granted under Clauses (c) and (f) of sub-sec.(1) of Sec.4 and sub-sec.(2) of Sec.4 of the Act.

27. Further, Sec.5 of the Act has to be construed liberally, being a social welfare legislation, and it is also a pre-constitutional enactment. In this connection, reference can be usefully made to the decision of the Apex Court reported in *M/s. Harihar Polyfibres v. Regional Director, E.S.I. Corporation*, (1984) 4 S.C.C. 324, wherein it has been observed as follows:

"The Employees' State Insurance Act is a welfare legislation and the definition of 'wages' is designedly wide. Any ambiguous expression must receive beneficent construction... The E.S.I. Act being a social welfare legislation must be given a liberal interpretation beneficial to the interests of the employees so as to serve the purpose and objects of the Act."

28. In the above view of mine, there is no need to refer in detail the judgments relied on by the learned Senior Counsel for the petitioner, for, there cannot be any demur to the proposition made by the learned Senior Counsel for the petitioner that there cannot be a delegation of legislative function.

29. Sec.5 of the Act does not delegate essential legislative function to the State Government. Exemption granted under Sec.4 is subject to withdrawal under Sec.5 and the power withdraws the exemption does not suffer from the vice of excessive delegation. Legislative policy is contained in Secs.4 and 5 of the Act. Standards and guidelines are discernible from the various provisions, and scheme and object of the Act. Therefore, I hold that Sec.5 of the Act is valid and legal.

30. This Court has been taking the consistent view that the employer is bound to disclose the reasons for termination in the order of termination itself and failure to do so would render the order of termination *void and non est* as could be seen from the following decisions. In the decision reported in *The Tata Iron and Steel Co. Ltd. (1950) 2 L.L.J. 1043*, P.V.Rajamanner, C.J., and A.V.Viswanatha Sastri, J., it has been observed as follows:

"Under Sec.41(1) of the Act, the services of a person like the first respondent who has been employed continuously for over a period of six months can be dispensed with for a reasonable cause after giving the person at least a month's notice or wages in lieu of such notice or on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose in which case notice would not be necessary. From the order of the company dispensing with the services of the 1st respondent, the only reason appearing is the non-requirement of his services. The order does not state anything else. The only question, therefore, for the appellate authority was to determine whether that ground can be said to be reasonable cause. The authority held that it could not be and we agree with him."

31. In the decision reported in *State Bank of Travancore v. Deputy Commissioner of Labour, Coimbatore, (1981) 1 L.L.J. 393*, Nainar Sundaram, J., as he then was), it has been observed as follows:

"The first ground is that the proceedings under Sec.41 of the Act before the first respondent are incompetent because the petitioner has passed the order of termination against the second respondent under paragraph 522 (1) of the Sastri Award. His submission is not tenable because it cannot be disputed that so far as the employment in question is concerned, the provisions of the Act are definitely attracted. The petitioner satisfies the definition of an employer and the second respondent satisfies the definition of a person employed within the meaning of the Act and any contract between the employer and the person employed cannot override the express provision of the Act, or, in particular, Sec.41 thereof. The learned counsel for the petitioner is not in a position to cite any direct authority that wherever there is a contract governing the relationship between the employer and the person employed the

provisions of the Act will have to be ignored and there is no necessity to adhere to and satisfy the formalities laid down under Sec.41 of the Act. Hence, I am not able to appreciate and accept the first contention of the learned counsel for the petitioner. The second ground urged by the learned counsel for the petitioner is that even otherwise the petitioner has dispensed with the services of the second respondent for a reasonable cause and there has been strict compliance with the first limb of sub-sec.(1) of Sec.41 of the Act, in the sense the second respondent has been paid more than a month's wages in lieu of the notice contemplated. In the instant case, a memo was issued to the second respondent on 11th May, 1976 and an explanation was obtained on 10th June, 1976. The order of termination dated 17th March, 1977 does not disclose as to whether the explanation was accepted or not and the factors which weighed with the petitioner to pass the order of termination on the basis of reasonable cause. If the termination is to be on the ground of reasonable cause, it is incumbent on the part of the employer to disclose the reasonable cause in the order of termination and in the absence of a disclosure it is not possible for any authority, and in particular the Appellate Authority under Sec.41(2) of the Act to determine as to whether the grounds put forth by the employer can be stated to constitute a reasonable cause and as to whether the order of termination has been passed *bona fide*. The necessity to disclose the reasonable cause in the order of termination has been stressed by a Bench of this Court in *Tata Iron and Steel Co. Ltd., (1950) 2 L.L.J. 1043*."

32. In the decision reported in *The Management of Blue Star & Co. Ltd., v. The Assistant Commissioner of Labour, Madras-6, (1989) 1 L.L.J. 233*, Shanmukham, J., has held as follows:

"From the above evidence, it is clear it is the practice of the management not to put down the reasons in writing in respect of managers, but to inform verbally and according to that practice, reasons were verbally stated and not stated in the letter. Thus, not only the documentary evidence emanated from the management but also the evidence of the management itself will give a direct lie to the stand taken by the management that it is because of the

specific request made by the 2nd respondent, the reasons for termination were not disclosed in the order of termination dated 3rd January, 1980. If so much is established, it follows that the order has to be struck down as illegal in view of the decision of this Court in *State Bank of Travancore v. Deputy Commissioner of Labour, Coimbatore and another*, (1981)1 L.L.J. 393, which in turn followed the decision of this Court in *Tata Iron and Steel Co. Ltd.*, 1950 L.L.J. 1043. Mr. Justice Nainar Sundaram in *State Bank of Travancore v. Deputy Commissioner of Labour*, (1981)1 L.L.J. 393 at 395."

It is also seen from the above decision, the learned Judge has followed the decision of this Court in *State Bank of Travancore v. Deputy Commissioner*

of Labour, (1981)1 L.L.J. 393, which in turn followed the decision of this Court in *Tata Iron and Steel Co. Ltd.* (1950)2 L.L.J. 1043.

33. It is admitted by the learned Senior Counsel for the petitioner that if Sec.5 of the Act is held to be valid, the notification viz., G.O.Ms.No.4074, Industries, Labour and Housing (Labour), dated 5.10.1966 would be valid and consequently, the 2nd respondent can invoke the remedy under Sec.41(2) of the Act, and since no reason has been given in the order of termination, the order of termination, in my view, is *void and non-est*. The order of termination, which is marked as Ex.A-1 before the Appellate Authority/1st respondent, is also reproduced hereunder:

"Air France
General Management - India and Nepal
50-B, Chanakyapuri, New Delhi-110 021.

Phone 604775 - Grams Airfrans -
Telex 2480

DEL.DA.0411/CC.AC. Mr.K.R.Gopalan
68, Abhiramapuram IV St.,
Madras-600 018.

Re: Notice of termination of Services.
Registered A/C.
New Delhi 27th February, 1987.

Sir,

In terms of our agreement Clause 8, we hereby terminate your services in Air France with effect from 31st March, 1987.

Yours Faithfully,
Air France

(Sd.) P.J.Borgne,
General Manager."

34. Therefore, the view of the Appellate Authority/1st respondent exercising powers under Sec.41(2) of the Act, that the order of termination issued by the writ petitioner to the 2nd respondent does not contain reasonable cause and that therefore, the same is liable to be set aside does not call for any

interference by this Court. The writ petition is, therefore, liable to be dismissed and accordingly, the same is dismissed. However, there will be no order as to costs.

B.S.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Abdul Hadi, J.*

S.A.No.865 of 1982

1st March, 1993.

Kandasami Mudaliar

...Appellant

v.

Muthukrishna Moorthy and another

...Respondents.

(A) *French Code De Commerce, Arts.179 and 185 - Promissory note - When becomes mature - Demand for payment of sum due under pronote - If necessary before pronote becomes matured for payment.*

(B) *Negotiable Instruments Act (XXVI of 1881), Sec.87 - Pronote - Date of - 12.2.1975 altered into 12.2.1976 - Alteration, whether material - Pronote whether void on that ground.*

The plaintiff-appellant filed a suit O.S.No.127 of 1979 on the file of the Sub Court, Pondicherry for the recovery of a sum of Rs.6,055 due under a promissory note executed by the 1st and 2nd defendant (respondents). The 2nd defendant remained *ex parte*. According to the 1st defendant, the suit pronote bears only the date 12.2.1975, but that it had been altered by the plaintiff to 12.2.1976. The trial court proceeded on the footing that there was a material alteration and directed the plaintiff to begin his side. The plaintiff had no oral evidence. The case was posted for arguments on 22.10.1981. On appeal, the lower appellate court dismissed the suit holding that the pronote was a void one in view of the material alteration. In appeal,

Held: The lower appellate court has held that as per the French Law, the limitation of three years' period would begin to run only from 1.2.1979 the date when the demand for the amount due under the promissory note was made by the plaintiff pursuant to the suit notice. This Court thinks that what the lower appellate court has observed in this respect can be taken as correct. As per the official transaction of Art.179 of the French Code de commerce, the relevant expression used therein would mean, in commerce, only 'maturity' and not 'payment' as contended by the respondent's counsel. If so, the lower appellate court cannot be said to be wrong in having come to the conclusion that the limitations of 3 years, as per the said Art.179

begins to run only from the date of demand. The said Art.179 no doubt relates to bills of exchange. But Art.185 which relates to promissory notes says that the law applicable to Bills of Exchange as found in Art.179) would apply, to promissory notes Art.179, no doubt, used the word 'maturity' in relation to bills of exchange. But in relation to demand promissory notes, that term could refer only to the date of demand unless demand is made for payment of the sum due under the promissory note, a promissory note payable on demand cannot be said to have become matured for payment.

[Para. 7]

Applying the meaning given by the Supreme Court to the expression, 'material alteration', it has to be concluded that the abovesaid alteration of the date of the suit promissory note in the present case does not vary 'the rights, liabilities or legal position of the parties or' the legal effect of the said promissory note, nor the said alteration may otherwise prejudice the party bound' by the document. In view of the abovesaid peculiar French Law of limitation, which is applicable to the present case, there is no likelihood even of prejudice to the defendants because of the abovesaid alteration of the year 1975 to 1976. So, the said alteration cannot be termed a material alteration.

[Paras. 11 & 12]

Cases referred to:

M.M.B.Catholicos v. T.Paulo Avira, A.I.R. 1959 S.C. 31. [Para. 6]

Devadattam v. Union of India, (1963)2 I.T.J. 123: (1963)2 S.C.J. 256: (1963)2 An.L.T. 253: (1963)49 I.T.R. 165 (S.C.) A.I.R. 1964 S.C. 880. [Para. 6]

Rishi Kesh Singh v. State, 1969 All.L.J. 657: A.I.R. 1970 All. 51 at 82: 1970 Cr.L.J. 132: I.L.R. (1969)1 All. 362 (F.B.). [Para. 6]

Sendamarai Ammal v. Vijaya Rajagopal Chettiar, (1984)1 M.L.J. 324: A.I.R. 1984 Mad. 122: 97 L.W. 85: 1984 T.L.N.J. 109. [Para. 7-A]

Nathu Lal v. Gomti Kuar, A.I.R. 1940 P.C. 160. [Para. 8]

Loonkaran Sethia v. Ivan E.John, (1977)1 S.C.C. 379: (1977)1 S.C.R. 853: A.I.R. 1977 S.C. 336. [Para. 8]

Vythianathan v. Murugayya Padayachi, 1985 T.L.N.J. 265. [Para. 9]

Rajagopala v. Avadai Velar, (1961)1 M.L.J. 193: 74 L.W. 29: A.I.R. 1961 Mad. 251. [Para. 9]

Rangaswami Reddi v. Doraiswami Reddi, (1957)2 M.L.J. 196: 70 L.W. 583: I.L.R. 1957 Mad. 987:

1957 M.W.N. 434: A.I.R. 1957 Mad. 715 (D.B.)
[Para. 9]

Govindasami v. Kuppusami, I.L.R. 12 Mad. 239.
[Para. 11]

Subramania Patta v. Porathana Andi, (1942)2 M.L.J.
303. [Para. 11]

C.N.G. Ezhil Arasi, for Appellant.

T.P. Manoharan, for Respondent No.1.

The Court delivered the following

JUDGMENT: Plaintiff is the appellant in this second appeal against the reversing judgment in A.S.No.205 of 1981 on the file of the Principal District Judge, Pondicherry, which dismissed his suit O.S.No.127 of 1979 on the file of the Principal Subordinate Judge, Pondicherry for the recovery of a sum of Rs.6,055 due under Ex.A-1 promissory note executed by both the defendants in favour of the plaintiff.

2. The only question that is argued before me in this second appeal relates to the material alteration of Ex.A-1 promissory note. The 2nd defendant remained *ex parte*. According to the 1st defendant, the suit promissory note bears, only the date 12.2.1975, but it has been altered by the plaintiff to 12.2.1976. The lower appellate court has found that there is such an alteration and it has also held that it is a material alteration within the meaning of Sec.87 of the Negotiable Instruments Act. Therefore, the lower appellate court has dismissed the suit since as per Sec.87 of the Negotiable Instruments Act, Ex.A-1 is a void document in view of the said material alteration.

3. Though the learned counsel for the appellant argues that there was no such alteration at all, after seeing Ex.A-1, I have only to concur with the lower appellate court that there was such alteration of date.

4. Further, the 1st defendant also marked Ex.B-1, which is draft copy of Ex.A-1 promissory note and that bears the date 12.2.1975 only and the lower appellate court also observes that the marking of Ex.B-1 was not objected to by the plaintiff and that on the contrary, by his suggestion to the 1st defendant, the plaintiff impliedly admitted the existence of the draft. No doubt, the learned counsel for the appellant argues that the existence of this draft Ex.B-1 was not adverted to in the written statement. But, on that ground, the genuineness of Ex.B-1 cannot be challenged when the plaintiff has not only chosen to object to the marking of the said document, but also put a suggestion to the 1st

defendant in the witness box impliedly admitting the existence of the draft.

5. But, the question that has to be considered is whether the said alteration is a "material alteration" within the meaning of that term under Sec.87 of the Negotiable Instruments Act. In this connection, there is of course a defence plea in the written statement of the 1st defendant, alleging the abovesaid alteration. The relevant plea in the 1st defendant's written statement is as follows:

"The 2nd defendant and the plaintiff are colluding together. The plaintiff is the brother-in-law of the 2nd defendant. There has been recent enmity and misunderstanding between 1st and 2nd defendant. The plaintiff and the 2nd defendant construed together and altered the years and brought into existence a false endorsement."

The lower appellate court also says that the point for determination in the first appeal is whether the promissory note is void for material alteration. Even in the trial court, though there is no specific express issue regarding the abovesaid material alteration, on 28.9.1981, while the suit was pending there was an interim order by the trial court as follows:

"Heard both sides on the question of burden proof. Perused pleadings and issues. The first defendant has alleged in his written statement that he has not executed any pro-note and the suit pronote is not enforceable as there is a material alteration of the year. On perusing the issues and on considering the pleadings, I find that the burden of proof first lies with the plaintiff and he has to discharge the burden first. Accordingly, I direct the plaintiff to begin his side. For trial call on 19.10.1981".

Thus, the trial court, on the footing that there was plea of material alteration by the 1st defendant, found that the burden of proof initially was on the plaintiff and had directed the plaintiff to discharge the said burden first by first letting in evidence. But, on 19.10.1981, when the suit was taken up for trial, the plaintiff did not choose to lead evidence and the 1st defendant alone examined his witnesses, and the trial court below, on that day, recorded that the plaintiff had no oral evidence, and that his counsel submitted to argue the case and posted the case for argument on 22.10.1981. So, even before considering whether there was material alteration, it has to be seen whether the

plaintiff has to be non-suited on the sole footing that he has not chosen to discharge the abovesaid burden of proof, by letting in evidence first. The lower appellate court also observes as follows after referring to the abovesaid interim order dated 28.9.1981 of the trial court:

"The plaintiff did not challenge in any manner that order of the trial court on the ground that any evidence was inadmissible in the teeth of the admission by the defendants in Ex.A-3. On the contrary he rested content with reporting that he had no evidence to place before the court. That refusal by itself in view of the order made earlier by the court would have been sufficient to dismiss the suit. At any rate under the circumstances of the case, it cannot be said that the recital in Ex.A-3 tantamounts to an admission and that no further enquiry on the matter was unnecessary and inadmissible. I therefore do not accept his contention."

But, on this point, I am unable to concur with the lower appellate court and I shall presently give out my reasons for holding that view. No doubt, the learned counsel for the appellant submits that in view of what is stated in Ex.A-3, there was no necessity for the plaintiff to let in any evidence first. Ex.A-3 dated 6.2.1979 is the reply by the 1st defendant to the suit notice Ex.A-2 dated 1.2.79. No doubt, the relevant observation therein is as follows:

"It is true that my client along with his brother executed a pronote on 12.2.76 in your client's favour."

The learned counsel for the appellant points out that there is an admission that the suit promissory note was executed only in 1976 and not in 1975. But, first of all, D.W.1, the 1st defendant has explained the abovesaid deposition as follows:

"Ex.A-3 is the reply. On the date of giving the reply as per A-3. I don't remember the year and date of pro-note. Only at the time when I took the draft B-1 and saw immediately after receiving the summons I came to know the year of pronote is only 75".

That apart, I have already observed that by simply seeing Ex.A-1 promissory note, it is clear that the year 1975 has been altered as 1976. So, the abovesaid explanation given by D.W.1 has to be accepted and the above referred to finding that there is alteration in the promissory note is correct. When that is so, it is only for the plaintiff to discharge the

burden case on him, particularly in the light of the abovesaid order dated 28.9.1981 specifically directing him to let in evidence first to discharge the burden. When that is not done and the plaintiff has not let in any oral evidence, explaining the abovesaid alteration and convincing the court that it was not a material alteration can the suit be dismissed on that score alone, when the 1st defendant has chosen to let in his evidence and without even considering whether in law, there would be material alteration?

6. The Supreme Court has observed in *M.M.B. Catholicos v. T. Paulo Avira*, A.I.R. 1959 S.C. 31 @ 38 (D.B.), as follows:

"The question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the court has to come to a decision on a consideration of all materials".

Likewise, in *Devadattam v. Union of India*, (1963)2 I.T.J. 123; (1963)2 S.C.J. 256; (1963)2 An.L.T. 254; (1963)49 I.T.R. 165 (S.C.) A.I.R. 1964 S.C. 880. The Supreme Court has also observed at page 885 as follows:

"The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties."

Further, in *Rishi Kesh Singh v. State*, 1969 All.L.J. 657; A.I.R. 1970 All. 51 at 82; 1970 Cr.L.J. 132; I.L.R. (1969)1 All. 362 (F.B.), it has been observed as follows:

"Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together..... As has been often pointed out, when there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burden or proof but by a careful election of the correct version, based no doubt on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favour of a conviction as to remove all reasonable

doubt. In other words, the importance of burdens of proof and presumptions vanishes in the face of evidence given by both sides."

So, the 1st defendant, having chosen to let in evidence, the court has only to analyse the whole evidence before it and come to a conclusion based on the entire evidence and the law applicable, and cannot come to a decision solely on the presumption that operates against the plaintiff in view of himself not discharging initial burden of proof. 7. So, it has to be seen whether there is really any material alteration in the present case, taking into consideration the entire evidence and the law on the point. The suit was filed only on 25.4.1979, as I find it from the decree copy. No doubt in this regard, the lower appellate court's observation that the suit was filed on 9.2.1979, is not correct since 9.2.1979 is only the date of the plaint, though the suit has been filed only on 25.4.1979. The lower appellate court has held that as per the French Law, the above said limitation of three years' period would begin to run only from 1.2.1979, the date when the demand for the amount due under the promissory note was made by the plaintiff pursuant to the suit notice Ex.A-2 regarding this peculiarity of French Law, as stated by the lower appellate court, I tried to make some investigation, since the learned Counsel for the 1st respondent contended that what was stated by the lower appellate court could not be the law since it would lead to absurdity. In this connection, Mr.V.S.Ramakrishnan, who was Government Pleader for Pondicherry some time back and who knows French also, at my request, rendered assistance for me to understand some of the relevant provisions in the French Code De Commerce and I record my appreciation of the service rendered by him. From what I could gather from the said assistance given, I think what the lower appellate court has observed in this aspect can be taken as correct. As per the official translation of Art.179 of the French Code De Commerce, the relevant expression used therein would mean, in commerce, only "maturity" and not "payment" as contended by the respondent's counsel. It so, the lower appellate court cannot be said to be wrong in having come to the conclusion that the limitation of 3 years, as per the said Art.179, begins to run only from the date of demand. The said Art.179 no doubt relates to bills of exchange, But, Art.185 which relates to promissory notes says that the law

applicable to Bills of Exchange (as found in Art.179) would apply to promissory notes. Art.179 no doubt uses the word "maturity" in relation to bills of exchange. But in relation to demand promissory notes, that term could refer only to the date of demand. Unless demand is made for payment of the sum due under the promissory note, a promissory note payable on demand cannot be said to have become matured for payment.

7-A. In this connection I may also point out that as per *Sendamarai Ammal v. Vijaya Rajagopal Chettiar*, (1984)1 M.L.J. 324: A.I.R. 1984 Mad. 122: 97 L.W. 85: 1984 T.L.N.J. 109, only French Law of Limitations has to be applied, in view of Sec.29(2) read with Sec.3 of the Limitation Act, 1963 and the said French Law would be "special or local law" referred to in the said Sec.29, applicable in the Union Territory of Pondicherry.

8. The learned counsel for the appellant cited decisions like *Nathu Lal v. Gomti Kuar*, A.I.R. 1940 P.C. 160 and *Loonkaran Sethia v. Ivan E.John*, (1977)1 S.C.C. 379: (1977)1 S.C.R. 853: A.I.R. 1977 S.C. 336 to contend that only if the alteration in question varies the rights, liabilities or legal position of the parties, it will be material alteration. According to him, since the suit is actually within time, as also found by the lower appellate Court, there is no variance, by the abovesaid alteration of the rights, liabilities or legal position of the parties, particularly, that of the defendants, In *Loonkaran Sethia v. Ivan E.John*, (1977)1 S.C.C. 379: (1977)1 S.C.R. 853: A.I.R. 1977 S.C. 336, the Supreme Court, observed as follows, after quoting a passage from Halsbury's Laws of England:-

"A material alteration, according to this authoritative work, is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed..... To the same effect are the observations made by the Privy Council in *Nathu Lal v. Gomti Kuar*, A.I.R. 1940 P.C. 160."

Nathu Lal v. Gomti Kuar, A.I.R. 1940 P.C. 160 has also observed that it cannot be said that an alteration in date is always material, irrespective of its effect upon the rights, liabilities or legal position

of the parties.

9. On the other hand, the learned counsel for the 1st respondent contends that the abovesaid observation of the Supreme Court was made only in relation to a material alteration of a deed and not a negotiable instrument. But, I do not think that there is any basis for such distinction, which is sought to be made by the said counsel between the material alteration of negotiable instrument and that of a deed. No authority also has been cited by the said counsel supporting the said argument. No doubt, the said counsel relied on the decision of K.M.Natarajan, J., in *Vythinathan v. Murugayya Padayachi*, 1985 T.L.N.J. 265, in this regard, but, in the said case, there was only an argument that *Loonkaran Sethia v. Ivan E. John*, (1977) 1 S.C.C. 379: (1977) 1 S.C.R. 853: A.I.R. 1977 S.C. 336, *Nathu Lal v. Gombi Kuar*, A.I.R. 1940 P.C. 160 and *Rajagopala v. AVadai Velar*, (1961) 1 M.L.J. 193: 74 L.W. 29: A.I.R. 1961 Mad. 251 (D.B.), consisting of P.V.Rajamannar, C.J., and Veeraswamy, J.) are in respect of deeds, and not a negotiable instrument. But, I do not find in the said case that such distinction as such, was accepted by the learned Judge, who decided the said case. No doubt, as pointed out by the learned counsel for the 1st respondent in the said decision in *Vythinathan v. Murugayya Padayachi*, 1985 T.L.N.J. 265, there was reference to *Rangaswami Reddi v. Doraiswami Reddi*, (1957) 2 M.L.J. 196: 70 L.W. 583: I.L.R. 1957 Mad. 987: 1957 M.W.N. 434: A.I.R. 1957 Mad. 715 (D.B.), consisting of the same P.V.Rajamannar, C.J., and another learned Judge. But in *Rangaswami Reddi v. Doraiswami Reddi*, (1957) 2 M.L.J. 196: 70 L.W. 583: I.L.R. 1957 Mad. 987: 1957 M.W.N. 434: A.I.R. 1957 Mad. 715 (D.B.), the issue was entirely different. On the footing that there actually a material alteration, the issue there was, whether the plaintiff therein was entitled to any relief, despite Sec.87 of the Negotiable Instruments Act making the promissory note in question void, and the court came to the conclusion that the plaintiff therein could not fall back on the original consideration, nor could he invoke Sec.65 of the Contract Act to sustain his claim.

10. In *Vythinathan v. Murugayya Padayachi*, 1985 T.L.N.J. 265, also, the date of the suit promissory note was altered, but it was found on facts that even without the said alteration, the suit would not be barred by limitation, in view of the

promulgation of moratorium Acts. Yet, the lower appellate court therein held that there was material alteration and in view of Sec.870 of the Negotiable Instruments Act, the suit promissory note had become void. K.M.Natarajan, J., who decided the said case, after setting out the rival submissions, concluded thus:

“But in view of the provisions of Sec.87 of the Negotiable Instruments Act and the ratio laid down by this court in *Rangaswami Reddi v. Doraiswami Reddi*, (1957) 2 M.L.J. 196: 70 L.W. 583: I.L.R. 1957 Mad. 987: 1957 M.W.N. 434: A.I.R. 1957 Mad. 715 (D.B.), it cannot be said that the decision rendered by the appellate Judge is erroneous and unsustainable.”

11. But, with due respect, I have to reiterate that no support can be drawn from *Rangaswami Reddi v. Doraiswami Reddi*, (1957) 2 M.L.J. 196: 70 L.W. 583: I.L.R. 1957 Mad. 987: 1957 M.W.N. 434: A.I.R. 1957 Mad. 715 (D.B.), to decide the question whether there was actually a material alteration, since the said decision proceeded on the footing that there was actually a material alteration and the only question there was whether despite material alteration, relief could be given to the plaintiff. Further, the abovesaid Sec.87 only speaks to the effect or consequence of material alteration. It does not say what “material alteration” is or in what cases there would be material alteration. Nor any of the other provisions of the Negotiable Instruments Act defines or explains “material alteration” That is why courts have been called upon to explain the same. In this connection, the Privy Council and the Supreme Court have adopted the meaning of the said terms as explained in Halsbury’s Laws of England. As already indicated, in applying the said meaning, no authority has been cited before me, which lays down that a distinction should be made between deeds on the one hand and the negotiable instruments on the other hand and that the said meaning cannot be applied to negotiable instruments. Therefore, I have to apply the abovesaid meaning given by the Supreme Court in *Loonkaran Sethia v. Ivan E. John*, (1977) 1 S.C.C. 379: (1977) 1 S.C.R. 853: A.I.R. 1977 S.C. 336. even with reference to material alteration of negotiable instruments. On so doing, I have only to conclude that the abovesaid alteration of the date of the suit promissory note in the present case, does not vary “the rights, liabilities or legal position of the parties” or “the

legal effect" of the suit promissory note, nor the said alteration "may otherwise prejudice the party bound" by the document. I reach this conclusion only because of the above referred to peculiar French Law that the limitation begins to run only from the date of demand. That is why, the above referred to alteration from the year 1975 to 1976, will have no bearing on the limitation question in the present case. No doubt, a Division Bench of this court in *Govindasami v. Kuppusami*, *I.L.R. 12 Mad. 239*, has held in a case where the date of the promissory note has been altered from 11th September to 25th September, that the said alteration materially affected the liability of the defendant, for it extended the time within which the plaintiff was entitled to sue. But, the said decision is not applicable to the present case, because the change of date in the present case does not and is also not likely to alter the law of limitation since the French Law, which alone is applicable to the present case, is different, as already indicated. Therefore, the change of date effected in the present case, will not amount to material alteration, in the light of the abovesaid observation of the Supreme Court as to the meaning of the said term. It must also be pointed out that the Supreme Court has also impliedly indicated, by approving the abovesaid meaning given in Halsbury's Laws of England that for material alteration, it is enough, if by alteration, prejudice is likely to cause though not actually caused ultimately to the party bound by the document. This is indicated by the expression used, "which may otherwise prejudice the party bound by the deed as originally executed", in the abovesaid observation of the Supreme Court, approving what is contained in Halsbury's laws of England, viewed in this light, the following observation in *Subramania Patta v. Porathana Andi*, (1942) 2 M.L.J. 303, which was also referred to by K.M.Natarajan, J. in *Vythinathan v. Murugayya Padayachi*, 1985 T.L.N.J. 265, is no doubt correct:

"The fact that an alteration does not ultimately involve any change in the rights and liabilities of the parties is not very germane to the consideration of the question whether it amounts to a material alteration within the meaning of Sec.87 of the Negotiable Instruments Act."

But the further observation therein, viz., "whether the change be prejudicial or beneficial to the maker does not in the least matter, "with due

respect, cannot be quite correct, since if the change "may prejudice" him—that is, it is likely to prejudice him it will be material alteration.

12. While so, in the present case, in view of the abovesaid peculiar French Law on limitation, which is applicable to the present case, there is no likelihood even of prejudice to the defendants because of the abovesaid alteration of the year 1975 to 1976. So, the said alteration cannot be termed a material alteration.

13. The lower appellate court has no doubt observed thus:

"Therefore in the present case, though it is true that the change of the year from 1975 to 1976 has not ultimately in any manner changed the right of the plaintiff as regards the limitation, there was every reason for the plaintiff to apprehend that the suit would be declared barred by limitation. This apprehension which prompted him to change the date would show that the alteration was a material one".

But, I do not find any evidence to show that the plaintiff had such "apprehension which prompted him to change the date." The 1st defendant, as D.W.1, did not whisper anything about such apprehension on the part of the plaintiff. D.W.2 is the scribe of the suit promissory note. He also did not whisper anything about the above referred to apprehension. No doubt the plaintiff himself did not choose to get into the witness box to depose that he did not have such apprehension. But from the said fact alone there is no warrant for coming to the conclusion that the plaintiff had such an apprehension at the time when he altered the date, particularly when the defendants have not even chosen to allege such apprehension on the part of the plaintiff. That apart, it is a moot point whether in the light of the above referred to Supreme Court observation as to the actual meaning of "material alteration", the existence or otherwise of such apprehension or even ulterior bad intention on the part of the plaintiff is germane to the issue whether the alteration is a material alteration or not.

14. In the result, the second appeal is allowed, the judgment and decree of the lower appellate court are set aside and that of the trial court are restored. However, in the circumstances of the case, there will be no order as to costs.

B.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No.60 of 1983

29th March, 1993.

S.Nagarathinam

...Appellant

v.

S.Balakathiresan and others

...Respondents.

Succession Act (XXXIX of 1925), Sec.180 - Doctrine of election - Principles - Election when arises - Legatee if can accept and reject the same instrument - Election once made, if can be revoked.

Sec.180 of Succession Act, 1989, corresponds to Sec.35(1) of the Transfer of Property Act which deals with the doctrine of election. The main principle is that there is an obligation on the legatee who takes a benefit under a Will or other instrument to give full effect to that instrument and if he finds that instrument purports to deal with something which it is beyond the power of the donor to dispose of but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit, the obligation of carrying the instrument into full and complete force and effect. He must elect either to retain his own property or to relinquish his own and take in its place property given to him by the Will. The doctrine of election rests on the principle that he who accepts a benefit under an instrument must accept the whole of it conforming with all its provisions and renouncing every right inconsistent with them. Election under Sec.180 arises wherever the legatee derived some benefit from the Will to which he would not be entitled except for the Will. In such a case, he has to elect whether to confirm the Will or dissent from it. He cannot accept and reject the same instrument. This is the foundation of the law of election. Election once made is irrevocable. [Paras. 4 & 7A]

Cases referred to:

Valliammal Achi v. Nagappa Chettiar, (1968)1 M.L.J. 347. [Para. 6]

Mani Mani v. Mani Joshua, (1970)1 S.C.R. 71. [Para. 7]

Bhau Ram v. Baij Nath Singh, (1962)1 S.C.R. 358: (1962)1 S.C.A. 368: A.I.R. 1961 S.C. 1327. [Para. 7]

M.V.Krishnan, for Appellant.

P.S.Sri Sailam, for Respondents.

The Judgment of the Court was delivered by *Thangamani, J.*: The appellant is the plaintiff in the trial court. Defendants 1 and 2 are his brothers. They are the sons of one Sankiah Pillai and Chithirathammal. While the third defendant is the wife of the first defendant, the fourth defendant is the wife of the second defendant. Door No.2 in Ramu Pillai Lane, South Veli Street, Madurai, described as item 1 in 'A' schedule appended to the written statement of the first defendant originally belonged to the mother of Sankiah Pillai. On the death of his mother Sankiah Pillai became exclusively entitled to this house as his separate property. He was also assigned an extent of 5 cents in Maruthur village. Sankiah Pillai bequeathed these two items in favour of the appellant by his Will Ex.A-1, dated 26.10.1966. The appellant claims that on the death of Sankiah Pillai on 29.12.1973, he became the exclusive owner of these properties. By the same Will Sankiah Pillai purported to bequeath 'A' schedule buildings and 'B' schedule lands and 'C' schedule nanja land described in the plaint. The appellant instituted O.S.No.213 of 1979 on the file of learned Subordinate Judge of Madurai for partition and separate possession of his 1/3 share in the abovesaid A, B and C schedule items and the items specified in Schedules D, E, F, G and H in the plaint. His claim was on the basis that A and B schedules are the family ancestral properties. The 'C' schedule property originally belonged to Chithirathammal, the wife of Sankiah Pillai. And on her death on 14.3.1978 it devolved on the appellant and defendants 1 and 2 who are her heirs. Plaint D and E schedule are house property and vacant site in Survey No.44/5 of Thirumalai Nagar Colony. Plaint 'F' schedule items are vessels while 'G' schedule are furniture, garments and other articles. Plaint 'H' schedule are jewels. Alleging that Sankiah Pillai had no right to dispose of plaint A, B and C schedule properties under Ex.A-1 Will, the appellant ignored the provisions of the Will regarding these items and claimed his 1/3 share therein. However, he did not include Door No.2. Ramu Pillai lane and the 5 cents plot referred to above and described as items 1 and 4 respectively in 'A' schedule to the written statement of the first defendant. He omitted to include them in any of the plaint schedules.

2. Defendants 1 to 4 contended that plaint D and

E schedules are the separate properties of defendants 3 and 4 respectively. All the items described in F, G and H schedules are not available. Out of items 1 to 44 specified in 'F' schedule, only 18 items are in existence. Of the silver articles, item 45 alone is available, and items 46 and 47 are not at all in existence. In 'G' schedule, items 1 to 3, 13, 14 and 15 are not in existence. The other items are available only in Door No.50, one of the family houses where the appellant himself is residing. In 'H' schedule jewels items 1 to 11 are not in existence. Items 12 to 15 weigh only 33 1/2 sovereigns. The first defendant has paid Court Fees and prayed for the allotment of his share and the share of his brothers.

3. Their main contention is that the appellant cannot approbate and reprobate at the same time regarding the terms of the Will. He cannot be allowed to avail the portion which is beneficial to him and repudiate those which are against him. The trial Court held that the appellant must be deemed to have repudiated Ex.A-1 Will and that Sankiah Pillai died intestate. It also found that plaintiff D and E schedule items are the separate properties of defendants 3 and 4 respectively. Regarding plaintiff schedules F, G and H, items specified in schedules B, C and D appended to the written statement of the first defendant alone are available. It also held that the lands and buildings mentioned in 'A' schedule to the written statement including Door No.2 Ramu Pillai Lane and the 5 cents of nanja land at Maruthur village are available for partition. Accordingly, the preliminary decree for partition and separate possession was passed in respect of plaintiff A, B and C schedules, the lands and houses described in 'A' schedule to the written statement of the first defendant and the movables mentioned in Schedules B, C and D appended to the written statement of the first defendant. The suit against defendants 3 to 14 was dismissed. Parties were directed to bear their respective costs.

4. Learned counsel for the appellant mainly assailed the findings of the trial court regarding the inclusion of Door No.2. Ramu Pillai lane and the 5 cents land in Maruthur village covered in 'A' schedule to the written statement in the preliminary decree on the basis that Sankiah Pillai died intestate. It is his argument that while the said property was validly bequeathed to him under Ex.A-1 Will, the disposition in favour of

defendants 1 and 2 in respect of plaintiff A, B and C schedule items cannot confer any right on the legatees. But, this argument runs counter to the express provision under Sec.180 of the Indian Succession Act which reads as under:

"Where a person, by his Will, professes to dispose of something in which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the Will."

This section corresponds to Sec.35(1) of the Transfer of Property Act which deals with the doctrine of election. The main principle is that there is an obligation on the legatee who takes a benefit under a Will or other instrument to give full effect to that instrument and if he finds that instrument purports to deal with something which it is beyond the power of the donor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect. He must elect either to retain his own property or to relinquish his own and take in its place property given to him by the Will. The doctrine of election rests on the principle that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. Election under Sec.180 arises wherever the legatee derives some benefit from the Will to which he would not be entitled except for the Will. In such a case he has to elect whether to confirm the Will or dissent from it. He cannot accept and reject the same instrument. This is the foundation of the law of election.

5. In this case the testator Sankiah Pillai had intended to dispose of the entirety of plaintiff A, B and C schedule properties over which he had no such disposing power by Ex.A-1. This intention appears on the face of Ex.A-1 Will by the express words employed. He has chosen to bequeath these items along with No.2. Ramu Pillai Lane over which he had exclusive right to dispose of. By instituting the suit for partition in respect of plaintiff A, B and C schedule properties the appellant has elected to repudiate the Will and dissent from it. So by the terms of Sec.180 he has necessarily to give up his right in No.2, Ramu Pillai Lane and the

5 cents plot which have to be divided among all the heirs as if Sankiah Pillai had died intestate. However, the trial Court is wrong in saying that the Will is void and he has died intestate. Under Sec.180 of the Indian Succession Act, it is only the legatee who is made to give up the benefits provided for him by the Will. It does not mean that the testator died intestate.

6. Learned counsel for the appellant relied on the decision in *Valliammal Achi v. Nagappa Chettiar*, (1968)1 M.L.J. 347, to assail the finding of the court below. In that case one Palaniappa's father Nagappa had considerable properties. This Nagappa made a Will making certain dispositions in favour of his own wife and gave the residue of his property to Palaniappa and appointed him as an executor of the Will. After Nagappa's death Palaniappa obtained probate of the Will and after providing for the legacies to others as indicated therein came into possession of the residue of the property. Later on the plaintiff Nagappa was adopted by Palaniappa. Dispute arose between Nagappa the adopted son of Palaniappa and Valliammai Achi the widow of Palaniappa as to the character of property left by Palaniappa's father Nagappa. It was found that all the properties left by Palaniappa's father were joint family properties of Palaniappa and his father which Palaniappa could acquire by survivorship on his father's death. It was urged on behalf of the appellant therein that Sec.180 would apply to the facts of that case for the property willed by Palaniappa's father was not his which he could Will away as it was joint family property in which Palaniappa who was a residuary legatee had also equivalent interest. Therefore Palaniappa had either to confirm the disposition or dissent from it, and his conduct showed that he had confirmed it for he took out probate. Therefore it must be held that after probate was taken out, the residue became the absolute property of Palaniappa and lost its character as joint Hindu Family property. The consequence of this was when Palaniappa adopted respondent Nagappa long after he had become the absolute owner of the properties, the respondent acquired no interest in them by virtue of the adoption. Palaniappa died after the Hindu Succession Act 30 of 1956 came into force. As there was no joint family property of Palaniappa and respondent Nagappa, the respondent could not claim half the property on the ground that it was joint family of himself and Palaniappa, as

Palaniappa's election to take under the Will of his father would bind him also. On the question of election held that as Palaniappa and his father were members of a joint Hindu family and as entire property left by Palaniappa's father was joint family property and Palaniappa had interest in the residue of the survivorship, there was no question of election by Palaniappa for all the property he got by the Will would have come to him by survivorship. In any case the Supreme Court pointed out that election under Sec.180 would only arise where the legatee derives some benefit from the Will to which he would not be entitled except for the Will. In such a case he has to elect whether to confirm the will or dissent from it. But where there is no question of legatee deriving any benefit from the Will to which he would not be entitled except for the Will, the fact that he confirms the Will and accepts what the Will provides would not amount to election, for he would have in any case got what the Will gave him. Thus election only arises where the legatee has to choose between his own property which might have been willed away to somebody else and the property which belongs to the testator and which the testator has given to the legatee by the Will. This decision cannot help the appellant in any manner because the facts therein are different from those in the present appeal. There what Nagappa Chettiar gave away under the Will belonged to the joint family of Nagappa Chettiar and his son Palaniappa in entirety. Even if there had been no Will, Palaniappa had a right by birth in it for a half share and on the death of his father would have become entitled to the entire property by survivorship. So the existence or otherwise of the will made no difference. But in the present case there were three sets of properties. While plaint A and B schedule properties belonged to the joint family of Sankiah Pillai and his three sons, 'C' schedule property belonged to his wife Chithirathammal. But he had dealt with these three items as his own along with No.2 Ramu Pillai Lane and 5 cents plot which are his exclusive properties. So the plaintiff had to choose either to ignore the Will and take his share in all the items as per the Law of Succession or to confirm the Will and get only what was bequeathed to him. Since he has elected to dissent from the Will and chosen to file the suit he cannot now be allowed to approbate and reprobate.

7. In *Mani Mani and others v. Mani Joshua*, (1970)1

S.C.R. 71, it has been laid down that under sec.180 of the Indian Succession Act, if a legatee has been given any benefit under a Will and his own property has also been disposed of by that very will, the legatee must elect either to confirm such disposition or to dissent from it, and in the latter case, he must relinquish all his claims under the Will if he chooses to retain his own property. The presumption being that a testator intends to dispose of only his own property, general words will not usually be construed so as to include a particular property over which he has no disposing power, unless, such an intention appears on the face of the Will either by express words or by necessary implication. In *Bhau Ram v. Baij Nath Singh*, (1962)1 S.C.R. 358; (1962)1 S.C.A. 368; A.I.R. 1961 S.C. 1327, the Apex Court has pointed out that a person who takes a benefit under an order *de hors* the claim on merits cannot repudiate that part of the order which is detrimental to him because the order is to take effect in its entirety. The existence of a choice between two rights is one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. While so, it is evident that there is no merit in the contention of the appellant.

7-A. Learned counsel for the appellant also submitted that even in this appeal he is entitled to make an election affirming the Will in entirety and claiming share on the basis of the Will as a whole. This is not possible since election once made is irrevocable. Moreover in this case, the plaintiff having made an election and filed the suit has put the defendants to unnecessary inconvenience and made them suffer expenditure. Hence he cannot be permitted to make a fresh election now.

8. The next contention raised in the appeal memo relates to D and E schedule properties. While defendants 3 and 4 claimed that these items are their separate properties, they have been included by the appellant in the plaint on the basis that they were acquired in the names of defendants with joint family funds. In view of Sec.4(1) and Sec.4(3)(a) of the Benami Transactions (Prohibition) Act 45 of 1988 this plea is no longer open to the appellant. The appellant has also not advanced any argument on this aspect.

9. The appeal memo further reads that the trial court has erred in holding that only the movables mentioned in B, C and D schedules of the written statement appended to written statement of first

defendant are available for partition. And the Court below ought to have held that 8 1/2 sovereigns are available with the first defendant belonging to the joint family and they are liable for partition. But the appellant as P.W.1 states in his evidence that he has given the details in F, G and H schedule only from his memory and there is no authentic record to establish that all these items are available in the joint family. Regarding these items the trial court has taken the view that excepting the averments in the written statement of the first defendant, there is nothing to suggest that all of them were taken away by defendants 1 and 2. And accordingly the preliminary decree has been passed only in respect of items disclosed as schedules B, C and D in the written statement of the first defendant. We find no reason to differ from the view of the trial court. And learned counsel for the appellant has also not challenged the same.

10. In the result, the appeal fails and is dismissed with costs of respondents 1 and 2.

B.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mishra and S.M.Ali Mohamed, JJ.

O.S.A.Nos.175 and 176 of 1986 21st January, 1993.

The State of Tamil Nadu represented by the Collector of Madras (Accommodation Wing), Madras

...Appellant

v.

M.Kazim Khaleeli and others

...Respondents.

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.3(5), proviso - Fair rent fixed for building taken over by Government - When becomes effective.

The fair rent fixed for the building taken over by the Government operates retrospectively from the date of tenancy subject to the law of limitation.

[Para. 12]

(B) Limitation Act (XXXVI of 1963), Art.52 - Suit

for enhanced rent - Limitation for - Starting point.
The right to sue for enhanced rent accrues when the enhanced rent is ascertained. [Para. 13]

Cases referred to:

State of Tamil Nadu v. K.N.Dhanasekaran, 93 L.W. 207. [Paras. 7, 10]

Mt. Bolo v. Mt. Koklan, 59 M.L.J. 621: 127 I.C. 737: A.I.R. 1930 P.C. 270: 57 I.A. 825. [Paras. 7, 13]

Rangayya Appa Rao v. Bobba Sriramulu, L.L.R. 27 Mad. 148 (P.C.). [Paras. 7, 13]

J.M.Andrews v. Radio Engineering Company, A.I.R. 1963 Mys. 113. [Para. 7]

Annamalai Chettiar v. Muthukaruppan Chettiar, 60 M.L.J. 1: 58 I.A. 1: A.I.R. 1931 P.C. 9. [Para. 13]

Gobinda Narayan Singh v. Sham Lal Singh, 61 M.L.J. 9: 58 I.A. 125: 131 I.C. 753: A.I.R. 1931 P.C. 89. [Para. 13]

Rukhmabai v. Laxminarayan, A.I.R. 1960 S.C. 335. [Para. 13]

O.S.Appeal under Clause 15 of the Letters Patent against the Order of S.A.Kader, J., dated 7.10.1985 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.Nos.276 of 1983 and 146 of 1981, respectively.

The Judgment of the Court was delivered by S.M.Ali Mohamed, J.: The above two appeals are against a common judgment of the learned single Judge in C.S.No.146 of 1981 and C.S.No.276 of 1983 respectively dated 7.10.1985. O.S.A.No.176 of 1986 is against C.S.No. 146 of 1981. The defendant-the State of Tamil Nadu, represented by the Collector of Madras (Accommodation Wing), is the appellant. The respondents herein are the plaintiffs. The plaintiffs filed a suit against the defendant-the State of Tamil Nadu, for recovery of a sum of Rs.43,66,959 with subsequent interest and costs. It is averred in the plaint that the premises known as, 'Rushkeyrum' bearing New Door No.149, Mount Road, Madras, belongs to the plaintiffs 2 to 8, who are the sons and daughters of the first plaintiff. The first plaintiff was the power of attorney agent of the plaintiffs 2 to 7 and property guardian appointed by the court of the eighth plaintiff who is a non-compose-mentis. The premises bearing New Door No.149, Mount Road, Madras, was taken over by the Accommodation Controller under Sec.3 of Madras Buildings (Lease and Rent Control) Act 1949 on 24.11.1956 and the same was allotted to the Director of Industries and Commerce, on a Provisional Rent of Rs.2,617.50 per month subject to fixation of fair rent. The

Accommodation Controller subsequently revised the provisional rent and fixed it at Rs.4,000, subject to fixation of fair rent with effect from 1.4.1961. The Director of Industries and Commerce vacated the premises, which was then re-allotted to the Tamil Nadu Electricity Board, in 1973. The State of Tamil Nadu is thus the statutory tenant of the premises in question. The plaintiffs filed a petition before the Rent Controller, Madras on 2.1.1974 for fixation of fair rent under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The Rent Controller fixed the fair rent of the premises on 22.4.1978 at Rs.28,000 per month. The plaintiff and the defendant preferred separate appeals in H.R.A.No.483 of 1970 respectively. The appellate authority dismissed the appeal filed by the defendant, but reduced the fair rent in the appeal filed by the first plaintiff to Rs.21,943. The plaintiff thereafter preferred a revision before this Court in C.R.P.No.756 of 1980. Pending disposal of the revision petition, the plaintiffs filed the above suit for recovery of the difference between the fair rent as fixed by the appellate authority and the tentative rent fixed by the Accommodation Controller after giving notice under Sec.80, C.P.C. 2. The case of the plaintiff before the trial court was that the fair rent in respect of the building taken over by the Accommodation Controller has retrospective operation from the date of taking over of the building and hence the plaintiffs were entitled to claim the difference between the fair rent and the provisional rent fixed by the Accommodation Controller, from 24.11.1956 when the building was taken over. However, they restricted the claim from 1.10.1960 when the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 under which the fair rent has been fixed came into force. The difference in rent from 1.10.1960 till 31.12.1980 came to Rs.43,72,584 and deducting the sum of Rs.5,625 towards the maintenance and repairs from the plaintiffs' claim of Rs.43,66,959. The plaintiffs further reserved their right to file a separate action after the disposal of C.R.P.No.756 of 1980. C.R.P.No.756 of 1980 was allowed on 29.10.1981 and the fair rent of Rs.28,000 per month was restored and thereafter, the plaintiff filed the second suit, viz., C.S.No. 276 of 1983, claiming a sum of Rs.15,18,288 with subsequent interest and costs thereon.

3. The appellant/defendant/the State of Tamil Nadu, raised the following contentions before the trial

court. The fair rent fixed by the Rent Controller in H.R.C.No.143 of 1974 at Rs.28,000 per month was to take effect only from the date of the petition. The appellate authority reduced the fair rent to Rs.21,943 and the High Court restored the order of the Rent Controller at Rs.28,000 per month, and there was no direction for payment of fair rent at the time of tenancy. It was further contended that the claim of the plaintiff was subject to Law of Limitation and at best, the plaintiffs would be entitled to claim the difference from a date three years before the date of the institution of the suit i.e., from 3.1.1978. The defendant has no objection for the plaintiffs' claim being allowed from 1978 till the date of filing of the suit and the claim beyond 3.1.1978 is barred by limitation. It was also contended that the plaintiff's claim was hit by O.2, Rule 2, Civil Procedure Code and is not maintainable.

4. On the above pleadings, the following issues were framed:

1. Whether any part of the claim of the plaintiffs for arrears of rent is barred by time?
2. Whether the suit is hit by O.2, Rule 2, Code of Civil Procedure?
3. To what reliefs are the plaintiffs entitled?

5. O.S.A.No.175 of 1986 is against C.S.No.276 of 1983. C.S.No.276 of 1983 was filed by the plaintiff claiming the difference between the fair rent finally fixed by the High Court. The fair rent was fixed by the appellate authority from 1.10.1960 upto 20.8.1981. The plaintiffs claimed a sum of Rs.15,18,288 with subsequent interest and costs. It is also averred that the plaintiffs sold the suit property to Sri Tirupurasundari Hotels Private Limited. The appellant-defendant- the State of Tamil Nadu raised the same contentions as in the earlier suit. On the above pleadings, the following issues were framed:

1. Whether any part of the claim of the plaintiffs for arrears of rent is barred by time?
2. Whether the suit is hit by O.2, Rule 2 of the Code of Civil Procedure?
3. To what reliefs are the plaintiffs entitled?

6. Both the suits were tried together as the subject matter of the litigation and the issues involved were the same by the learned single Judge.

7. In a well-considered judgment, learned single Judge has held that the plaintiffs were entitled to a decree as prayed for in both the suits and rejected the contentions of the defendant. With regard to

Issue No.1 in C.S.No.146 of 1981 and C.S.No.276 of 1983, the learned Single Judge following the rulings of this Court in Second Appeal No.1615 of 1969 in *Dr.S.S.David v. State of Madras represented by The District Collector, Coimbatore* and the ruling reported in *State of Tamil Nadu v. K.N.Dhanasekaran*, 93 L.W. 207, held that the fair rent fixed for the building taken over by the Government, as a statutory tenant is payable retrospectively from the date of the tenancy subject to Law of Limitation. With regard to the question of limitation, the learned Single Judge, following the rulings of Privy Council reported in *Mt.Bolo v. Mt.Koklan*, 59 M.L.J. 621: A.I.R. 1930 P.C. 270; 127 I.C. 737: 57 I.A. 825 and *Rangayya Appa Rao v. Bobba Sriramulu*, I.L.R. 27 Mad. 148 (P.C.) and also the ruling reported in *J.M.Andrews v. Radio Engineering Company*, A.I.R. 1963 Mys. 113, has held that no part of the claim is barred by limitation. With regard to Issue No.2, in both the suits, whether the suit claim is barred under O.2, Rule 2, Civil Procedure Code, since no submissions were advanced by the defendant, the learned single Judge has held that it was not shown as to how the suit is barred under the above provisions of Civil Procedure Code. The said issues in both the suits were also found against the appellant-defendant. Accordingly, the learned single Judge decreed the suit in C.S.No.146 of 1981 for a sum of Rs.43,66,957 with subsequent interest and costs and decreed the suit in C.S.No.276 of 1983, for a sum of Rs.21,77,229 with interest and costs. Aggrieved by the above common judgment, the State of Tamil Nadu have filed the above two appeals.

8. The learned counsel for the appellant contended that the fair rent fixed for the building taken over by the Government, will operate only from the date of filing of the application and not from the commencement of original tenancy. It is also contended that under Art.52 of the Limitation Act, 1963, the period of limitation for a suit for arrears of rent is three years from the date when the arrears become due. It is also contended that the suit claim is barred under O.2, Rule 2, C.P.C.

9. On the other hand, Mr.S.Govindaswaminathan, learned Senior Counsel appearing for the respondents-plaintiffs submitted that the contentions of the appellant-defendant are erroneous and unsustainable and there are no sufficient reasons to modify the well-considered judgment of the learned

Single Judge.

10. We are unable to accept the contentions of the learned counsel for the appellant to the effect that the fair rent fixed for the building taken over by the Government as a statutory tenant, will operate only from the date of filing of the application and not from the commencement of the original tenancy. In this connection, it is pertinent to point out that the premises known as, 'Rush Keyrum' bearing New Door No.149, Mount Road, Madras belonging to the plaintiffs 2 to 8 was taken over by the Accommodation Controller on 24.11.1956 under Sec.3 of the Madras Buildings (Lease and Rent Control) Act of 1949 and allotted to the Director of Industries and Commerce on a provisional rent of Rs.2,617.50 per month subject to the fixation of fair rent. The Accommodation Controller subsequently revised the provisional rent and fixed it at Rs.4,000 subject to fixation of fair rent with effect from 1.4.1961. The Director of Industries and Commerce vacated the premises and the same was allotted to the Tamil Nadu Electricity Board in 1973 and it is the admitted case that the State of Tamil Nadu is a statutory tenant of the premises in question. Even though the plaintiffs were entitled to claim the difference between the fair rent and the provisional rent fixed by the Accommodation Controller from 24.11.1956 when the building was taken over by the Government, they restricted the claim from 1.10.1960 when the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 under which the fair rent has been fixed, came into force. The plaintiff claimed the difference in the rent from 1.10.1960 to 31.12.1980. Ex.P-1 is the order of the Accommodation Controller dated 24.11.1956 and it clearly shows that the rent of Rs.2,617.50 per month, is subject to fixation of fair rent. Proviso 3 and 4 to Sec.3(5) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 runs as follows:

"Provided also that the rent payable shall be the fair rent, if any, fixed for the building under the provisions of this Act; and if no fair rent has been so fixed, such reasonable rent as the authorised officer may determine in such manner as may be prescribed;

Provided also that the reasonable rent fixed by the authorised officer under the foregoing proviso shall be subject to such fair rent as may be fixed by the controller."

It is therefore clear the provisional rent fixed by

the Accommodation Controller is subject to fixation of the fair rent under the provisions of the Act. The plaintiffs filed H.R.C.No.143 of 1974, before the Rent Controller, Madras, on 2.1.1974 to fix the fair rent and the Rent Controller fixed the fair rent on 22.4.1978 at Rs.28,000 per month. The learned single Judge has followed the ratio laid down by M.M.Ismail, J., (as he then was) in S.A.No.1615 of 1969 in the case of *Dr.S.S.David v. State of Madras* and a Division Bench of this Court in the case reported in *State of Tamil Nadu v. K.N.Dhanasekaran*, 93 L.W. 207, and has held that the fair rent fixed for the building taken over by the Government operates retrospectively from the date of tenancy and the recovery of the excess rent is subject to the Law of Limitation.

11. In the above case, the question before the Division Bench of this Court was when a building has been taken over by the Government, under Tamil Nadu Buildings (Lease and Rent Control) 1960 as amended by Act 23 of 1973 and when the Government became tenant as provided under the Act, whether the Government is liable to pay fair rent fixed under the Act subsequent to such tenancy from the date of the commencement of tenancy or from the date of the application for fixing the fair rent.

12. The Division Bench after considering the relevant provisions of the Act independent of the reasoning of Ismail, J., in S.A.No.1615 of 1969 was of the following view:

"The fair rent fixed pursuant to the proviso to Sec.3(5) of the Act will become effective from the date of commencement of the original tenancy itself subject to the Law of Limitation regarding the recovery of excess, where the fair rent fixed is more than the reasonable rent fixed by authorised officer. Where the fair rent fixed is less than the reasonable rent fixed by the authorised officer, then Explanation to Sec.3(5) would be attracted and the recovery of the excess amount or adjustment of the same shall be governed by the terms of the Explanation."

In view of the ratio in the above ruling of this Court, the learned single Judge was right in holding that the fair rent fixed for the building taken over by the Government operates retrospectively from the date of tenancy subject to the Law of Limitation. We find no reason to differ from the findings of the learned single Judge. Therefore, we

reject the contention of the learned counsel for the appellant that the fair rent fixed for the building taken over by the Government will operate only from the date of filing of the application and not from the commencement of original tenancy.

13. It was also contended by the learned counsel for the appellant that under Art.52 of the Limitation Act, 1963, the period of limitation for a suit

for arrears of rent is three years from the date when the arrears become due and at best the plaintiffs would be entitled to claim a difference from a date three years before the date of institution of the suit, i.e. from 3.1.1978. We are unable to accept the above contention of the learned counsel for the appellant. Art.52 of Limitation Act, 1963 reads as follows:

Description of suit	Period of Limitation	Time from which period begins to run
For arrears of rent	Three years	When the arrears become due.

A similar provision in Art.110 of Schedule II of Indian Limitation Act (Act XV of 1877) which prescribes for a suit for arrears of rent, a period of limitation of three years reckoned from the time when the arrears become due was the subject matter of judicial scrutiny by the Judicial Committee of the Privy Council, in the case of *Rangayya Appa Rao v. Bobba Sriramulu*, I.L.R. 27 Mad. 148 at 150 (P.C.) and it was held as follows:

"The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all. In such an act, the falling due of rent naturally means the falling due of an ascertained rent, which the tenant is under an obligation to pay and which the landlord can claim and, if necessary, sue for....

As long as proceedings are pending before the Collector and on appeal from him, before the civil courts, the rate of rent is in suspense, for no one can say what it will prove to be and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act."

Therefore, the right to sue for enhanced rent accrues when the enhanced rent is ascertained. With regard to when the right to sue accrues, the leading decision on the subject is that of the Privy Council in *Mt. Bolo v. Mt. Koklan*, 59 M.L.J. 621: 127 I.C. 753: A.I.R. 1930 P.C. 270: 57 I.A. 825.

Therein, Sir Benod Mitter observed as follows:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

The said principle was restated and followed by

the Judicial Committee in *Annamalai Chettiar v. Muthukaruppan Chettiar*, 60 M.L.J. 1: 58 I.A. 1: A.I.R. 1931 P.C. 9 and in *Gobinda Narayan Singh v. Sham Lal Singh*, 61 M.L.J. 9: 58 I.A. 125: 131 I.C. 753: A.I.R. 1931 P.C. 89 and the same view has been followed by our Supreme Court in the case reported in *Rukhmabai v. Laxminarayan*, A.I.R. 1960 S.C. 335.

14. In the instant case, the enhanced rent was payable and fell due only when the enhanced rent was ascertained, i.e. when the fair rent was fixed by the Rent Controller on 22.4.1978 in H.R.C.No.143 of 1974 at Rs.28,000 per month. The respondent/plaintiff has filed the suits only after the fair rent was ascertained and fixed by the Rent Controller in H.R.C.No.143 of 1974. It is, therefore, clear that from the date when the fair rent was fixed, the arrears of rent became due and the cause of action to sue accrued with regard to Art.52 of Limitation Act, 1963. Therefore, the learned single Judge was right in his view that, "where the right asserted in the suit itself came into existence within the prescribed period before the date of the suit, it is obvious that its infringement, if any, must be within such period and consequently, no question of limitation arises." In view of the above rulings of the Privy Council and the Supreme Court, we are of the view that the findings of the learned Single Judge on this issue is correct and we reject the contention of the learned counsel for the appellant.

15. The last contention of the learned counsel for the appellant is that the suit claim is barred under O.2, Rule 2 of C.P.C. But no arguments were advanced before the learned Single Judge on this point and before us also, no arguments were advanced to substantiate the contention that the suit claim is barred under O.2, Rule 2, C.P.C. In

view of the above, we reject the contention of the learned counsel for the appellant. The learned Single Judge has elaborately considered all the contentions raised by the appellant-defendant and has given a well-considered judgment and the appellant-defendant has not made out any case both on facts and in law to set aside the common judgment.

16. In view of the above, both O.S.A.Nos.175 and 176 of 1986 are dismissed and the judgment and decree in C.S.No.146 of 1981 and C.S.No.276 of 1983 respectively are confirmed. On the peculiar facts and circumstances of the case, there is no order as to costs.

B.S. ---- Appeals dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Srinivasan and Thangamani, JJ.

App.No.817 of 1982. 25th February, 1993.

Nallaya Gounder and another ...Appellants
v.
P.Ramaswami Gounder (died) and others
...Respondents.

Specific Relief Act (XLVII of 1963), Secs.9 and 10 - Person asking for specific performance - Not coming forward with clean hands - Relief refused.

In the present action, the court has no hesitation in negating specific performance for the reason that the plaintiffs have not come forward with clean hands in asking for the equitable relief.

[Para 15]

Cases referred to:

Ramaswamy Gounder v. Venkatachalam, (1976)1 M.L.J. 243. [Para. 16]

Vyapuri v. Vijayan, 1978 T.L.N.J. 62. [Para. 16]

Abdul Khader Rowther v. Sara Bai, (1989)4 S.C.C. 313. [Para. 16]

Premi Raj v. D.L.F. Housing and Construction (Private) Limited, (1968)3 S.C.R. 648. [Para. 16]

G.Subramaniam, Senior Counsel, for

K.Govindarajan, for Appellants.

K.Doraiswami, Senior Counsel, for Mrs.Muthumani Doraiswami, for Respondents.

The Judgment of the Court was delivered by Thangamani, J.: Appeal against the judgment and decree of learned Subordinate Judge of Salem in O.S.No.124 of 1981 on his file.

2. The appellants are defendants 4 and 5 in the trial Court. Respondents-plaintiffs instituted the suit for specific performance against the appellants and three others alleging that on 27.8.1980 defendants 1 to 3 entered into Ex.A-1 sale agreement with them undertaking to sell the suit properties for Rs.52,500. They received a portion of the sale price of Rs.20,000 as advance and agreed to receive the balance of Rs.32,500 within a period of 5 1/2 months from that date and to execute the sale deed in favour of the plaintiffs. On 16.11.1980 which corresponds to the 1st of Tamil month Karthigai the plaintiffs were put in possession of the properties as agreed and since then they are in actual enjoyment of them. Appellants were aware of Ex.A-1 agreement as well as handing over possession of the properties to the plaintiffs by defendants 1 to 3. Since defendants 1 to 3 were postponing the execution of the sale deed, the plaintiffs convened panchayat thrice. The last panchayat took place at the house of Village Munsif of Konnaray on 1.1.1981 in which defendants 1 to 3 undertook to execute the conveyance on 7.1.1981. Appellants were also present along with defendants 1 to 3 in that panchayat. However, defendants 1 to 3 and the appellants have colluded together and created Ex.B-2 sale agreement dated 5.3.1980 in favour of the appellants on 3.1.1981 by ante dating the same. Ex.B-1 sale deed dated 2.1.1981 was also executed by defendants 1 to 3 in favour of the appellants in respect of the suit properties fraudulently in order to deprive the plaintiffs of their right. The recitals as to consideration, possession are all false and fabricated so as to get over the right of the plaintiffs under Ex. A-1 agreement dated 27.8.1980. Appellants cannot derive any right, title or interest in the suit properties by virtue of Ex.B-1 sale deed. Appellants are not *bona fide* transferees for value without notice of the earlier agreement for sale in favour of the plaintiffs and their possession.

3. Defendants 1 to 3 remained *ex parte* in the suit.

4. The appellants resisted the suit denying that Ex.A-1 came into existence on 27.8.1980 and that

the plaintiffs were ever in actual possession of the properties and that there was any medication in this connection. They pleaded that they lawfully entered into Ex.B-2 agreement with defendants 1 to 3 on 5.3.1980 and in pursuance of the same defendants 1 to 3 conveyed the suit properties in favour of them under two sale deeds Ex.B-1 dated 2.1.1981 and Ex.B-9 dated 13.1.1981. They were also put in actual possession of the suit properties. Till then their vendors alone were in enjoyment of the properties and Ex.B-2 agreement is not an anti-dated one.

5. Holding that Ex.A-1 is a genuine agreement and there is nothing to suspect that it was created later on by antedating the instrument, that appellants were aware of the existence of Ex.A-1 agreement, that possession was delivered to the plaintiffs as per Ex.A-9 delivery receipt dated 16.11.1980, that Ex.B-2 sale agreement was created by ante-dating the same and that the plaintiffs had come to court with clean hands, the trial court decreed the suit with costs for specific performance.

6. The endeavour of Mr.G.Subramanian, learned senior counsel for the appellants was mainly to place before the Court the suspicious circumstances attendant on the transactions and to demonstrate that Ex.A-1 sale agreement dated 27.8.1980 was created subsequent to the coming into existence of Ex.B-2 agreement on 5.3.1980. In other words, his argument was that Ex.B-2 agreement preceded Ex.A-1 agreement. The first submission in this connection relates to delivery of possession of the property. It is the evidence of the first plaintiff as P.W.1 that on 27.8.1980 defendants 1 to 3 agreed to convey the suit items to them for Rs.52,500 and received an advance of Rs.20,000. The sale deed was to be executed within a period of 5 1/2 months. He was willing to pay the balance of sale consideration and get the sale deed executed. On 16.11.1980 defendants 1 to 3 handed over possession of the properties to him as per Ex.A-9 delivery receipt. Learned senior counsel for the appellants pointed out that as per the recitals in Ex.A-1 the property in Survey No.231/1 is a plot of 30 cents with a five anganam thatched shed thereon. 1st defendant Periyakaruppa Gounder and third defendant Nallammal are to enjoy this property till their life time and only thereafter appellants are to take possession of the same. There is no reason why contrary to the express recitals in Ex.A-1 defendants 1 and 3 should have

surrendered the right to reside in that house till their life time. None of the witnesses examined on the side of the plaintiffs seeks to give any explanation on this aspect. So in all probability plaintiffs were never given possession as indicated in Ex.A-9 delivery receipt.

7. Ex.A-1 agreement reads that the properties are to be handed over to the prospective purchasers on the 1st of Karthigai month. The specific averments in the plaint are to the effect that defendants 1 to 3 are closely related to defendants 4 and 5, and they are colluding with each other. It is not the evidence of the first plaintiff as P.W.1 that defendants 1 to 3 are in any way related to or interested in him. While so, it passes one's comprehension as to the necessity or urgency for defendants 1 to 3 to undertake and later on hand over possession of the properties to the plaintiffs even before receiving sale consideration in full. Besides the version of the first plaintiff as P.W.1 that because there were standing cotton crops, the vendors undertook to hand over possession on the first of Karthigai month does not inspire confidence. Had it been the real reason, certainly this would have found a place in Ex.A-1 sale agreement itself.

8. Ex.A-9 purports to be a delivery receipt dated 16.11.1980 evidencing handing over possession of the suit properties by defendants 1 to 3 in favour of the plaintiffs. No doubt Ex.A-1 agreement recites that on the 1st of Tamil Month Karthigai the vendors are to hand over possession to the vendees. And in Ex.A-3 the notice dated 6.1.1981 issued by the plaintiffs to the defendants stating that Ex.B-2 agreement has been created by ante-dating mention is made about the plaintiffs taking possession on 16.11.1980. However, it is significant to note that this notice makes no reference to Ex.A-9 delivery receipt. Even the plaint is conspicuously silent about the execution of Ex.A-9 delivery receipt, even though there is an allegation that possession was handed over on 16.11.1980. Besides, a scrutiny of Ex.A-9 reveals that it has been filed into Court only on 28.6.1982 during trial. Had it really been in existence on the date of document, such a vital piece of evidence would not have been failed to be disclosed in the list of documents appended to the plaint.

9. P.W.2 Kuppanna Gounder is an ancestor to Ex.A-9 delivery receipt. He owns lands adjacent to the suit properties. It is significant to note that

when he was examined on 24.6.1982, he merely stated that on the 1st of Tamil Month Karthigai possession was delivered and he attested delivery receipt. However, the said receipt was not placed before him on that day. Even P.W.1 who was examined on 24.6.1982 stated that delivery of property was given to him on 16.11.1980. He made no mention of the existence of this receipt on that day. Only when he was again examined on 28.6.1982 Ex.A-9 was produced and marked through him. P.W.2 also identified his signature in Ex.A-9 only when he was examined for the second time on 29.6.1982. Further this witness admits in cross-examination that subsequent to Ex.A-1 he had never visited the suit properties. Evidently he could not have had any personal knowledge of the handing over of possession as per Ex.A-9 delivery receipt. So there is substance in the argument of learned senior counsel for the appellants that Ex.A-9 delivery receipt was got up for the occasion as an after thought when the trial proceeded. And the evidence of P.W.1 that the appellants were present at the time of delivery is only an attempt to attribute knowledge of Ex.A-1 agreement to them.

10. Yet another factor brought to our notice by learned senior counsel for the appellants is this. P.W.1 states in the witness box that on 26.8.1980 he purchased some other property for Rs.22,200 from defendants 1 to 3 under Ex.A-8. There was no written agreement preceding the said sale. At the time of Ex.A-8 he was in possession of one lakh rupees. After paying the sale consideration of Rs.22,200 under Ex.A-8 the balance was remaining with him. And as per the version of P.W.2 Kuppanna Gounder, the plaintiffs were ready to pay the money and get the sale deed executed in their favour. While so it is not known why the suit properties were not also purchased along with the items conveyed under Ex.A-8. There was absolutely no reason for entering into Ex.A-1 agreement on the same day undertaking to complete the sale transaction within a period of 5 1/2 months from that day.

11. P.W.2 Kuppanna Gounder and P.W.3 Kuppusubramaniam are the attestors to Ex.A-1 agreement. P.W.4 Hanumantha Rao purports to be the scribe of this agreement. While P.W.3 Kuppusubramaniam is the karnam of Elachipalayam, P.W.4 Hanumantha Rao is the Karnam of Kilapalayam village. P.W.1, the first plaintiff is categorical in his version that Ex.A-1 was written in the

house of Kilapalayam Karnam, though in the first instance they only went to the house of P.W.3 to write the document there, whereas P.Ws.2 to 4 would say that this agreement was written in the house of P.W.3 only. The first plaintiff as P.W.1 says that Ex.A-8 sale deed was written and registered on the same day and the terms of the agreement under Ex.A-1 were also concluded on that day, but it was written only on the next day. We find from Ex.A-8 that that sale deed was written on 26.8.1980 and registered on 27.8.1980. Further according to P.W.2 Kuppanna Gounder, they left Mallasamudram at 3.15 p.m. and reached Elachipalayam at 4.00 P.M. And P.W.3 Kuppusubramaniam says that Ex.A-1 was written at his residence from 4.00 P.M. to 5.00 P.M. on 27.8.1980. But the endorsement in Ex.A-8 reveals that this sale deed was registered between 3.00 and 4.00 P.M. on that day. P.W.2 Kuppanna Gounder is one of the attestors to Ex.A-8. P.W.4 Karnam of Kilapalayam is the scribe of this sale deed. When these persons were available in Mallasamudram itself, it is not known why Ex.A-1 was not written there itself on the date of registration of Ex.A-8 sale deed. It is also significant to note that P.W.4 Karnam nowhere states that he wrote Ex.A-1, though he has chosen to give evidence that the defendants 1 to 3 executed the agreement wherein the plaintiffs also affixed their signature and thumb impression. The infirmities in the evidence of P.Ws.1 to 4 certainly cast doubt about the credibility of their versions regarding the coming into existence of Ex.A-1 agreement.

12. Ex.B-2 is the agreement dated 5.3.1980 executed by defendants 1 to 3 in favour of the appellants in respect of the suit properties. The 5th defendant as D.W.1 says that pursuant to the same they purchased the property under Ex.B-1 the sale deed dated 2.1.1981. Since one item was omitted to be included in the sale deed, later on they got Ex.B-9 executed in their favour on 13.1.1981. Ex.B-2 agreement has been attested by D.W.2 Kandasamy Gounder. He speaks about the typing of this agreement at the Sub Registrar's Office at Tiruchengodu and the passing of Rs.15,000 part of sale consideration. The stamp paper for Ex.B-2 has been purchased in the name of 5th defendant Kulandaivel at Thammampatti on 20.2.1980. Mr.K.Doraiswami, learned senior counsel for the respondents laid stress on the purchase of the stamp paper at Thammampatti and argued that on

coming to know of Ex.A-1 agreement, the appellants went in search of old stamp papers and connected Ex.B-2 agreement with the aid of one they secured at distant Thammampatti. Even the trial Court discarded Ex.B-2 on the ground that to create antedated agreement stamp papers were searched for and purchased at Thammampatti which is 50 miles away from Mallasamudram, while admittedly there is a Sub Registrar's Office at Mallasamudram and stamp papers are available there. However, on a careful scrutiny of the evidence on record, we do not feel convinced of this claim. It is seen that as per the evidence of D.W.1 Kulandaivel, 20 days prior to Ex.B-2 the negotiation for sale was over in the house of the first defendant. Five days later he purchased the stamp paper and 10 or 15 days subsequent to that date Ex.B-2 was written. It is not as if the stamp paper for Ex.B-2 sale deed stands in the name of somebody else. If it is so, one can argue that an old stamp paper was searched for and obtained in order to create an antedated agreement. But it is significant to note that the stamp paper for Ex.B-2 stands only in the name of 5th defendant Kulandaivel. Be it also seen that the stamp papers for Ex.B-1 sale deed have been purchased in the name of 5th defendant Kulandaivel in Madras as well as Salem. D.W.1 has denied the suggestion that on coming to know of Ex.A-1 sale agreement a search was made for old stamp paper in all the places and since it was available only at Thammampatti, the stamp paper was purchased there and the agreement was written by putting an earlier date. But there is one fallacy in this claim. Be it noted that Ex.A-1 agreement has come into existence only on 27.8.1980. Whereas the stamp paper for Ex.P-2 has been purchased on 20.2.1980. So evidently the stamp paper for Ex.B-2 could not have been purchased on coming to know of the existence of Ex.A-1 agreement.

13. Ex.A-21 is a duplicate of Ex.B-2 agreement. Besides, reciting all the contents of Ex.B-2, Ex.A-21 contains the signatures of the executants. D.W.2 alone figures as a witness in both Exs.B-2 and A-21. While one Palani Gounder son of Sengoda Gounder is an attester in Ex.B-2, in the other agreement one Palaniappan son of Subbu Gounder is the attester. Of course there are some discrepancies in the schedule of property in the two agreements. While Ex.B-2 makes mention of S.F.No.231/3, in Ex.A-21 it is typed as Survey

No.231/34. But extent and assessment are the same in both the documents. Evidently it is a typographical error. Further, while Ex.B-2 makes mention of Survey No.232/2, that survey filed does not find a place in Ex.A-21. It is possible that this last item in Ex.B-2 is an omission in Ex.A-21. There is no reason for not accepting the testimony of D.W.1 that because the first defendant wanted a copy, they typed Ex.A-21 and handed it over to him. This witness further says that all of them signed in that copy and the person who typed also affixed his signature to the same. And the view of learned Subordinate Judge that because of these discrepancies, Ex.B-2 is an antedated agreement does not appear to be sound.

14. Further, learned senior counsel for the appellants drew our attention to the fact that this Ex.A-21 was marked during the cross-examination of D.W.1 by the plaintiffs' counsel. As per the evidence of D.W.1. Ex.A-21 was handed over to the first defendant since he wanted a copy of Ex.B-2 agreement. There is no explanation as to how this document found its way into the hands of the plaintiffs. Evidently it should have been handed over to them by the first defendant. This factor clinchingly points out the collusion between defendants 1 to 3 on one hand and the plaintiffs on the other. As a corollary it follows that Ex.A-1 document could have necessarily come into existence later on after the agreement under Ex.B-2 was entered into on 5.3.1980. Probably defendants 1 to 3 wanted to go back on the agreement since the plaintiffs who are neighbouring land owners chose to offer higher price on coming to know of Ex.B-2 in favour of the appellants. That Ex.A-6 the prior title deed executed in favour of the first defendant was produced by the plaintiffs also goes to strengthen the view that the collusion was only between the plaintiffs and defendants 1 to 3. We find as per the plaint averment, "the plaintiffs convened panchayat thrice and the last panchayat took place at the house of the Village Munsif of Konnayar on 1.1.1981 in which it was decided and the defendants 1 to 3 agreed to convey the suit properties to the plaintiff free of all encumbrances at their cost on 7.1.1981. The panchayatdars are Sellappa Gounder, son of Periya Gounder, Sankaranpalayam, (2) Kaliyanna Gounder, Nallamapalayam, (3) Ponnayaru Poon Gounder, Kuppuswami Gounder, Selliyamman Koil Trustee, Konnarayar and Ex.V.M. of Konnayar." However, in his

evidence P.W.1 gives the names of panchayatdars as Kuppanna Gounder, Konnayar Munsif, Sellappa Gounder, Pulli Gounder and Subramanian. The discrepancy in the names of the panchayatdars mentioned in the plaint and the evidence has not been explained. And the plaintiffs have not chosen to examine any of the panchayatdars to substantiate their allegations. Though Ex.A-3 notice has been issued on 6.1.1981, subsequent to the date of the last panchayat, the said panchayat is not referred to this notice. Ex.A-1 agreement stipulates that the sale is to be completed within 5 1/2 months from 27.8.1980. However, the plaintiffs have not given any reason for convening three panchayats within the date agreed to under agreement Ex.A-1. While the date of the last panchayat alone finds a place in the plaint, the dates of other panchayats are neither pleaded nor spoken to in evidence. So there could be no doubt that this plea of panchayat is also far from truth. In the circumstances, we are of the view that it is Ex.B-2 agreement which preceded Ex.A-1 agreement and not *vice versa* as concluded by learned trial Judge.

15. Learned senior counsel for the appellants next submitted that the remedy of specific relief being an equitable one, the plaintiffs must come to court with clean hands. In this case there is positive proof that Ex.A-9 delivery receipt has been concocted for the purpose of this case. We have also seen that the plaintiffs have put forward a false case regarding convening of panchayat. So even if we are to take that Ex.A-1 agreement has come into existence prior to Ex.B. agreement, the plaintiffs cannot maintain this action. In support of his contention he cited the decision of Ismail, J. (as he then was) in *Ramaswamy Gounder v. Venkatachalam*, (1976) 1 M.L.J. 243. In that case, the plaintiff denied in his evidence that he averred in the plaint that the defendants did not come to the Sub-Registrar's office. Further, while the allegation in the plaint was to the effect that prior to a particular date he had tendered the entire balance of Rs.14,000 to the defendant, it was borne out from his evidence that he came into possession of part of the money only at a later date. There was also discrepancy in his evidence regarding the persons in whose names the stamp papers were purchased. Besides, his version in the witness box on the receipt of the notice was not consistent with the averment in the plaint. On the question whether the plaintiff would be entitled to the relief of

specific performance, it was held that the falsity of the case put forward by the plaintiff disentitled him from obtaining the discretionary relief of specific performance of agreement. The falsity of the case directly impinged on the essential ingredients and elements necessary for claiming the relief. In *Vyapuri v. Vijayan*, 1978 T.L.N.J. 62, the court found that a sum of Rs.11,000 was not paid as advance as contended by the plaintiff and that what was paid was only a sum of Rs.1,000. The Division Bench comprising of Ismail and Nainar Sundaram, JJ. held that the plaintiff who comes to the Court with a false case in material ingredients necessary for the grant of relief of specific performance will not be entitled to the equitable remedy and is in the discretion of the Court, which discretion has to be exercised according to recognised principles of law and not arbitrarily. In Appeal No.355 of 1984 we had occasion to consider the same question. In that case the appellant based his relief on Ex.A-1 agreement after making interpolation so as to make it appear that he has a right in it. On the ratio laid down in the decisions referred to above, this Bench took the view that that was sufficient to refuse the relief to the appellant. So, in the present action also we have no hesitation in negating specific performance for the reason that the plaintiffs have not come forward with clean hands in asking for the equitable relief.

16. Under Sec.16(c) of the Specific Relief Act, specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendants. Learned senior counsel for the appellants submitted that the plaint in this case did not contain any averment to the effect that the plaintiffs made a demand for specific performance and there was a refusal on the part of defendants 1 to 3 to comply with the said demand. It will not be sufficient if the plaintiff pleads and proves that he is ready and willing to perform his part of the contract, but he must also plead that he made a demand on the defendant for performance of the contract and the defendant refused to comply with the same and that the language of Rule 3 of O.6 of the Code of Civil Procedure is mandatory and any plaint in a suit for specific performance has to be strictly in

conformity with Form No.47 or 48 of Appendix A of the Code of Civil Procedure learned counsel for the appellants further pointed out that the plaint does not contain averments regarding cause of action also. He relied on the decision in *Abdul Khader Rowther v. Sara Bai*, (1989)4 S.C.C. 313, wherein the Apex Court has laid down; "A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Prem Raj v. D.L.F. Housing and Construction (Private) Limited*, (1968)3 S.C.R. 648, that it is well settled that in a suit for specific performance that plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of

such an allegation the suit is not maintainable".

17. A perusal of Form Nos.47 and 48 shows that in a suit for specific performance there must be averments to the effect that plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so. The plaintiff was still ready and willing specifically to perform the agreement on his part of which the defendant had notice. And we find from the plaint that besides stating that they are ready and willing to perform their part of the contract mention is made of the plaintiffs convening panchayat thrice and defendants 1 to 3 agreeing to execute the conveyance and later on selling the properties in favour of the appellants under Exs.B-1 and B-9. So in our view there is sufficient compliance of the requirements of Forms 47 and 48 of Appendix-A of the Code of Civil Procedure.

18. In the result, the appeal is allowed and the judgment and decree of the trial court are set aside and the suit is dismissed with costs of defendants 4 and 5 (appellants) throughout.

B.S.

Appeal allowed.

[End of Volume (1993)1 M.L.J. (Reports)]

property and thereafter the assets should be applied in rateable payment to each partner of what is due to him firstly on account of advances as distinguished from capital and secondly on account of capital, the residue, if any, being divided rateable among all the partners. It is obvious that the Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and it will, therefore, be correct to say that, for the purposes of the Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is, in the words of Lindley: 'his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged.'

12. In *Commissioner of Income Tax, West Bengal, Calcutta v. Juggilal Kamalapat*, (1967)1 S.C.J. 177: (1967)1 S.C.R. 784: A.I.R. 1967 S.C. 401, the facts were that three brothers and one J entered into a partnership business. The firm owned both moveable and immoveable properties. Sometime thereafter the three brothers created a Trust with themselves as the first three trustees and simultaneously executed a deed of relinquishment relinquishing their rights in and claims to all the properties and assets of the firm in favour of J and of themselves in the capacity of trustees. Thereafter a new partnership firm was constituted between J and the Trust with specified shares. The Trust brought a sum of Rs.50,000 as its capital in the new firm. The new firm applied for registration under Sec.26-A of the Income Tax Act, 1922, but the application was rejected by the authorities. The tribunal held that the deed of relinquishment being unregistered could not legally transfer the rights and the title to the immoveable properties owned by the original firm to the trust. Since the immoveable properties were not separable from the other business assets it held that there was no legal transfer of any portion of the business assets of the original firm in favour of the trust. A reference was made to the High Court on the question whether the new partnership legally came into existence and as such should be registered under Sec.26-A. The High Court held that there was no impediment to its registration. The matter was brought in appeal before this Court. This Court

pointed out that the deed of relinquishment was in respect of individual interests of the three brothers in the assets of the partnership firm in favour of the Trust and consequently, did not require registration, even though the assets of the partnership included immoveable property. In taking this view reliance was placed on the decision *Ajudhia Pershad Ram Pershad v. Sham Sunder*, A.I.R. 1947 Lahore 13, as well as the decision of this Court in *Addanki Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1966 S.C. 1300: (1966)2 M.L.J. (S.C.) 60: (1966) An.W.R. (S.C.) 60: (1966)2 S.C.J. 490: (1966)3 S.C.R. 400.

13. Again in *C.I.T., Madhya Pradesh v. Dewas Cine Corporation*, A.I.R. 1968 S.C. 676: (1968)2 S.C.R. 173: (1968)1 S.C.J. 691: (1968)1 I.T.J. 444, the partnership firm was dissolved and on dissolution it was agreed between the partners that the theatres should be returned to their original owners who had brought them into the books of the partnership as its assets. In the books of account of the partnership the assets were shown as taken over on October 1, 1951 at the original price less depreciation, the depreciation being equally divided between the two partners. In the proceedings for the assessment year 1952-53 the firm was treated as a registered firm. The appellate tribunal held that restoration of the two theatres to the original owners amounted to transfer by the firm and the entries adjusting the depreciation and writing off the assets at the original value amounted to total recoupment of the entire depreciation by the partnership and on that account the second proviso to Sec.10(2)(vii) of the Income Tax Act, 1922 applied. The High Court in reference upturned the decision of the Tribunal and held in favour of the assessee against which the Revenue appealed to this Court. This Court after referring to Secs.46 and 48 of the Partnership Act held that on the dissolution of the partnership each theatre must be deemed to be returned to the original owner in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. In law there was no sale or transfer by the partnership to the individual partners in consideration of their respective share in the residue. In taking this view reliance was once again placed on the decision of this Court in *Addanki Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1966 S.C. 1300: (1966)2 M.L.J. (S.C.) 60: (1966)2 An.W.R. (S.C.) 60: (1966)2 S.C.J. 490:

(1966)3 S.C.R. 400.

14. In *C.I.T., U.P. v. Bankey Lal Vaidya*, A.I.R. 1971 S.C. 2270, this Court pointed out that on dissolution of partnership the assets of the firm are valued and the partner is paid a certain amount in lieu of his share of the assets, the transaction is not a sale, exchange or transfer of assets of the firm and the amount received by the partner cannot be taxed as capital gains. In taking this view reliance was placed on the decision of this Court in *C.I.T., Madhya Pradesh v. Dewas Cine Corporation*, A.I.R. 1968 S.C. 676; (1968)2 S.C.R. 173; (1968)1 S.C.J. 691; (1968)1 I.T.J. 444.

15. Again in *Malabar Fisheries Company, Calicut v. C.I.T. Kerala*, (1980)1 S.C.R. 696; A.I.R. 1980 S.C. 176, the facts were that the appellant firm which was constituted on April 1, 1959, with four partners carried on six different business in different names. The firm was dissolved on March 31, 1963 and under the deed of dissolution the first business concern was taken over by one of the partners, the remaining five concerns by two of the other partners and the fourth partner received his share in cash. It appears that during the assessment years 1960-61 to 1963-64 the firm had installed various items of machinery in respect of which it had received Development Rebate under Sec.33 of the Income Tax Act, 1961. On dissolution, the Income Tax Officer took the view that Sec.34(3)(b) of the Act applied on the premises that there was a sale or transfer of the machinery by the firm whereupon he withdrew the Development Rebate earlier allowed to the firm by amending the orders in that behalf. The appeal filed on behalf of the dissolved firm was dismissed by the Appellate Assistant Commissioner, but was allowed by the Tribunal. At the instance of the revenue a reference was made to the High Court and the High Court allowed the reference holding that there was a transfer of assets within the meaning of Sec.34 (3)(b). The dissolved firm approached this Court in appeal. This Court after referring to the definition of the expression 'transfer' in Sec.2(47) of the Act and the case law on the point concluded as under:

"Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the

partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of Sec.2(47) of the Act."

16. From the foregoing discussion it seems clear to us that regardless of its character, the property brought into stock of the firm or acquired by the firm during its subsistence for the purposes and in the course of the business of the firm shall constitute the property of the firm unless the contract between the partners provides otherwise. On the dissolution of the firm each partner becomes entitled to his share in the profits, if any, after the accounts are settled in accordance with Sec.48 of the Partnership Act. Thus in the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit. Thus during the subsistence of the partnership, a partner would be entitled to a share in the profits and after its dissolution to a share in the residue, if any on settlement of accounts. The mode of settlement of accounts set out in Sec.48 clearly indicates that the partnership asset in its entirety must be converted into money and from the pool the disbursement has to be made as set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) and thereafter if there is any residue that has to be divided among the partners in the proportions in which they were entitled to a share in the profits of the firm. So viewed, it becomes obvious that the residue would in the eye of law, be moveable property i.e., cash, and hence distribution of the residue among the partners in

proportion to their shares in the profits would not attract Sec.17 of the Registration Act. Viewed from another angle it must be realised that since a partnership is not a legal entity but is only a compendious name each and every partner has a beneficial interest in the property of the firm even though he cannot lay a claim on any earmarked portion thereof as the same cannot be predicated. Therefore, when any property is allocated to him from the residue it cannot be said that he had only a definite limited interest in that property and that there is a transfer of the remaining interest in his favour within the meaning of Sec.17 of the Registration Act. Each and every partner of a firm has an undefined interest in each and every property of the firm and it is not possible to say unless the accounts are settled and the residue or surplus determined what would be the extent of the interest of each partner in the property. It is, however, clear that since no partner can claim a definite or earmarked interest in one or all of the properties of the firm because the interest is a fluctuating one depending on various factors, such as, the losses incurred by the firm, the advances made by the partners as distinguished from the capital brought in the firm, etc., it cannot be said unless the accounts are settled in the manner indicated by Sec.48 of the Partnership Act, what would be the residue which would ultimately be allocable to the partners. In that residue, which becomes divisible among the partners, every partner has an interest and when a particular property is allocated to a partner in proportion to his share in the profits of the firm, there is no partition or transfer taking place nor is there any extinguishment of interest of other partners in the allocated property in the sense of a transfer or extinguishment of interest under Sec.17 of the Registration Act. Therefore, viewed from this angle also, it seems clear to us that when a dissolution of the partnership takes place and the residue is distributed among the partners after settlement of accounts, there is no partition, transfer or extinguishment of interest attracting Sec.17 of the Registration Act.

17. Strong reliance was, however, placed by the learned counsel for the respondents on two decisions of this Court, namely, *Ratan Lal Sharma v. Purshottam Hari*, A.I.R. 1974 S.C. 1066: (1974) 3 S.C.R. 109 and *Lachman Das v. Ram Lal*, (1989) 3 S.C.C. 99. Insofar as the first mentioned case is concerned, the facts reveal that the appellant and

the respondent who had set up a partnership business in December, 1962 soon fell out. The partnership had a factory and other moveable and immovable properties. On August 22, 1963, the partners entered into an agreement to refer the dispute to the arbitration of two persons and gave the arbitrators full authority to decide their dispute. The arbitrators made their award on September 10, 1963. Under the award exclusive allotment of the partnership assets, including the factory, and liabilities was made in favour of the appellant and it was provided that he shall be absolutely entitled to the same in consideration of a sum of Rs.17,000 plus half the amount of realisable debts of the business to the respondent. The arbitrators filed the award in the High Court on November 8, 1963. On September 10, 1964, the respondent filed an application for determining the validity of the agreement and for setting aside the award. On May 27, 1966, a learned single Judge of the High Court dismissed the application as barred by time but declined to make the award the rule of the court because in his view the award was void for uncertainty and created rights in favour of the appellant over immovable property worth over Rs.100 requiring registration. The Division Bench dismissed the appeal as not maintainable whereupon this Court was moved by special leave. Before this Court it was contended, (i) that the award is not void for uncertainty, (ii) that the award seeks to assign the respondent's share in the partnership to the appellant and therefore does not require registration, and (iii) that under Sec.17 of the Arbitration Act, the court was bound to pronounce judgment in accordance with the award. This Court while reiterating that the share of a partner in the assets of the partnership comprising even immovable properties, is moveable property and the assignment of the share does not require registration under Sec.17 of the Registration Act. The legal position is thus affirmed. However, since the award did not seek to assign the share of the respondent to the appellant but on the contrary made an exclusive allotment of the partnership asset including the factory and liabilities to the appellant, thereby creating an absolute interest on payment of consideration of Rs.17,000 plus half the amount of the realisable debts, it was held to be compulsorily registrable under Sec.17 of the Registration Act. The court did not depart from the principle that the share of a partner in the

asset of the partnership inclusive of immoveable properties, is moveable property and the assignment of the share on dissolution of the partnership did not require registration under Sec.17 of the Registration Act. The decision, therefore, turned on the interpretation of the award in regard to the nature of the assignment made in favour of the appellant. So far as the second case is concerned, we think it has no bearing since that was not a case of assignment of partnership property under a dissolution deed. In that case, the dispute was between two brothers in 2 1/2 kallas of land situate in Panipat, Haryana. The said land stood in the name of one brother, the appellant. The respondent contended that he was a benamidar and that was the dispute which was referred to arbitration. The arbitrator made his award and applied to the court for making it the rule of the court. Objections were filed by the appellant raising various contentions. The award declared that half share of the ownership of the appellant shall "be now owned by Shri Ram Lal, the respondent in addition to his half share owned in those lands". Therefore, the award transferred half share of the appellant to the respondent and since the value thereof exceeded Rs.100, it was held that it required registration. It is, therefore, obvious that this case has no bearing on the point in issue herein.

18. In the present case, the Division Bench of the High Court concluded that the award required registration because of an erroneous reading of the award. The Division Bench after extensively reproducing from the Schedules A to F of the award proceeded to state in paragraph 39 that the allotments are exclusive to the brothers and they get independent rights of their own under the award in the properties allotted under the Schedule and hence it is not a case purely of assignment of the shares in the partnership but it confers exclusive rights to the allottees. On this line of reasoning it concluded that the award required registration. The court next pointed out in paragraph 42 of the judgment that the award also partitions certain immoveable properties jointly owned by the disputants. In this connection it has placed reliance on paragraph 10(c) of the award which reads as under:

"(c). Other Lands and Buildings and House properties belonging to S.V.Sivalinga Nadar and Brothers standing in the name of the firm and or otherwise jointly owned by the

disputants. These have been allotted by us to one or other or jointly to some of the disputants as per schedules annexed hereto."

The reasons which weighed with the Division Bench of the High Court in concluding that the award requires registration appear to be based on an erroneous reading of the award. We have carefully read the award and it is manifest therefrom that the arbitrators had confined themselves to the properties belonging to the two firms in question and scrupulously avoided dealing with the properties not belonging to the firm. This is manifest from paragraphs 15 to 18 of the award. However, properties standing in the names of disputants, individually or jointly, and others as benamidars but belonging to the firm also case to be included in the distribution of the surplus partnership asset under the award. That is the purport of paragraph 10(c) extracted hereinabove. When on settlement of accounts the residue is required to be divided among the partners in proportions in which they were entitled to share profits under sub-clause (iv) of clause (b) of Sec.48, the properties will have to be allocated to the partners as falling to their share on the distribution of the residue and, therefore, the arbitrators indicated in the schedules the properties falling to the share of each brother. Mere statements that a certain property will now exclusively belong to one partner or the other, as the case may be, cannot change the character of the document or the nature of assignment because that would, in any case, be the effect on the distribution of the residue. The property falling to the share of the partner on the distributing of the residue would naturally then belong to him exclusively but so long as in the eye of law it is money and not immovable property there is no question of registration under Sec.17 of the Registration Act. Besides as stated earlier, even if one looks at the award as allocating certain immovable property since there is no transfer, no partition or extinguishment of any right therein, there is no question of application of Sec.17(1) of the Registration Act. The reference to other land and buildings and house properties jointly owned by the disputants in clause (c) of paragraph 10 of the award merely indicates that certain properties belonging to the firm stood in the names of individual partners or in their joint names, but they belonged to the firm and, therefore, they were taken into account for the purpose of settlement.

of accounts under Sec.48 of the Partnership Act and distributed on the determination of the residue. The award read as a whole makes it absolutely clear that the arbitrators had confined themselves to the properties belonging to the two firms and had scrupulously avoided other properties in regard to which they did not reach the conclusion that they belonged to the firm. On a correct reading of the award, we are satisfied that the award seeks to distribute the residue after settlement of accounts on dissolution. While distributing the residue the arbitrators allocated the properties to the partners and showed them in the schedules appended to the award. We are, therefore, of the opinion that on a true reading of the award as a whole, there is no doubt that it essentially deals with the distribution of the surplus properties belonging to the dissolved firms. The award, therefore, did not require registration under Sec.17(1)

of the Registration Act.

19. For the above reasons, we allow these appeals and set aside the impugned orders of the Division Bench and remit the matters to the Division Bench for answering the other contentions which arose in the appeal before it, but which were not decided in view of its decision on the question of registration of the award. We also make it clear that the award which is pending for registration may be registered by the Sub-registrar notwithstanding the objection raised by one of the partners S.V.Sivalinga Nadar through his lawyer if that is the only reason for withholding registration. The appeals are allowed accordingly with costs.

B.S.

Appeals allowed.

[End of Volume (1993) 1 M.L.J. (Supreme Court)]

THE MADRAS LAW JOURNAL

SUPREME COURT

1993

IN THE SUPREME COURT OF INDIA.

Present: *L.M.Sharma, S.Mohan and Venkatachala, JJ.*

C.A.No.2944 of 1992 11th August, 1992.

B.Lakshmipathi Naidu ...Appellant

 $\mathbf{v}_i$

District Educational Officer and others

...*Respondents.*

Educational service - Special Rules for the Tamil Nadu Higher Secondary Educational Service - Post of Head Master of Aided Higher Secondary School - Rule requiring experience of not less than ten years as B.T. Assistant or Pandit in a Secondary School or Higher Secondary School after obtaining a teaching degree - Person working as Telugu Pandit from 1975 but acquiring teaching degree only in 1983 - Whether eligible for appointment as Head Master in 1986.

According to the Special Rules for the Tamil Nadu Higher Secondary Educational Service, a candidate to be appointed as a Head Master of a Higher Secondary School should have experience for a period of not less than ten years as B.T. Assistant or Pandit in a Secondary School/Training School/Higher Secondary School after obtaining a teaching degree recognised by the Director of School Education. The appellant who was working as a Telugu Pandit since 1975 and acquiring the degrees of Master of Arts in Telugu in 1978 and Bachelor of Education in 1983 claimed to be appointed as a Head Master when a post fell vacant on November 1, 1986. A single Judge of the High Court and a Division Bench held him ineligible for the post as he acquired the teaching degree in 1983 and had put in only 3 years as a Pandit after obtaining that degree. In appeal, it was contended that in view of several other provisions in the Rules as also instructions issued by the State, the experience of a language Pandit had to be equated with that of a trained-graduate.

Held:- The Madras High Court had to deal with

the claim of a Tamil Pandit in *P.Subbannan v. Director of School Education*, (W.P.No.4470 of 1982 decided on 21.2.1983), and that of a Hindi Pandit in *Chandrasekhar Case*, (W.P.No.7367 of 1983 decided on 18.10.1983). Since the same considerations arise in regard to any language Pandit, the decisions are certainly in favour of the appellant. A writ appeal was filed against the judgment in *P.Subbannan case*, which along with another writ appeal was withdrawn by the State as is evident by the order of the Division Bench in W.A.Nos.950 and 951 of 1983. The learned counsel is, therefore, right in contending that the two judgments interpreting the rule in favour of language Pandits prevailed in the State for a considerably long period. It should further be presumed that the said principle has become settled and must have been applied in the other schools of the State. In view of this consideration, it is held that the High Court, in the present case, should not have departed from the settled position and should have followed the two decisions mentioned above.

[Para 4]

V. Krishnamurthy and V. Balachandra, for Appellant.

S. Balakrishnan, R.N. Keshwani and R. Mohan, for Respondents.

The Judgment of the Court was delivered by
Sharma, J.:- Heard the learned counsel for the
parties. Special leave is granted.

2. The appellant is a school teacher claiming appointment as Head Master. He has been working as a Telugu Pandit since 1975 in the school concerned. He got the degree of Master of Arts in Telugu in 1978 and Bachelor of Education in 1983. The post of Head Master fell vacant on November 1, 1986. According to the impugned judgment of the learned Single Judge of the Madras High Court, he has been held to be ineligible for the post. The decision was confirmed on appeal by a short order by a Division Bench which is under challenge in the present appeal.

3. The main ground for holding that the appellant was not qualified for the post of Head Master in

1986 is based upon the minimum qualification fixed in this regard by the Special Rules for the Tamil Nadu Higher Secondary Educational Service in its annexure by requiring the candidate to have:

“(iii) Experience for a period of not less than ten years as B.T. Assistant or Pandit in a Secondary School/Training School/Higher Secondary School, after obtaining a teaching degree, recognised by the Director of School Education;”

According to the respondents, the above condition requires ten years experience as a Pandit, after obtaining a teaching degree, recognised by the Director of School Education. It is said that since the appellant acquired the degree only in 1983, his experience in 1986 was of about three years. The plea of the appellant that this period has to be calculated from 1975 when he was appointed as Telugu Pandit has been rejected departmentally as well as by the High Court.

4. The learned counsel for the appellant has contended that in view of several other provisions in the Rules as also instructions issued by the State, the experience of a language Pandit has to be equated with that of a trained graduate and on this basis, at least two judgments were delivered by the Madras High Court in *P. Subbannan v. Director of School Education, W.P.No.4470 of 1982, decided on 21.2.1983*, and in *P.S. Chandrasekhar v. Director of School Education, W.P.No.7367 of 1983, decided on 18.10.1985*. We have examined the judgment in *P. Subbannan v. Director of School Education, W.P.No.4470 of 1982, decided on 21.2.1983*, wherein the High Court had to deal with the claim of Tamil Pandit and in *P.S. Chandrasekhar v. Director of School Education, W.P.No.7367 of 1983, decided on 18.10.1985*, that of a Hindi Pandit, but since the same considerations arise in regard to any language Pandit the decisions are certainly favour of the appellant. A writ appeal was filed against the judgment in *P. Subbannan Case*, which along with another writ appeal was withdrawn by the State as is evident by the order of the Division Bench in *W.A.Nos.950 and 951 of 1983 vide Annexure J*. The learned counsel is, therefore, right in contending that the two judgments interpreting the rule in favour of language Pandits prevailed in the State for a considerably long period. It should further be presumed that the said principle has become settled and must have been applied in the

other schools of the State. In view of this consideration, we hold that the High Court, in the present case, should not have departed from the settled position and should have followed the two decisions mentioned above.

5. The learned single Judge has also mentioned another ground for rejecting the appellant's case. It has been held that for the promotion to the post of Head Master it was necessary that the claimant had passed Accounts Test, and since the appellant was lacking in this qualification he was not eligible. The learned counsel for the appellant has drawn our attention to the G.O.Ms.No.720 dated April 28, 1981 showing that this qualification was not to be insisted upon until further orders for appointment of Head Master of aided higher secondary schools. It is averred on behalf of the appellant and not denied on behalf of any of the respondents that the school in question is an aided higher secondary school and that no further orders to the contrary have been passed so far. The second ground put against the appellant in the impugned judgment also must be rejected.

6. For the reasons indicated above, we set aside the judgments of the High Court, rendered by the learned Single Judge and the Division Bench. We further hold that the appellant must be treated to be fully qualified for the post of the Head Master. Hence his case will be taken into consideration before taking a final decision in the question of the appointment of the Head Master in the school concerned. The appeal is accordingly allowed, but in the circumstances, without costs.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present: *Kuldip Singh and M.Fathima Beevi, JJ.*

C.A.Nos.582 to 625 of 1988 23rd April, 1992.

**Commissioner and Secretary to Government
Commercial Taxes and Religious Endowments
Department and others** ...*Appellants*

v.

Sree Murugan Financing Corporation, Coimbatore and others ...*Respondents.*

Tamil Nadu Chit Fund Rules (1964), Appendix II, Arts.1 (as amended) and 8-A as inserted by the Amendment -Validity of.

The Act and the Rules provide a complete mechanism for the constant supervision and regulation of the 'Chit Fund' business in the State of Tamil Nadu. No person can start or conduct any 'chit' unless he registers the proposed bye-laws in accordance with the procedure prescribed. It is common knowledge that there are large number of subscribers to the 'chit fund' business. The Act and Rules primarily protect the subscribers and in the process help the proprietors to run the 'chit fund' business to their advantage. There are elaborate provisions under the Act and the Rules providing investigation into the functioning of the said business. The scheme of the Act and the Rules shows that there is effective supervision and control at every stage of the functioning of the 'Chit Fund' business. The High Court grossly erred in holding that the number of the subscribers or the instalments has no nexus with the registration fee. Every subscriber has to enter into an agreement with the foreman who conducts the business on behalf of the proprietors. The object of the Act/Rules, obviously, is to protect the interest of the subscribers. More the subscribers more the burden on the authorities under the Act/Rules and as a consequence more fee is required to meet the expenditure. It is no doubt correct that after registration of bye-laws, fees are payable under Sec.53 of the Act for the performance of various other functions by the Registrar and his staff, but that is justified in view of the scheme of the Act. The expectation of winning a draw or a bid at the auction and becoming rich overnight lures the lower-middle class and the poor to subscribe to the chit fund out of their savings or even by borrowing money. In such a

situation apart from regulatory measures it is necessary to have strict control and supervision over 'Chit Fund' business. The Act and the Rules are operating with that objective. The enhanced fee, in this case, is justified on the legal as well as the factual anvil of *quid pro quo*. Apart from the appointment of the Registrar, its staff and various other functionaries, the scheme of the Act in its operation involves huge expenditure which is entirely met out of the Fee Fund. The fees collected under the Act have, therefore live nexus under the expenditure incurred for the benefit of the 'Chit Fund' business. The Registrar is justified, rather duty bound to act in furtherance of the objects of the Act and the Rules. Even otherwise when the Rules provide for filing of the balance sheets by the Chartered Accountants, it is necessary in the context of the rules and the Act to provide machinery to examine and verify the contents of the balance sheets. No fault can be found with the reasons given by the State for bringing in Art.8-A in Appendix II to the rules.

[*Paras 16, 17 and 19*]

Cases referred to:

Keval Krishan Puri v. State of Punjab, A.I.R. 1980 S.C. 1008: (1980)1 S.C.C. 416: (1979)1 S.C.R. 1217. [Para 12]

Sreenivasa General Traders v. State of A.P., A.I.R. 1983 S.C. 1246: (1983)4 S.C.C. 353. [Para 13]

Commissioner of H.R. & C.E. Madras v. Shri Lakshmindra Thirtha Swamiar, (1954)1 M.L.J. 596: 1954 S.C.J. 335: 1954 S.C.R. 1005: A.I.R. 1954 S.C. 282. [Para 14]

H.I.Sudhundara Thirtha Swamiar v. Commissioner, H.R. & C.E. Mysore, A.I.R. 1963 S.C. 966: (1963)2 S.C.R. (Supp.) 302. [Para 14]

Hingir Rampur Coal Company Ltd. v. State of Orissa, A.I.R. 1961 S.C. 459: (1961)2 S.C.R. 537. [Para 14]

H.H.Shri Swamiji v. Commissioner, H.R. & C.E. Department, (1980)1 S.C.R. 368: 1980 S.C.C. (Tax) 16: (1979)4 S.C.C. 642. [Para 14]

Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala, A.I.R. 1981 S.C. 1863: (1981)4 S.C.C. 391: 1981 S.C.C. (Tax) 320: (1982)1 S.C.R. 519. [Para 14]

Municipal Corporation of Delhi v. Mohd. Yasin, A.I.R. 1983 S.C. 1617: (1983)3 S.C.C. 229: 1983 S.C.C. (Tax) 154: (1983)2 S.C.R. 999. [Paras 14 and 15]

Sree Murugan Financing Corporation v. State of

Tamil Nadu, (1985) 1 M.L.J. 474.

V. Krishnamurthy and V.R. Karthikeyan, for Appellants.

K.V. Mohan, Smutha Singh and T.V.S.N. Chari, for Respondents.

The Judgment of the Court was delivered by *Fathima Beevi, J.*:- These appeals arise out of the common judgment of the Madras High Court in a batch of writ petitions in which the respondents challenged the validity of the amendments effected to Art.1 and insertion of Art.8-A to Appendix II of the Tamil Nadu Chit Fund Rules, 1964 (for short 'the Rules'). The High Court in its judgment dated March 20, 1985 has struck down as invalid the impugned amendments.

2. The Tamil Nadu Chit Funds Act, 1961 (the Act) provides for the regulation of chit funds in the State of Tamil Nadu. 'Chit' is a transaction by which its foreman enters into an agreement with a number of subscribers that every one of them shall subscribe certain sum by instalments for a definite period and that each subscriber in his turn as determined by lot or by auction, shall be entitled to a prize amount. The sum total of the subscription payable by all the subscribers for any instalment of a chit without any deduction for discount or otherwise is chit amount.

3. It is useful to summarise the scheme of the Act and the rules. The Registrar of Chit Funds is appointed by the Government under Sec.51. No person can start or conduct any chit unless he registers with the Registrar the proposed bye-laws of the chit. Sec.7 provides that the Registrar, on being satisfied that the bye-laws have been registered, the chit agreement has been filed, and the security required under Sec.12 has been furnished by the foreman, grants "certificate of commencement". The auction or drawing of any chit commences only on obtaining such certificate. The security furnished under Sec.12 can only be released by Registrar in accordance with the prescribed procedure.

4. Under Sec.16 every foreman has to prepare and file with the Registrar a duly audited balance-sheet. A defaulting non-prized subscriber is liable to be removed and the aggrieved person has a right of appeal to the Registrar whose order in the matter is final. Any substitution in place of a defaulting subscriber has to be recorded and copy filed with the Registrar. The rights of the prized or non-prized subscribers in the chit cannot be

transferred or interfered with without the previous sanction in writing of the Registrar. The foreman is required to maintain all the records pertaining to a chit for a specified period. The Registrar is empowered under Sec.37 to inspect the chit books and all records after giving due notice. If the Registrar is of the opinion that the accounts of any chit are not properly maintained and that such account should be audited, it shall be lawful for him under Sec.51(4) to have such account audited by a chit auditor. The foreman has a right of appeal against the order of the Registrar refusing to register bye-laws or to grant a certificate of commencement or refusing to accept the security or refusing to release the property charged by way of security as provided under Sec.54. Penalty for the contravention of the provisions is provided under Sec.56.

5. The provisions of the Act impose duties on the Registrar and are intended to regulate the conduct of the business. The Registrar has to take adequate security and keep the same intact until the claims of all subscribers are satisfied and till the termination of the chit, the Registrar is required to discharge several duties.

6. Sec.63 empowers the Government to make rules for carrying out all or any of the purposes of the Act. Sec.53 which provides for levy of fees reads:

"53. *Levy of fees*:- (1) There shall be paid to the Registrar such fees as the Government may from time to time, prescribe for-

(a) the registration of the bye-laws of a chit under Sec.3;

(b) the grant of a certificate of commencement under Sec.7;

(c) filing with the Registrar of the chit agreement and copies of documents under Secs.11, 20, 21, 29 and 32;

(d) the inspection of documents under Sec.52;

(e) the certificate, copy of or extract of documents under Sec.52;

(f) the audit of accounts of the foreman and the issue of an audit certificate;

(g) such other matters as may appear necessary to give effect to the purposes of this Act.

(2) A table of fees payable under Sub-sec.(1) shall be published in the Fort St. George Gazette-now the Tamil Nadu Government Gazette."

7. The rules have been framed under Sec.63. Rule

3 states that the bye-laws shall provide for the matters specified thereunder. If the Registrar refuses to register the bye-laws of a chit, he shall record his reasons for such refusal in writing and communicate a copy of the order to the applicant. Rule 11 prescribes the particulars to be contained in the chit agreement, Rule 14 prescribes the form of minutes of the proceedings and Rules 15 to 22 regulate the acceptance and release of security. In the case of cash deposited in an approved bank and transferred in favour of Registrar, intimation has to be given by the Registrar to the bank. Under Rule 22 the Registrar before releasing the security may call upon the foreman to produce register and books of accounts maintained and issue a notice

to the subscribers. Registrar has to hear objections, if any, and inquire into the same and record the decision in writing. On the application of the foreman, the Registrar shall cause the balance-sheet and profit and loss account to be audited by the chit auditor as expeditiously as possible. Rule 42 states that the fees payable to the Registrar for the matters specified under Sec.53 shall be as set out in Appendix II and shall be paid in cash. Appendix II contains the table of fees for the registration of by-laws of chit under Sec.3 as Art.1 and for the audit of accounts under sub-sec.(4) of Sec.51 as Art.8.

8. The impugned amendments are to the following effect:

AMENDMENT

In the said rules, in Appendix II, in the Table of Fees (1) for Art.1 and the entries relating thereto, the following Article and entries shall be substituted, namely;

(1) For the Registration of bye-laws of a chit under Sec.3,--

Rates of Fees

(a) for chits for a term of less than one year	Re.1 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(b) for chits for a term of one year and above	
(i) chit amount of value up to Rs.5,000	Rs.2.50 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(ii) for chit amount of value between Rs.5,001 and Rs.10,000	Rs.5 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(iii) for chit amount of Rs.10,001 and Rs.20,000	Rs.7 per subscriber or value between instalment whichever is higher subject to a minimum of Rs.50
(iv) for chit amount of value between Rs.20,001 and Rs.30,000	Rs.10 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(v) for chit amount of value between Rs.30,001 and Rs.40,000	Rs.12 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(vi) for chit amount of value between Rs.40,001 and Rs.50,000	Rs.15 per subscriber or instalment whichever is higher subject to a minimum of Rs.50
(vii) for chit amount of value exceeding Rs.50,000	Rs.20 per subscriber or instalment whichever is higher subject to a minimum of Rs.50

(2) * * *

(3) After Art.8, as so amended, the following Article and entries shall be inserted, namely:
"8-A. For filing balance sheets audited and certified by Chartered Accountant--(a) when the chit amount does not exceed Rs.500 .. Rs.10.00

(b) when the chit amount exceeds Rs.500 for the first Rs.500 as under sub-clause (a) and for every Rs.500 or part thereof in excess of Rs.500 subject to the maximum of Rs.250. The

fee leviable under this clause shall not exceed Rs.250 .. Rs.5.00."

9. The challenge was mainly on the ground that the rates of fees fixed in Art.1 and Art.8-A in Appendix II to the Rules were disproportionately high having no nexus to the nature of services rendered and intended to augment revenue and partake of the character of tax and as such the levy suffered from the vice of arbitrariness, hostile discrimination and unreasonable restriction on trade. The High Court came to the conclusion that the necessary element of *quid pro quo* was absent and as such struck down the amendment on the said ground.

10. The High Court declared the amendment by which the registration fee was enhanced, as *ultra vires*, on the following reasoning:

"When a foreman starts a chit, under Sec.3 he has to apply for registration of the by-laws. It is only thereafter, he can approach the subscriber and get the chit agreements as prescribed under Sec.5 executed and file them under Sec.6. He cannot commence the business till he secures the certificate under Sec.7(2). Therefore, when an application is made for registration of by-laws, at that stage, Sec.3(3) authorises the Registrar to find out as to whether the by-laws are in accord with the provisions of the Act or the rules made thereunder. As to what the by-laws should provide, Rule 3 enumerates them. An application for registration is to be in Form 1 accompanied by fees set out in Appendix II. Hence, the number of the subscribers or the instalments, has no nexus with what are required to be done under Sec.3(3) by the Registrar. Whether they are more or less, it was only a question of furnishing particulars and recording them and no more. If for the entire period of the chit except the registration fee no other fee is demanded and the entire service rendered is covered by this demand alone, then the correlation claimed could be available. Sec.53 enables imposition of fees in respect of almost each one of the subsequent stages of the conduct of the chit whenever the authorities are to be approached or they are to exercise their powers. In the context of such provisions having been made in the Act, the registration fees claimed has to be restricted to what are required to be done under Sec.3(3)."

11. The High Court held Art.8-A to be invalid on the following reasoning:

"When rules themselves do not contemplate

production of registers, books of accounts and other records, the claim made that pursuant to the filing of the balance sheet, records have to be verified and that the whole matter has got to be thoroughly examined is unacceptable. In such of those matters where irregularities are noticed, the Registrar can call for all the records and scrutinise them and thereafter initiate prosecution or take such other action. Such instances would arise in both categories. Hence, when the rules themselves contemplate different type of services to be rendered when Chartered Accountant's Certificates are filed, the fee imposable under Art.8-A cannot be the same as in Art.8 which contemplates more comprehensive services to be rendered. Therefore as rightly pleaded by the petitioners, the necessary element of *quid pro quo* is not existing and furthermore this is an unreasonable restriction on right of trade and the rate fixed is aimed at increasing general revenues."

12. The High Court relied upon the judgment of this Court in *Kewal Krishan Puri v. State of Punjab*, A.I.R. 1980 S.C. 1008: (1980)1 S.C.C. 416: (1979)1 S.C.R. 1217, wherein it was observed that a substantial portion of the amount collected on account of fees, must be shown with reasonable certainty as being spent for rendering services to justify the *quid pro quo* which is a distinguishing feature of 'fee' from 'tax'.

13. This Court in *Sreenivasa General Traders v. State of A.P.*, A.I.R. 1983 S.C. 1246: (1983)4 S.C.C. 353, considered *Kewal Krishan Puri v. State of Punjab*, A.I.R. 1980 S.C. 1008: (1980)1 S.C.C. 416: (1979)1 S.C.R. 1217 and observed as under:

"The decision in *Kewal Krishan Puri v. State of Punjab*, A.I.R. 1980 S.C. 1008: (1980)1 S.C.C. 416: (1979)1 S.C.R. 1217, does not lay down any legal principle of general applicability. The observation made therein seeking to quantify the extent of correlation between the amount of fee collected and the cost of rendition of service, namely, 'At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee', appears to be an obiter. It was not intended to lay down a rule of universal

application but it was a decision which must be confined to the special facts of that case."

14. This Court in several judgments over a period of 40 years has authoritatively crystallised the contradistinction between 'tax' and 'fee'. The judgments of this Court in *Commissioner of H.R. & C.E., Madras v. Shri Lakshmindra Thirtha Swamiar*, (1954)1 M.L.J. 596: 1954 S.C.J. 335: 1954 S.C.R. 1005: A.I.R. 1954 S.C. 282, *H.I. Sudhundara Thirtha Swamiar v. Commissioner, H.R. & C.E. Mysore*, A.I.R. 1963 S.C. 966: (1963)2 S.C.R. (Supp.) 302, *Hingir Rampur Coal Company Ltd. v. State of Orissa*, A.I.R. 1961 S.C. 459: (1961)2 S.C.R. 537, *H.H. Shri Swamiji v. Commissioner, H.R. & C.E. Department*, (1980)1 S.C.R. 368: 1980 S.C.C. (Tax) 16: (1979)4 S.C.C. 642, and *Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala*, A.I.R. 1981 S.C. 1863: (1981)4 S.C.C. 391: 1981 S.C.C. (Tax) 320: (1982)1 S.C.R. 519, were considered by this Court in *Municipal Corporation of Delhi v. Mohd. Yasin*, A.I.R. 1983 S.C. 1617: (1983)3 S.C.C. 229: 1983 S.C.C. (Tax) 154: (1983)2 S.C.R. 999, wherein the Court speaking through Chinappa Reddy, J. held as under:

"What do we learn from these precedents? We learn that there is no generic difference between a tax and a fee, though broadly a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of taxpayers whereas a fee is a payment for services rendered, benefit provided or privilege conferred. Compulsion is not the hallmark of the distinction between a tax and a fee. That the money collected does not go into a separate fund but goes into the consolidated fund does not also necessarily make a levy a tax. Though a fee must have relation to the services rendered, or the advantages conferred, such relation need not be direct, a mere causal relation may be enough. Further, neither the incidence of the fee nor the service rendered need be uniform. That others besides those paying the fees are also benefited does not detract from the character of the fee. In fact, the special benefit or advantage to the payers of the fees may even be secondary as compared with the primary motive of regulation in the public interest. Nor is the court to assume the role of a cost accountant. It is neither necessary nor expedient to weigh too meticulously the cost of the

services rendered etc. against the amount of fees collected so as to evenly balance the two. A broad relationship is all that is necessary. *Quid pro quo* in the strict sense is not the one and only true index of a fee; nor is it necessarily absent in a tax."

15. In *Municipal Corporation of Delhi v. Mohd. Yasin*, A.I.R. 1983 S.C. 1617: (1983)3 S.C.C. 229: 1983 S.C.C. (Tax) 154: (1983)2 S.C.R. 999, the Municipal Corporation of Delhi enhanced the slaughtering fee in respect of two categories of animals by eightfold. Some butchers of the city questioned the revision of rates on the ground that the proposed enhanced fee was wholly disproportionate to the cost of services and supervision and was in fact not a fee, but a tax. During the pendency of the writ petitions in the High Court, by virtue of an interim arrangement, the Municipal Corporation of Delhi was permitted to collect slaughter fee at double the rates (instead of 8 times) and as a result thereof the Corporation realised a sum of Rs.4,24,494. The budget of the Corporation showed a sum of Rs.2,56,000 as the expenditure involved in connection with the slaughter house. The High Court came to the conclusion that even if the original fee was doubled the amount realised would be more than sufficient to meet the expenditure involved and, therefore, there was no reason at all for increasing fee eightfold and so the proposed fee was not fee but a tax for which there is no legislative mandate. This Court allowed the appeal and set aside the judgment of the High Court. This Court clarified the concept of 'fee' which we have quoted above. We respectfully agree with the same.

16. The Act and the Rules provide a complete mechanism for the control, supervision and regulation of the 'chit fund' business in the State of Tamil Nadu. No person can start or conduct any 'chit' unless he registers the proposed bye-laws in accordance with the procedure prescribed. It is common knowledge that there are large number of subscribers to the 'chit fund' business. The Act and Rules primarily protect the subscribers and in the process help the proprietors to run the 'chit fund' business to their advantage. There are elaborate provisions under the Act and the Rules providing investigation into the functioning of the said business. The scheme of the Act and the Rules as detailed in the earlier part of the judgment shows that there is effective supervision and

control at every stage of the functioning of the 'chit fund' business. The High Court grossly erred in holding that the number of the subscribers or the instalments has no nexus with the registration fee. Every subscriber has to enter into an agreement with the foreman who conducts the business on behalf of the proprietors. The object of the Act/Rules, obviously is to protect the interest of the subscribers. More the subscribers more the burden on the authorities under the Act/Rules and as a consequence more fee is required to meet the expenditure. It is no doubt correct that after registration of bye-laws, fees are payable under Sec.53 of the Act for the performance of various other functions by the Registrar and his staff, but that is justified in view of the scheme of the Act. The expectation of winning a draw or a bid at the auction and becoming rich overnight lures the lower-middle class and the poor to subscribe to the chit fund out of their savings or even by borrowing money. In such a situation apart from regulatory measures it is necessary to have strict control and supervision over 'chit fund' business. The Act and the Rules are operating with that objective. The counter-affidavit filed by the State before the High Court justified the enhancement of the registration fee *inter alia* on the following grounds:

"...Considering that in respect of chits of longer duration and larger number of instalments, greater amount of service had to be rendered in that, more minutes etc., were filed, it is equitable and fair to fix the fees for registration of bye-laws with regard to number of instalments or duration of chits. The fees were revised taking these facts into consideration. It has also to be verified whether the foreman has taken proper security for future payment of subscription from the prized subscriber, whether proper receipts were obtained for the payment of prize monies and on due dates, if not whether the prize amount has been deposited in a Bank as required by the Act by verifying receipts of deposit etc. The extracts filed in respect of removal, substitution and assignment etc. have also to be verified and in respect of higher chit amounts in long term chit for longer duration these transactions will be more and they impose greater responsibility on the Chit Registrar. The work connected with watching the filing of various documents by the foreman on the due dates and in proper form also takes

considerable time...."

17. We are of the view that the High Court fell into error in quashing the impugned amendments. The enhanced fee, in this case, is justified on the legal as well as the factual anvil of *quid pro quo*. Apart from the appointment of the Registrar, its staff and various other functionaries, the scheme of the Act in its operation involves huge expenditure which is entirely met out of the Fee Fund. The fees collected under the Act have, therefore live nexus under the expenditure incurred for the benefit of the 'chit fund' business.

18. To justify Art.8-A prescribing fee for filing balance sheets by the chartered accountants it was stated as under:

"...I submit that pursuant to the filing of the balance sheet, records have to be verified. The balance sheet has also got to be examined in detail to find out whether it is in conformity with the objects of the chit and also whether the figures tally with regard to the collections and payments of prize amounts and whether the prize amount also correctly reflects the scope of each chit and whether the commission of the foreman has been correctly worked out. In short, the whole matter has got to be thoroughly examined to see whether that particular year's transactions fully reflect the scope of each chit and whether the collections and disbursements including the commission retained by the foreman have all been done in conformity with the Act and the Rules, since it is the subscriber's interest which is paramount. I submit that all these involve the services of the staff of the office of the Registrar."

19. The High Court was wholly unjustified in rejecting the above quoted reasoning for levying fee under Art.8-A. The High Court reached the conclusion that it was not required under the Rules to scrutinise and investigate the contents of the balance sheets submitted through the Chartered Accountants and as such it was not necessary to do. The High Court further found that since no scrutiny or examination of balance sheets was required to be done, no expenditure need be incurred and as such no fee for that purpose could be levied. We do not agree with the High Court reasoning. The Registrar is justified, rather duty-bound to act in furtherance of the objects of the Act and the Rules. Even otherwise when the Rules provide for filing of the balance sheets by the

Chartered Accountants, it is necessary in the context of the rules and the Act to provide machinery to examine and verify the contents of the balance sheets. No fault can be found with the reasons given by the State for bringing in Art.8-A in Appendix II to the rules.

20. We, therefore, allow the civil appeals and set aside the judgment of the Madras High Court dated Madras 20, 1985. The writ petitions filed by the respondents-petitioners are dismissed with costs. We quantify the costs as Rs.20,000 to be paid jointly by all the respondents-petitioners in these case.

B.S. ---- Appeals allowed and petitions dismissed.

IN THE SUPREME COURT OF INDIA.

Present: *M.Fathima Beevi and S.C.Agrawal, JJ.*

C.A.Nos.301 and 302 of 1976 6th March, 1992.

Jammi Raja Rao

...Appellant

v.

Sri Anjaneya Swami Temple Valu and others

...Respondents.

(A) *Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (XVII of 1986), Sec. 77 - Public being allowed to visit a temple, if indicative that the trust is public trust.*

It is no doubt true that the mere fact that the public is allowed to visit a temple or thakurdwara cannot necessarily indicate that the trust is public as opposed to private. But, as pointed out by the court in *Deoki Nandan v. Murlidhar*, (1957)1 M.L.J. (S.C.) 28: (1957)1 An.W.R. (S.C.) 28: 1956 S.C.R. 756: A.I.R. 1957 S.C. 133: 1957 S.C.J. 75, if the endowment was in favour of the idol itself, proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public. [Para 27]

(B) *Constitution of India (1950), Art.136 - Concurrent finding that temple is public temple - Interference by Supreme Court - Scope for.*

In the instant case the trial court as well as the High Court have found that the suit temple is a public temple. The finding is a finding of fact. The

said finding is not open to further scrutiny by this Court unless it suffers from an error of law.

[Para 29]

Cases referred to:

Deoki Nandan v. Murlidhar, (1957)1 M.L.J. (S.C.) 28: (1957)1 An.W.R. (S.C.) 28: 1956 S.C.R. 756: A.I.R. 1957 S.C. 133: 1957 S.C.J. 75. [Paras 8 and 27]

Annachalam Chetty v. Venkatachalapathi Guruswamigal, 37 M.L.J. 460: (1919) L.R. 46 I.A. 204: A.I.R. 1919 P.C. 62. [Paras 19 and 21]

Narayan Bhagwantrao Gosavi Balajiwal v. Gopal Vinayah Gosavi, (1960)1 S.C.R. 773, 780: A.I.R. 1960 S.C. 100. [Para 20 and 29]

The Poohari Fakir Sadavarthy of Bondilipuram v. Commissioner, Hindu Religious and Charitable Endowments, (1962)2 S.C.R. (Supp.) 276: A.I.R. 1963 S.C. 510: (1962)2 An.L.T. 274. [Para 21]

Babu Bhagwan Din v. Gir Har Saroop, (1940)1 M.L.J. 1: (1939) L.R. 67 I.A. 1: A.I.R. 1940 P.C. 7. [Para 27]

Mundacheri Koman v. Thachangat Puthan Vittel Achuthan Nair, 67 M.L.J. 788: L.R. 61 I.A. 405, 408: A.I.R. 1934 P.C. 230. [Para 28]

T.V.Mahalinga Iyer v. State of Madras, (1981)1 S.C.C. 445: A.I.R. 1980 S.C. 2036. [Para 28]

Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar, L.R. 18 I.A. 55: I.L.R. 13 All. 300. [Para 30]

Troilokya Nath Basu v. Jyoti Perakash Nandi, I.L.R. (1903)30 Cal. 761: 8 C.W.N. 251. [Para 30]

Balwant Rao Bishwant Chandra Chor v. Purun Mal Chaube, L.R. 10 I.A. 90: I.L.R. 6 All. 1. [Para 30]

Ambalavana Pandara Sannidhi v. Meenakshi Sundareswarar Devasthanam (by its Manager), L.R. 47 I.A. 191: A.I.R. 1921 P.C. 97: 25 C.W.N. 1.

[Para 30]

Lala Hem Chand v. Lala Pearey Lal, (1943)1 M.L.J. 11: A.I.R. 1942 P.C. 64: 47 C.W.N. 46. [Para 30]

Sri Sarangadevar Peria Matam v. Ramaswamy Gounder, (1966)1 S.C.R. 908: A.I.R. 1966 S.C. 1603. [Para 30]

S.Shannugam Pillai v. K.Shannugam Pillai, (1973)2 S.C.C. 312: (1973)1 S.C.R. 570, 582, 583. [Para 32]

The Judgment of the Court was delivered by *S.C.Agrawal, J.*:- These appeals by special leave directed against the judgment dated April 25, 1975 of the Andhra Pradesh High Court in Appeal Nos.87 and 362 of 1972, involve the question whether the Temple of Sri Anjaneya Swami (hereinafter referred to as 'the suit temple') situate at Valuthimmapuram in Peddapuram Taluk, East

Godavari District, of the State of Andhra Pradesh is a private temple and not a public temple and the appellant as the hereditary trustee of the suit temple is entitled to the possession of the temple and the properties attached to it.

2. After the enactment of the Madras Hindu Religious Endowments Act, 1926 (Madras Act II of 1927), hereinafter referred to as 'the 1927 Act', Turanga Rao, father of the appellant, submitted an application (O.A.No.117 of 1934) under Sec.18 and 84 of the said Act wherein it was claimed that the suit temple is a private temple and the application was the hereditary trustee of the same. One M.Satyanarayana Murthy of Peddapuram also filed a petition before the Board alleging that the suit temple is a public temple and that he may be appointed as the trustee. The said application of Turanga Rao was dismissed by the Board of Commissioners constituted under the 1927 Act by order dated March 30, 1935, and it was held that the suit temple is a public temple in terms of Sec.9(12) of the said Act and that the Act was applicable to it and to its endowments. Turanga Rao filed a petition (O.P.No.15 of 1936) in the Court of District Judge of East Godavari for setting aside the order of the Board dated March 30, 1935 and to declare him as the hereditary trustee of the suit temple. In the said proceedings, Turanga Rao filed a petition (Ex.A-7 dated April 2, 1936) seeking to withdraw O.P.No.15 of 1936 on the ground that the post of trustee for the suit temple was now vacant and the Board was proposing to appoint him as the trustee. In view of the said application of Turanga Rao, the District Judge passed an order (Ex.A-8) dated April 2, 1936 whereby O.P.No.15 of 1936 was dismissed. It appears that thereafter, in 1936, Turanga Rao was appointed as a trustee of the temple for a period of five years. The said appointment of Turanga Rao as a trustee was not renewed on the expiry of the period of five years but he continued to be in possession of the suit temple and the properties attached to it till his death in 1946. After the death of Turanga Rao, the appellant came in possession of the same. Madras Act II of 1927 was replaced by Madras Religious and Charitable Endowments Act of 1951 (Madras Act 19 of 1951). On the creation of the State of Andhra Pradesh, the said Act in its application to the State of Andhra Pradesh, was styled as Andhra Pradesh (Andhra area) Hindu Religious and Endowments Act, 1951,

hereinafter referred to as 'the 1951 Act'. The said Act was replaced by the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (Andhra Pradesh Act 17 of 1966), hereinafter referred to as 'the 1966 Act', which came into force on January 26, 1967.

3. The appellant moved an application (O.A.No.19 of 1967) under Sec.57 of the 1951 Act, corresponding to Sec.77 of the 1966 Act, whereby he pleaded that the nature and character of the suit temple be determined as a private temple and the appellant be declared as its hereditary trustee, Manager-cum-Archaka. The said application of the appellant was dismissed by the Deputy Commissioner, Endowments Department, Kakinada by order (Ex.A-10) dated August 30, 1969 whereby it was held that the appellant had not been able to establish his exclusive right over the suit temple nor had he been able to extract proof that the temple is a private one and that there was no evidence that the trusteeship of the temple is hereditary one. Thereupon, the appellant filed a suit (O.S.No.21 of 1970) in the Court of District Judge, East Godavari District, to declare the suit temple as a private temple and its trusteeship, managership-cum-archakaship is hereditary after setting aside the order dated August 30, 1969 passed by the Deputy Commissioner, Endowments Department, Kakinada. Another suit, which was originally numbered as O.S.No.41 of 1968, was filed by the Executive Officer of the suit temple for recovery of possession of the scheduled lands and ejecting the appellant therefrom and for directing the appellant to render the true and proper account of the net proceeds realised by him from the suit lands during the period of six years prior to the suit and for recovery of the said proceeds. The said suit was originally filed in the Subordinate Court, Kakinada, but it was withdrawn to the Court of District Judge, East Godavari District to be tried along with O.S.No.21 of 1970 and on such withdrawal, it was tried as O.S.No.108 of 1970 of the Court of District Judge, East Godavari District.

4. The case of the appellant in O.S.No.21 of 1970 filed by him was that the suit temple was founded and the idol was installed by the ancestors of the Jammi family for the exclusive worship of the Jammi family and there were no worshippers from the public and that certain lands mentioned in the annexed Schedule were also endowed by them for

the upkeep of the temple and for performing 'Nithya Naivedya Deepa Dhooparadhana' and that the trusteeship, management and archakatvam vests solely in the Jammi family ever since the inception, devolving on the family members by the right of primogeniture and in the absence of descendants in any one branch, by testamentary appointment by the last office-holder, and that no outsider had succeeded to the office even by appointment. It was claimed that Jammi Chika Charyulu held the office of the trustee, manager-cum-Archaka since installation till 1862 and thereafter Jammi Mukhya Pranacharyulu Garu held it from 1862-73, Jammi Pedda Hanumantha Rao Garu from 1873-1917, Shrimati Jammi Munemma, widow of Mukhyapranacharyulu, discharged the functions from 1917-1934, Jammi Turanga Rao, the appellant's father, from 1934-1946 and that from 1946 onwards the appellant is discharging those functions. It was claimed that the suit temple is purely a private temple and the public as such have no legal right to access to the suit temple. As regards the proceedings which took place in 1935-36, the case of the appellant was that Jammi Turanga Rao did not care to place all the material showing the nature and character of the temple and hence the Board, by its order dated March 30, 1935, held that the suit temple was a public temple and further that although Jammi Turanga Rao had questioned the correctness of the order passed by the Board by preferring O.P.No.15 of 1936, he did not properly prosecute that matter and he jeopardised the interest of the suit temple as also of the hereditary trustees by bartering away all rights in a compromise whereunder he withdraw the said petition on condition of the Board appointing him as a trustee and that in doing so, Turanga Rao acted in gross dereliction of his duties as a hereditary trustee of a private temple since he had no authority to compromise and barter away valuable rights of the temple and the trust and that the said acts of Turanga Rao cannot in any manner bind his successor trustees and the trust and that the order passed by the District Judge dismissing O.P.No.15 of 1936 is not valid. The said suit was contested by the defendant-respondents who denied the allegation that the suit temple was built and idol was installed by the Jammi family and the suit temple was constructed on the land of the appellant for their exclusive worship and it was claimed that the suit temple area was founded by the public for the

benefit of all Hindus. It was claimed that the suit temple is not a private temple but a public temple right from its inception and that the trusteeship, management-cum-archakavatam did not vest solely in the Jammi family and it did not devolve on the members of the Jammi family either by primogeniture or by testamentary appointment, in the absence of descendants in any one branch, on the members of the Jammi family. It was denied that the office of the trustee, manager-cum-archaka of the suit temple was held by persons mentioned in the plaint and it was claimed that during the periods mentioned in the plaint, several persons not belonging to Jammi family acted as trustees and further that even if some of the members of the Jammi family assumed management of the suit temple, it does not clothe the appellant with trusteeship much less hereditary trusteeship. It was also asserted that public have full access, right from its inception, to the suit temple and all the Hindus have been worshipping the deity in the suit temple. It was also stated that in spite of the efforts of the father of the appellant to secure an order in his favour by placing all the material, he could not succeed in showing that the suit temple is his family's private temple and that he was not guilty of negligence in prosecuting the proceedings before the Board as well as the original petition before the District Judge, but since the material was against his contention, the appellant's father had withdrawn the original petition in the Court of District Judge and that the decisions in the proceedings initiated by the appellant's father were binding on the appellant and the appellant was not entitled to lay claim once again for the relief asked for in the suit.

5. O.S.No.108 of 1970 filed by the Executive Officer proceeded on the basis that the scheduled properties belonging to the suit temple have been endowed to the temple in ancient times and that the appellant is a archaka in the temple and had been in the management of the suit lands and was unauthorisedly and unlawfully utilising the income of the scheduled lands for his own personal use and that the possession of the scheduled properties by the appellant is detrimental to the interest of the suit temple and that he is not entitled to be in possession of the properties. The said suit was contested by the appellant on substantially the same grounds which he raised in O.S.No.21 of 1970 filed by him.

6. By his common judgment dated January 10, 1972, the District Judge, East Godavari District, disposed of both the suits and O.S.No.21 of 1970 filed by the appellant was dismissed while O.S.No.108 of 1970 was decreed. It was held that the suit temple is a public temple and the appellant is not a hereditary trustee of the temple. The appellant was directed to render accounts of the net income realised for six years prior to the filing of O.S.No.108 of 1970 and it was also held that the plaintiff in the said suit was entitled to future profits till delivery of possession. The appellant filed Appeal Nos.87 and 362 of 1970 against the said judgment and decree of District Judge, East Godavari District. The said appeals were dismissed by the High Court by judgment dated April 25, 1975.

7. Shri Sitaramiah, learned counsel appearing for the appellant, has urged that the High Court has erred in holding that the suit temple is a public temple and not the private temple of the family of the appellant, and that in arriving at the said finding, the High Court has not applied the correct tests and has not properly considered the material documents produced by the appellant. Shri Sitaramiah has taken us through the relevant record and the evidence adduced by the parties. Before we refer to the same, we may briefly set out the principles of law that are applicable for determining whether an endowment is public or private.

8. In *Deoki Nandan v. Murlidhar*, (1957)1 M.L.J. (S.C.) 28; (1957)1 An.W.R. (S.C.) 28; 1956 S.C.R. 756; A.I.R. 1957 S.C. 133; 1957 S.C.J. 75, this Court has indicated these principles. It has been observed: (S.C.R. pp.759-60)

"The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

9. While dealing with the question, who are the beneficiaries when a temple is built, idol installed therein and properties endowed therefor, it has been stated: (S.C.R. pp.762-63)

"When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the

purpose of the endowment is the maintenance of that worship for the benefit of the worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers."

10. In that case temple was held to be a public temple. One of the considerations which weighed with the Court in arriving at this conclusion was that the idol was installed not even in the precincts of the residential quarters but in a separate building constructed for that very purpose on a vacant site. It was observed that (S.C.R. p.770) "it is a factor to be taken into account in deciding whether an endowment is private or public whether the place of worship is located inside a private house or a public building."

11. Relying on this decision, Shri Sitaramiah has submitted that in the instant case, the suit temple is situate in the private residential house of the appellant and this aspect has been omitted from consideration by the High Court. The said submission of Shri Sitaramiah is, however, not borne out by the evidence on record, which shows that the suit temple is located at Valuthimmapuram and the appellant's residential house is at Peddapuram and in Peddapuram there is another temple dedicated to Anjaneya Swami in the residence of the appellant. In his deposition, as P.W.1, the appellant has stated:

"The suit temple is the last installation by him near a forest in Valuthimmapuram."

"Along with the installation of the suit idol, Hanumatdeekshitulu Garu installed one idol in our house itself. Chikkaryulu, that is, the son of Hanumatdeekshitulu, constructed a temple for that idol also, and dedicated his

self-acquired property to the deity."

"Within 2 miles from the suit temple, there is no village, but within half a mile from the suit temple, there is harijanawada."

12. During cross-examination, P.W.1 has further clarified:

"Hanumatdeekshitulu, installed one temple at Kotipalli, another at Vijeswaram, one at Dowleswaram, one in our own house and the other is the suit temple."

"I and my ancestors belong to Peddapuram. Valuthimmapuram is 2 miles to Peddapuram."

13. It would thus be clear that the temple in the residential house of the appellant at Peddapuram is different from the suit temple situate at Valuthimmapuram and the suit temple is not situated in the residential house of the appellant.

14. We may now briefly refer to the documents on which strong reliance has been placed by Shri Sitaramiah, namely, Exs.A-4, A-6 and A-9. Ex. A-4 is a partition deed executed in 1867 by Jammi Mukhya Pranacharyulu and Jammi Bindu Medhava Rao, sons of Jammi Hanumantha Charyulu, and the sons of their deceased brothers Chikka Charyulu, Venkata Charyulu and Vyasarayya Charyulu wherein it is stated that Chikka Charyulu purchased some Inam Jyroythi lands in the names of Addanki Rammanna Pantulu and Venkata Krishna, the father of his son-in-law Yerramilli Kameswara Rao and got the same dedicated by them to the suit temple at Valuthimmapuram and that Chikka Charyulu himself had been exercising Saravadhikaratvam and Dharmakarthurvaam and as he became old, he appointed his brother, Bindu Madhava Rao to do service to Shri Anjaneya Swami enshrined at Valuthimmapuram. It is further stated that Yerramilli Kameswara Rao had no male issue and his daughter Munemma alias Ramanamma, was given in second marriage to Mukhya Pranacharyulu and as per the settlement at the time of marriage the Dharmakarthurvam and the properties belonging to Shri Anjaneya Swami in Valuthimmapuram should after the death of Chikka Charyulu pass to Mukhya Pranacharyulu and that after the death of Chikka Charyulu the entire properties standing in the name of Shri Anjaneya Swami passed to Mukhya Pranacharyulu and he is enjoying the same and since Mukhya Pranacharyulu has become old and has no male issue, it is settled that Mukhya Pranacharyulu, himself, during his life time shall appoint as

Dharmakartha any member from out of our family only but should not appoint any other person and the Dharmakarthurvam of Shri Anjaneya Swami shall remain in our family alone and that our family members alone shall perform the worship of the deity without powers of disposition by way of gift and sale and they shall enjoy the said lands truly from son to grandson and so on in succession. In the said deed it was also stated that if the God wills otherwise, the Dharmakarthurvam of the deity at Valuthimmapuram and the entire property belonging to the said deity shall pass hereditary, by rule of primogeniture, in the family of the late Chikka Charyulu and from then onwards the individual concerned himself shall be the Dharmakartha and shall attend to the worship of the deity and maintain the family.

15. Ex.A-6 is the will dated August 13, 1973 executed by Jammi Mukhya Pranacharyulu whereby the trusteeship relating to Sri Anjaneya Swami at Thimmapuram which was in his possession was entrusted to Chinna Hanumantha Rayudu and Pedda Hanumantha Rayudu.

16. Ex.A-9 is an extract from the register prepared under Sec.38 of the 1927 Act in respect of the suit temple by Jammi Turanga Rao, the father of the appellant, who was trustee of suit temple at that time. Against column 4(a) relating to names of previous trustees, the periods of their previous service, their addresses and dates of assuming of the said posts and their particulars, it has been mentioned: (1) Jammi Chikka Charyulu till the year 1862; (2) Jammi Mukhya Pranacharyulu till the year 1873; (3) Jammi Pedda Hanumantha Rao Garu till the year 1917; (4) Jammi Munemma alias Ravanamma till the year 1931; and (5) Jammi Turanga Rao till the year 1934. Against column 4(b) relating to whether the suit Temple is under the control of or whether it is managed as per the scheme approved by the Court or whether it is under the management of the independent trustees who were not governed by the such scheme whether the said trustees are appointed by as per the terms of deeds or as per the custom other particulars, it has been stated: "As per the deed executed in 1873 by Jammi Mukhya Pranacharyulu and subsequently since 1934 onwards acted as *de facto* trustee and as per the orders issued by the Board of Trustees in March, 1936."

17. While considering whether any weight could be attached to the above-mentioned documents,

the High Court has pointed out that by order Ex.B-7 passed in O.A.No.117 of 1934, the suit temple was declared as public temple by the Board and O.P.No.15 of 1936 filed by Turanga Rao, the father of the appellant, for setting aside the said order of the Board was dismissed since the said petition was withdrawn by Turanga Rao. In this context, the High Court has also referred to the documents Exs.B-1, B-2, Ex.4, Ex.B-5. Ex.B-1 is the certified copy of Inam Register of the lands in T.D.No.1620 in Village Valuthimmapuram. Under column No.16 relating to particulars regarding the name of the present owner there is the entry: "Sri Anjaneya Swami Varu Manager Yerramilli Kameswara Rao". This relates to the period 1869-70. Ex.B-2 is certified copy of Inam Register No.36, Village Valuthimmapuram relating to suit lands in T.D.No.192 containing entries of the year 1860. Under column 2 relating to General Class to which the Inam belongs, it is mentioned, "Devadayem Religious Institutions". Under column 7 relating to description of Inam, it is stated: "Devadayem granted for the daily offerings". Under column 12 relating to written instruments in support of the claim it is stated: "Deed of sale executed by Godavari Juggana to Yerramilli Venkata Kroostnama on October 1, 1844, selling this Inam of 5 Jooms (not clear) for 44 Rupees". Under column 16 relating to particulars regarding present owner it is mentioned: "Vali Timma Pooram Anjaneya Swami Manager Yerramilli Camaswara Rao". Under column 19, relating to surviving heirs of the present incumbent, it is stated: "Thus Inam was purchased by Yerramilli Venkata Kroostnama the father of the present Dharmakarthha or Manager Yerramilli Kameswara Rao from Jagana son of the party in column 14 for 44 Rs. Document in support of this sale is produced". In column 21, relating to Deputy Collector's opinion and recommendation, it is stated: "In the account for fasli 1241, it is stated that this Inam of 5 Jooms was older (not clear) as this is an old Inam it is to be confirmed to the temple as long as it is maintained properly". This endorsement bears the signature of Deputy Collector and the date January 11, 1860. Ex.B-4, is certified copy of the entry in the Inam Register 'B' for the years 1312 Fasli for Village Valuthimmapuram wherein in column 1 relating to particulars of Inam, it is stated: "income from the temple". Under column 12 relating to name and profession of Pattadar

entered in the Inam Register it is mentioned: "Sri Anjaneya Swami Varu (Deity)". Similarly Ex.B-5 is the certified copy of Inam Register No.31 of Valuthimmapuram village wherein in column No.2 relating to the name of the Inamdar there is the entry "Sri Anjaneya Swamivaru", and in column No.16 relating to names of the Managers of Religious Endowments and Inams, Archakas and trustee, there is the entry "Manager Yerramilli Kameswara Rao". This entry relates to the year 1808 Fasli (1901 A.D.). After referring to these documents, the High Court has observed:

"These documents, which relate to the suit temple and the suit lands, clearly show that the members of the Jammi family were not mentioned either as trustees or managers of the suit temple or as the persons in possession and enjoyment of the suit lands, though they mention that Anjaneya swami as the pattaholder of the said lands and Yerramilli Kameswara Rao as the manager or as Dharmakarthha of the temple and its lands. If the plaintiff's predecessors were in possession of the lands described in the suit schedule of O.S.No.108 of 1970, they would have paid taxes and the plaintiff could have proved the possession and enjoyment by filing the necessary documents. Not even a single land revenue receipt was produced by the plaintiff to show that the land revenue or the quit rent was paid by the plaintiff's father and forefathers. In the absence of any such documents and in the face of Exs.B-1, B-2, B-4, and B-5 it is clear that the members of the Jammi family never dealt with the suit lands or with the suit temple in the manner as mentioned in Exs.A-4 and A-6 or in Ex.A-9 and that Exs.A-4 and A-6 were never acted upon by the Jammi family."

18. The High Court has further observed:

"In view of Exs.B-1, B-2, B-4 and B-5, it is difficult to accept the plaintiff's case that the lands which were endowed to the temple were purchased by Chikkacharyulu with his own funds. Whatever may be the recitals in Exs. A-4 and A-6, it is clear that there is no iota of evidence to show that in fact the plaintiff's father's predecessors acted as hereditary trustees and enjoyed the suit lands as mentioned in Exs.A-4 and A-6. On the other hand, Exs.B-1, B-2, B-4 and B-5 make it abundantly clear that Yerramilli Venkatakrishnamma and Yerramilli

Kameswara Rao were acting as Dharmakarthas or managers of the suit temple and the suit lands. Hence Exs.A-4 and A-6 were never acted upon. Thus Exs.A-4 and A-6 are of no consequence."

19. We are unable to hold that the High Court was not justified in preferring to place reliance on the entries in the Inam Register (Exs.B-1, B-2, B-4 and B-5) as compared to Ex.A-4 and Ex.A-6 which are documents executed by the members of the appellant's family and Ex.A-9, the register prepared by Turanga Rao, the father of the appellant after his appointment as a trustee under the 1927 Act. Laying stress on the importance of the entries in the Inam Registers, the Judicial Committee of the Privy Council, in *Arunachalam Chetty v. Venkatachalapathi Guruswamigal*, 37 M.L.J. 460: (1919) L.R. 46 I.A. 204: A.I.R. 1919 P.C. 62, has observed: (I.A. pp.217-18)

"It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax free. But it must not be forgotten that the preparation of this (Inam) Register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the Inam Commissioners through their officials made inquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free but of a statement of the history and tenure of the property itself."

20. It was held that they could not fail to attach "the utmost importance, as part of the history of the property, to the information set forth in the Inam Register". These observations were reiterated by this Court in *Narayan Bhagwantrao Gosavi Balajiwalale v. Gopal Vinayah Gosavi*, (1960)1 S.C.R. 773, 780: A.I.R. 1960 S.C. 100.

21. Shri Sitaramiah has placed reliance on the decision of this Court in *The Poohari Fakir Sadavarthy of Bondilipuram v. Commissioner Hindu Religious and Charitable Endowments*, (1962)2 S.C.R. (Supp.) 276: A.I.R. 1963 S.C. 510: (1962)2 An.L.T. 274, wherein after referring to the decision of the Privy Council in *Arunachalam Chetty v. Venkatachalapathi Guruswamigal*, 37 M.L.J. 460: (1919) L.R. 46 I.A. 204: A.I.R. 1919 P.C. 62, it was

observed (S.C.R. p.291)

"The observations of the Privy Council in *Arunachalam Chetty v. Venkatachalapathi Guruswamigal*, 37 M.L.J. 460: (1919) L.R. 46 I.A. 204: A.I.R. 1919 P.C. 62, that in the absence of the original grant the Inam Register is of great evidentiary value, does not mean that the entry or entries in any particular column or columns be accepted at their face value without giving due consideration to other matters recorded in the entry itself."

22. In the present case, it cannot be said that there is an ambiguity in the entries in the Inam Registers. They indicate that the lands attached to the suit temple were purchased by Yeramilli Venkata Kroostnama, the father of Yerramilli Kameswara Rao, and Yerramilli Kameswara Rao was in possession as Dharam Karta or Manager and that the lands were entered in the said Registers as property of the deity, namely Shri Anjaneya Swami and the Inam was "Devadayam" for the religious institution and was granted to the temple as long as it was maintained properly. These entries relate to the years 1860, 1869-70, 1901 and state that Yerramilli Kameswara Rao was the Manager of the suit temple in these years and the lands were granted in Inam for the maintenance of the temple. 23. Apart from the aforesaid documentary evidence, there is oral evidence of D.Ws.1 to 4. D.W.1, Bachala Chandrayya, is a Harijan residing in Valuthimmapuram. He has stated:

"People from Kondapalli used to visit the temple. Settbalijas from my village used to visit the temple. Kurukuri Subbanna of Rayabhupalapatnam, for 3 years, got the pujas performed in Karteeka Masam in the suit temple and also arranged feasting. One Kittamsetti Gangaraju of Peddapuram, a Devangi by community presented eyes to the idol."

On cross-examination, he has stated:

"Some people used to offer Namaskaram to God, standing out side of the road, and some people used to go inside the temple. P.W.1 used to lock the temple and keep the key in a niche and whoever wanted to enter the temple in the absence of P.W.1, used to open the temple with the key from the niche, and used to pay homage and go after locking and keeping the key in the niche."

24. Similarly, D.W.2, Pithani Subbarao, who belongs to Valuthimmapuram, has stated:

"I am a Settibaliju. I am in the habit of visiting the temple along with other members of my community..... Not only the people of my village, but also the people of the neighbouring villages visit the temple."

On cross-examination, he has stated:

"When P.W.1 leaves the temple, he leaves the key in the niche so that anybody that visits the temple in his absence, may open the lock with the key and break coconut and lock it again and go away."

25. D.W.3, Kurukuri Subbanna of Village Rājabhaopalapatam has stated:

"On auspicious days, I used to get Abhishekam performed by the Archaka. For three years, I arranged Santarpana in Karteek Masam in the suit temple."

On cross-examination, he has stated:

"I arranged Santarpana not only for my workers but also for villagers, and the persons belonging to my village in the suit temple."

26. D.W.4, Duvva Raju of Village Anuru Kon-dapalli has stated:

"While passing in front of the suit temple, I and other villagers offer homage to the God, and break coconuts. It is not the exclusive temple of P.W.1 and it is open to all."

On cross-examination, he has stated:

"I used to go to the temple at 10.00 a.m. There used to be one by that time. Sometimes, it used to be locked, and sometimes it used to be kept open. The keys used to be kept in the niche."

27. It is no doubt true that "the mere fact that the public is allowed to visit a temple or thakurdwara cannot necessarily indicate that the trust is public as opposed to private" *Babu Bhagwan Din v. Gir Har Saroop*, (1940)1 M.L.J. 1: (1939) L.R. 67 I.A. 1: A.I.R. 1940 P.C. 7. But, as pointed out by this Court in *Deoki Nandan v. Murlidhar*, (1957)1 M.L.J. (S.C.) 28: (1957)1 An.W.R. (S.C.) 28: 1956 S.C.R. 756: A.I.R. 1957 S.C. 133: 1957 S.C.J. 75, if the endowment was in favour of the idol itself "proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public". The entries in the Inam Registers mentioned above (Exs.B-1, B-2, B-4 and B-5) indicate that the dedication in the present case was in favour of the idol (Sri Anjaneya Swami).

28. While considering the question whether the suit temple is a public temple or a private temple, it cannot be ignored that the suit temple falls in the

area which was formerly part of Madras Presidency. In the greater part of the Madras Presidency, where private temples are practically unknown, the presumption is that temples and their endowments form public religious trusts. Exception is made in respect of Malabar, where the large tarwards often established private temples for their own use and there is no presumption one way or the other. (*Mundacheri Koman v. Thachangat Puthan Vittil Achuthan Nair*, 67 M.L.J. 788: L.R. 61 I.A. 405, 408: A.I.R. 1934 P.C. 230.) In *T.V. Mahalinga Iyer v. State of Madras*, (1981)1 S.C.C. 445: A.I.R. 1980 S.C. 2036, it has been observed that so far as Tamil Nadu is concerned there is initial presumption that a temple is a public one, it being up to the party who claims that it is a private temple, to establish that fact affirmatively and this initial presumption must be rebutted by clinching testimony and the crucial question is as to whether the public worship in the temple as of right. In the instant case, we find that the said presumption, instead of being rebutted by the appellant, is reinforced by the entries in the Inam Registers as well as by the oral evidence of D.Ws.1 to 4 with regard to public having free access to the suit temple for the purpose of worshipping the deity.

29. As pointed out by this Court in *Narayan Bhagwantrao Gosavi Balajiware v. Gopal Vinayah Gosavi*, (1960)1 S.C.R. 773, 780: A.I.R. 1960 S.C. 100, the finding that the suit temple is a public temple and not a private one is a finding of fact. In the instant case, the trial court as well as the High Court have found that the suit temple is a public temple. The said finding is not open to further scrutiny by this Court unless it suffers from an error of law. We have examined the contentions urged by Shri Sitaramiah to assail this finding, but we do not find any merit in the same. We, therefore, uphold the finding recorded by the High Court that the suit temple is a public temple and not a private one and that the appellant has failed to establish his case that he is a hereditary trustee of the same.

30. Shri Sitaramiah has urged that even if the suit temple is held to be a public temple, the appellant has acquired title over the suit lands by prescription inasmuch as after the death of his father, Jammi Turanga Rao, in 1946 he has been in possession of the suit property in his own right and that O.S.No.108 of 1970 was filed only in 1968,

long after the expiry of the prescribed period of limitation. Shri Sitaramiah has conceded that the plea of limitation was not raised by the appellant at any stage earlier but he argued that in view of the express provision contained in Sec.3 of the Limitation Act, 1963, it is permissible for the appellant to raise the plea before this Court in these appeals and in this context he placed reliance on the decision of the Privy Council in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*, L.R. 18 I.A. 55: I.L.R. 13 All. 300, and the decision of the Calcutta High Court in *Troilokya Nath Basu v. Jyoti Perkash Nandi*, I.L.R. (1903)30 Cal. 761: 8 C.W.N. 251. In support of his submission that rights can be acquired in property of a religious and charitable trust by adverse possession, Shri Sitaramiah has placed reliance on the decisions of the Privy Council in *Balwant Rao Bishwant Chandra Chor v. Purun Mal Chaube*, L.R. 10 I.A. 90: I.L.R. 6 All. 1, *Ambalavana Pandara Sannidhi v. Meenakshi Sundareswarar Devasthanam (by its Manager)*, L.R. 47 I.A. 191: A.I.R. 1921 P.C. 97: 25 C.W.N. 1, *Lala Hem Chand v. Lala Pearey Lal*, (1943)1 M.L.J. 11: A.I.R. 1942 P.C. 64: 47 C.W.N. 46 and the decision of this Court in *Sri Sarangadevar Peria Matam v. Ramaswamy Gounder*, (1966)1 S.C.R. 908: A.I.R. 1966 S.C. 1603. Shri Nambiar, the learned counsel for the respondent has, on the other hand, submitted that since the appellant obtained possession over the suit properties as the legal representative of Turanga Rao, who was the trustee, the bar of limitation would not apply in view of Sec.10 of the Limitation Act, 1963. In our opinion, the objection with regard to the bar of limitation was rightly not raised by the appellant before the lower courts in view of the provisions contained in Sec.94 of the 1951 Act and in Sec.103 of the 1966 Act. Sec.94 of the 1951 Act provided as under:

"Nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor-in-title before the commencement of this Act."

Sec.103 of the 1966 Act reads as under:

"103. *Property of charitable or religious institution or endowment not to vest under the law of Constitution after commencement of this Act:* Nothing contained in any law of limitation for the time being in force shall be deemed to vest

in any person the property or funds of any charitable or religious institution or endowment which had not vested in such person or his predecessor-in-title before the September 30, 1951 in the Andhra Area of the State and on the date of commencement of this Act in the remaining areas of this State."

31. The suit temple falls in the Andhra area of the State of Andhra Pradesh and in view of Sec.103, the relevant date for considering whether a right has been acquired by prescription is September 30, 1951. In order to succeed the appellant would have to establish that he had acquired the right over the suit properties by prescription before September 30, 1951. Shri Sitaramiah does not dispute that possession of Jammi Turanga Rao, father of the appellant, was not adverse to the trust in view of his having been appointed as the Trustee in 1936. Adverse possession on behalf of the appellant has been claimed after the death of his father in 1946. Even if it be assumed that the possession of the appellant was adverse ever since 1946, it cannot be said that he had acquired his title over the suit properties by adverse possession before September 30, 1951. In this view of the matter, it cannot be held that the appellant has acquired title over the suit properties by adverse possession. In these circumstances, we do not consider it necessary to go into the question whether in view of Sec.10 of the Limitation Act the appellant cannot claim title by adverse possession since he obtained possession of the suit property as the legal representative of Jammi Turanga Rao who was in possession of the suit property as Trustee.

32. Shri Sitaramiah has lastly contended that Ex.A-4 shows that after meeting the expenses for the upkeep of the deity, the income from the suit property was to be used for the benefit of his family which means that there was only a partial dedication of the property in favour of the deity. The submission of Shri Sitaramiah is that in view of the fact that the dedication was only partial, the property retained its original private and secular character and that there was only a charge on the common obligation used as part of the income for the upkeep of the deity and therefore, the said property attached to the temple cannot be regarded as the trust property. reliance has been placed on the decision of this Court in *S.Shanmugam Pillai v. K.Shanmugam Pillai*, (1973)2 S.C.C. 312: (1973)1 S.C.R. 570, 582, 583. Since we have not

accepted the case set up by the appellant on the basis of the aforesaid document and have found that in view of the entries in the Inam Registers, there was complete dedication of the property to the deity, it cannot be held that there was only a partial dedication of the suit property and the property continued to retain its private and secular character.

33. In the result, the appeals fail and are accordingly dismissed with costs.

B.S. ---- *Appeal dismissed.*

IN THE SUPREME COURT OF INDIA.

Present: *M.H.Kania, C.J., and Kuldip Singh, J.*

C.A.No.2446 of 1991 6th May, 1992.

Mrs.Payal Ashok Kumar Jindal ...Appellant
v.

Captain Ashok Kumar Jindal ...Respondent.

Family Courts Act (LXVI of 1984), Sec.10 - Civil Procedure Code (V of 1908), O.5, Rules 9, 10, 20 and 21 - Natural Justice - Principles of - Divorce proceedings pending before Family Court, Pune - Wife filing petition before Supreme Court for transfer of case from Pune to Family Court, Delhi - Interim stay granted - Transfer petition dismissed and stay vacated - Thereafter notices sent by Family Court Pune, to wife at her addresses at Noida and Delhi coming back with endorsement 'not found' - Substituted service in newspaper published - Thereafter ex parte order of divorce passed - Legality.

Held:- In the facts and circumstances of this case, the wife was justified in her assumption that the proceedings before the Family court, Pune, would be resumed after fresh notice to the parties. The applicability of the rules of natural justice depends upon the facts and circumstances of the case. In this case fair play and the interest of justice required the issuance of a fresh notice to the parties after the stay order was vacated by the Supreme Court. [Para 12]

The Family Court sent two registered notices to the appellant at her Noida address and also at the address given by her in the proceedings before the

Supreme Court. Unfortunately, both the notices came back with the endorsement that the appellant could not be found on the given addresses. This is not material on the record to reach a conclusion that the appellant refused to receive the notices. There is also nothing on the record to show as to whether the postal authorities made any efforts to deliver the registered letters to any of the appellant's relations at the given addresses. The courts below are wholly unjustified in holding that the appellant refused to receive the notices and further that the said notices could have been received by any of her relations on the given addresses. After the notices sent by registered post were received back, the Family Court did not make any attempt to serve the appellant through the process of the Court. The appellant was no stranger to the respondent. She was his wife. It could not have been difficult for him to find out the address where she was staying. Under the circumstances, resort to the substituted service by way of publication in the newspaper was not justified. The *ex parte* order of divorce must therefore be set aside. [Paras 12, 13, and 14]

C M. Chopra, for Appellant.

The Judgment of the Court was delivered by **Kuldip Singh, J.:-** His parents advertised for "homely non-medico" bride. Her parents responded. Marriage took place on January 24, 1988 at Noida near Delhi. They hardly lived as husband and wife at Pune for about seven months when on August 16, 1988 the husband filed a petition under Sec.13 of the Hindu Marriage Act for dissolution of marriage on the ground of cruelty. He alleged "she had a habit of smoking" and "it was found that she was in the habit of drinking and even once came drunk to the applicant's house and abused everybody" He further alleged "it was found by the applicant that she was working as a model prior to marriage and he found few pictures of the respondent in bikini and semi-nude clothes in magazines". She vehemently denied the allegations and claimed that she was a homely, vegetarian, non-smoking, teetotalter and faithful housewife. The Family Court at Pune proceeded *ex parte* and granted divorce-decree by the order dated November 30, 1989. Wife's application for setting aside the *ex parte* decree was dismissed by the Family Court on June 24, 1990. The High Court by its judgment dated October 10/11, 1990 upheld the findings of the Family Court with the modification that in

place of decree for dissolution of marriage it granted a decree for judicial separation. This appeal by way of special leave is by the wife against the judgments of the courts below.

2. During the pendency of the divorce-proceedings before Family Court, Pune, the wife filed a petition, on May 1, 1989, before this Court seeking transfer of the case from the Family Court, Pune to Delhi. This Court granted *ad interim* stay of the proceedings before the Family Court, Pune. The stay remained operative till September 11, 1989 when this Court dismissed the transfer petition and vacated the stay. Thereafter the husband appeared before the Family Court on September 15, 1989 whereas the appellant-wife remained absent. Notices were sent by registered post to the wife on her address at Noida and also at her Delhi address given by her in the proceedings before this Court. The notices came back with the remarks "not found". The family Court ordered substituted service and a notice was published in the "Times of India" New Delhi of date October 24, 1989 asking the wife to appear before the Family Court on November 16, 1989 or the proceedings would be taken *ex parte*. On November 16, 1989 the Family Court ordered *ex parte* proceedings. The issues were framed on November 21, 1989, the evidence of the husband was recorded on November 25, 1989 and the judgment was pronounced on November 30, 1989.

3. The appellant filed an application dated December 18, 1989 for setting aside the *ex parte* divorce-decree wherein she stated that after she was forced to leave her matrimonial-home at Pune, she was residing with her parents at Noida. She further stated that in October/November, 1989 she had gone to reside with her brother at Delhi. According to her, she applied to the Army Authorities claiming maintenance out of her husband's salary. Respondent-husband is an Army officer. The Army authorities sent a letter dated December 14, 1989 to her father wherein it was mentioned that his daughter's application for maintenance allowance could not be entertained because the husband had already obtained a divorce-decree from the court. A copy of the Family Court judgment granting divorce-decree to the husband was also annexed to the letter. The appellant claims that for the first time, on or about December 14, 1989, she came to know through her father that the respondent had already been granted

an *ex parte* divorce-decree by the Family Court. The appellant in her application *inter alia* stated as under:

"The applicant submits that the applicant did not receive any notice/letter/summons or communication from this Hon'ble Court's office. Even there was no intimation given by postal authorities and the applicant honestly states that till the receipt of the letter from the Army H.Q., New Delhi, she was not aware of the date of proceeding. The applicant submits, the applicant was under *bona fide* belief that she will receive a notice from this Hon'ble Court. As such and being far from Pune, either in Noida (U.P.) or at New Delhi, it was not possible for her to approach this Hon'ble Court for any enquiry since she was also not permitted to appear through the lawyer..... At any rate and in any event, the applicant also did not come across the public notice published in the "Times of India", New Delhi on October 24, 1989 as stated in the decree. The applicant submits, the applicant had every intention to resist the marriage petition filed by the opponent since the same was absolutely false, frivolous and out and out false, and has been resisted by the applicant by filing written statement, preliminary objections including to approach the Supreme Court of India. The intention of the applicant was clear. The applicant submits, the applicant was also advised by her Advocate that she will receive a fresh notice in due course of time after the stay was vacated by the Hon'ble Supreme Court of India from this Hon'ble Court. The applicant states, she resides at a far long distance from Pune. She was also refused any assistance of lawyer. The applicant has no relation or any representative who can look after her in the present proceeding in Pune. It was in these circumstances, the applicant was prevented by sufficient cause from appearing in the marriage petition proceeding No.561 of 1989 and as such the said decree is required to be set aside..... The applicant states, the applicant is unable to maintain herself, she has no source of income.... The applicant submits, because of the passing of *ex parte* decree, she has been refused maintenance allowance. The applicant also prays for granting of maintenance allowance pending final disposal of this application."

4. The Family Court dismissed the application for setting aside *ex parte* divorce-decree on the following reasoning:

"But where the party itself knows that stay obtained by it has been vacated, there appears no warrant for the proposition that again a notice is required to be given to the said party. I do not think that such advice was really given to the applicant. The applicant has not produced any evidence to the effect that she received such advice from a lawyer. It is her own statement. It is a self-serving statement and can hardly be believed. I think that if the applicant was really keen and desirous to contest matrimonial petition, she would have at once made enquiries to find out as to when the next date for hearing in this court was fixed after her application for transfer of the case was dismissed by the Supreme Court and the stay obtained by her was vacated. The order of vacating the stay was passed on September 11, 1989 by the Hon'ble Supreme Court and the applicant knew fully well about it. The opponent who had also appeared in the Supreme Court in connection with that matter did appear in this Court on September 15, 1989. The record of P.A.No.561 of 1989 shows that opponent applied for issuing of notice to the present applicant. The notice was issued by registered post on two separate addresses. One of the addresses was the one shown by applicant herself in the Supreme Court petition and the other address was the one which was admitted to be her address in the matrimonial petition (which was address of her father at Delhi). Both these notices were sent by registered post in due course. The court waited till return of this notice. On both these envelopes postal authorities have endorsed that the present applicant was not found on these addresses. The opponent had, therefore, made application that the applicant was avoiding to take notice and hence substituted service by publishing in the "Times of India" be made. Accordingly, a notice was published as per order of the Court on opponent's application..... Thus the contention of the respondent that she had no notice of the further proceeding in marriage petition does not appear convincing. As stated already in the first instance, there was no necessity for her to wait for

receipt of the notice in the circumstances of the present case. The notices sent to her were obviously evaded, otherwise there was no reason why the applicant was found on either of the addresses which she admits to be the correct addresses. Even if she was not present, there was no reason why other major members of the family did not accept these notices. And lastly the publication of the notice in one of the most widely circulated newspaper at Delhi was sufficient notice to the applicant."

5. The High Court upheld the reasoning and the conclusions reached by the Family Court and dismissed the appeals filed by the wife.

6. The respondent appeared before us in person and himself argued his case. The learned counsel for the appellant raised the following points for our consideration:

(a) That the Family Court and the High Court grossly erred in dismissing the application filed by the appellant for setting aside the *ex parte* proceedings;

(b) that the divorce-petition was filed hardly seven months after the marriage. Sec.14 of the Hindu Marriage Act provides 'it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage'. The divorce petition should have been dismissed as not competent in terms of Sec.14 of the Hindu Marriage Act;

(c) that even on merits the divorce-decree is based on no evidence. That allegations in the divorce-petition are wholly vague. In any case the evidence of Major Ved Prakash being wholly interested and contrary to the record the courts below fell into grave error in accepting serious allegations against the appellant on the basis of his evidence;

(d) that the High Court acted illegally in substituting the decree of divorce to that of a decree for judicial separation. The High Court should have dismissed the divorce-petition.

7. We may take up the first point.

8. The appellant filed written statement before the Family Court, Pune vehemently denying the allegations made against her by the respondent. She also raised preliminary objections regarding the maintainability of the divorce petition. She filed a transfer petition before this Court which was

dismissed in September, 1989. She filed another transfer petition which was dismissed by this Court on April 12, 1990 with the following observations *Payal Ashok Kumar Jindal v. Ashok Kumar Jindal, Transfer Petition (Civil) Nos.318-19 of 1990, decided on April 12, 1990:*

"It is open to the petitioner to move the High Court under Sec.24 Code of Civil Procedure for consideration of her prayer that the case be transferred to another Judge. On the merits of this prayer, we decline to make any observation.

It would appear that the case is now listed before the Family Judge at Pune on April 13, 1990. It will be appropriate that having regard to the apprehension expressed by the petitioner the Court should not proceed with the matter until her prayer for transfer is considered by the High Court. We accordingly direct the Family Court, Pune to stay further proceedings in the case a period of 60 days from today to enable the petitioner to approach the High Court."

9. It is no doubt correct that the appellant did not approach the High Court for the transfer of the case but the fact remains that she has been seriously contesting the divorce proceedings and it would not be fair to assume that she deliberately chose to abstain from the Family Court and was intentionally avoiding the summons.

10. The Family Court and the High Court have held that after the dismissal of the transfer petition and vacation of stay by this Court the appellant-wife should have, on her own, joined the proceeding before the Family Court. According to the courts below no notice for appearance was required to be sent to the parties after the stay was vacated.

11. It is not necessary for us to go into the question as to whether a fresh notice to the parties is necessary where the superior Court vacates the stay order and as a consequence the proceedings recommence before the court below. We are of the view that in the facts and circumstances of this case the interest of justice required the issue of such a notice. The admitted facts in this case are as under:

(i) While dismissing the transfer petition and vacating the stay order this Court did not fix any date for the appearance of the parties before the Family Court, Pune.

(ii) The Family Court had permitted the

assistance of a lawyer to the appellant-wife in the following terms: "As applicant is from Delhi and it would cause hardship, permission is granted for engaging an Advocate for pleading her case only for the purpose of presenting applications or serving notices and noting the orders of the Court."

(iii) The appellant did not engage a lawyer to represent her before the Family Court, Pune.

(iv) The appellant-wife was residing with her parents at Noida (Delhi).

12. Even the distance between Noida and Pune was a big hassle for the appellant especially when she had no counsel to look after the proceedings before the Family Court, Pune. We are of the view that in the facts and circumstances of this case she was justified in her assumption that the proceedings before the Family Court would be resumed after fresh notice to the parties. The applicability of the rules of natural justice depends upon the facts and circumstances of each case. We are of the view that in this case fair play and the interest of justice required the issuance of a fresh notice to the parties after the stay order was vacated by this Court. We do not, therefore, agree with the findings of the courts below to the contrary.

13. In any case, realising the requirements of natural justice, the Family Court, sent two registered notices to the appellant at her Noida address and also at the address given by her in the proceedings before this Court. Unfortunately, both the notices came back with the endorsements that the appellant could not be found on the given addresses. This is not material on the record to reach a conclusion that the appellant refused to receive the notices. There is also nothing on the record to show as to whether the postal authorities made any efforts to deliver the registered letters to any of the appellant's relations at the given addresses. The courts below are wholly unjustified in holding that the appellant refused to receive the notices and further that the said notices could have been received by any of her relations on the given addresses.

14. After the notices sent by registered post were received back, the Family Court did not make any attempt to serve the appellant through the process of the Court. The appellant was no stranger to the respondent. She was his wife. It could not have been difficult for him to find out the address where she was staying. Under the circumstances, resort

to the substitute service by way of publication in the newspaper was not justified.

15. We are, therefore, of the view that there was sufficient cause for the non-appearance of the appellant in the matrimonial petition before the Family Court.

16. The view we have taken on the first point, it is not necessary to deal with the other points raised by the learned counsel for the appellant.

17. We, therefore, set aside the order of the Family Court dated June 24, 1990 and allow the appellant's application dated December 18, 1989 and set aside the *ex parte* decree passed against the appellant in marriage petition No.A-561 of 1989. As a consequence the judgment of the Family Court, Pune dated November 30, 1989 and the judgment of the High Court in First Appeal No.649 of 1990 and First Appeal No.696 of 1990 dated October 10/11, 1990 are also set aside.

18. The appellant had asked for transfer of her case from the Principal Judge, Family Court, Pune to some other court and this Court gave liberty to the appellant to move the High Court for the said purpose. We are satisfied that the reasons given by the appellant for such transfer and the apprehensions entertained by her are wholly unjustified. We are, however, of the view that the Principal Judge, Family Court Pune, has taken the grievances made by the appellant before this Court rather seriously and has commented adversely about the same. With a view to do complete justice between the parties we direct that this case be transferred from the file of Principal Judge, Family Court, Pune to the Principal Judge, Family Court, Bombay. The parties are directed to appear before the Principal Judge, Family Court, Bombay on June 22, 1992.

19. Before concluding we wish to place on record that we tried to persuade the parties to live together and in the alternative to settle their dispute amicably but with no result.

20. We allow the appeal in the above terms with no order as to costs.

B.S. Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present:- Dr. T.K.Thommen and S.C.Agrawal, JJ.

C.A.No.2460(N) of 1977 15th May, 1992.

P.M.C.Kunhiraman Nair ...Appellant
v.

C.R.Naganatha Iyer and others ...Respondents.

Transfer of Property Act (IV of 1882), Sec.111(f) - Implied surrender of lease - Lessor granting a new lease to third person with assent of the lessee under existing lease - Lessee directing his sub-tenant to pay rent direct to landlord - If amount to implied surrender.

Under clause (f) of Sec.111 of the Transfer of Property Act, 1882 implied surrender is a mode for determination of a lease of immovable property. In English law, delivery of possession by the tenant to a landlord and his acceptance of possession effects a surrender by operation of law. It is also called implied surrender in contradistinction to express surrender which must be either by deed or in writing. It has been held that directing the occupier to acknowledge the landlord as his landlord i.e., to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord. It has also been held that receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant whether he is a stranger, or whether he was already in possession as sub-tenant. [See *Halsbury's Laws of England*, 4th Edn. Vol.27, paras 444, 445, 446 and 450 and Note (1) to para 446]. Under the illustration to clause (f) of Sec.111 of the Transfer of Property Act, there would be an implied surrender of the former lease if a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. The said illustration is, however, not exhaustive of the cases in which there may be an implied surrender of the lease. Just as under the English law, there can be an implied surrender of the law of transfer of property in India, if the lessor grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his subtenant to pay the rent directly to a lessor. [Para 10]

Cases referred to:

Konijeti Venkayya v. Thammanna Peda Venkata

Subbarao, 1956 An. W.R. 207: A.I.R. 1957 A.P. 619.
[Para 10]

Noratmal v. Mohanlal, A.I.R. 1966 Raj. 89: 1966 Raj. L.W. 484: I.L.R. (1966) 16 Raj. 57. [Para 10]
T.R.G. Wariyar, Senior Advocate (Ms. Shanta Vasudevan and P.K. Manohar, Advocates, with him),
for Appellant.

S. Balakrishnan and G. Srinivasan, Advocates, for Respondents.

The Judgment of the Court was delivered by *S.C. Agrawal, J.*: This appeal is directed against the judgment and decree dated March 10, 1977 of the High Court of Kerala. It arises out of a suit filed by respondents 1 to 6 against the appellant and respondent 7 for redemption and recovery of possession of property consisting of 25 cents of land in Valiyaveetuparamba in Nagaram Amson, District Kozhikode and the buildings and the machinery of the flour mill standing on the said land.

2. The land and the buildings belong in Jenm to the Vettathu Tharavad who leased out the same in or about 1939 to Sivarama Iyer, respondent 2 on a rent of Rs.40 per mensem. Late C.N. Rama Iyer, father of respondents 1 to 5 and husband of respondent 6 started a flour mill known as 'Sivaram Mills' on the said premises in or about 1940 and for that purpose, he installed an engine and necessary plant and machinery and also made some further constructions over the land. C.N. Rama Iyer died on May 2, 1953 and after his death, respondents 1 to 5 entered into an agreement with the appellant on February 7, 1954 whereunder the appellant advanced Rs.4,500 to respondents 1 to 5 and respondents 1 to 5 agreed to entrust the appellant with the management of the mill for a period of one year from March 5, 1954 on a monthly payment of Rs.300 out of which Rs.125 was to be appropriated every month towards the advance given. Respondents 1 to 5 could not entrust the management of mill to the appellant on or before March 5, 1954 and they could do so only in the middle of April, 1954 and on April 13, 1954, a fresh agreement (Ex.B-2) modifying the terms of the previous agreement was entered into between respondents 1 to 5 and the appellant. Under the said agreement dated April 13, 1954 a further sum of Rs.1,900 (in addition to the sum of Rs.4,500) was advanced by the appellant to respondents 1 to 5 and it was agreed by respondents 1 to 5 that the total sum of Rs.6,400 which had been advanced by the appellant to respondents 1 to 5 will not bear

any interest from the date of the said agreement and that the appellant shall run the mill for one year and after the stipulated period, respondents 1 to 5 would get the possession of the mill back from the appellant. It was also agreed that a sum of Rs.40 which is the rent of the building where the mill is situate and current charges for each month of the electric lights of the mill should be paid by the appellant to respondents 1 to 5 and a sum of Rs.100 per month would be paid by the appellant as rent for the mill, out of which a sum of Rs.50 shall be adjusted by the appellant towards Rs.6,400 paid in advance and the balance amount of Rs.50 should be paid to respondents 1 to 5 every month. It was also agreed that on the expiry of the period of one year, respondents 1 to 5 would get back the possession of the mill after paying the balance amount of Rs.5,800 to the appellant. Before the expiry of the period of one year fixed under the agreement dated April 13, 1954, the plaintiffs-respondents 1 to 5 entered into an agreement (Ex.B-3) dated March 22, 1955 with one T.M. Rama Iyer (who happened to be the father-in-law of respondent 2). In the said agreement, reference has been made to the agreement dated April 13, 1954 with the appellant and it was stated that a sum of Rs.5,600 is to be paid as balance amount to the appellant after adjusting the sum of Rs.800 which has already been paid to him. It was further stated that a sum of Rs.5,072 and annas 2 was payable to T.M. Rama Iyer, towards the arrears of rent for the building belonging to the said T.M. Rama Iyer, which has been taken on rent by respondents 1 to 5 and that since there was difficulty for respondents 1 to 5 to clear the said liability, they have decided to assign the company (named 'Sivaram Mills & Co.') to T.M. Rama Iyer for a consideration of Rs.10,672 and annas 2, out of which Rs.5,072 and annas 2 had been adjusted and from the balance amount due to them the sum of Rs.5,600 due to be paid to the appellant may be paid to him. In the said agreement, it was also stated that the said T.M. Rama Iyer on paying the amount due to the appellant after the stipulated period could take up the management by himself, pay the rent of the building, conduct the business and if necessary file a suit against the appellant and get the company vacated and do anything as per his will and pleasure. In the said agreement, respondents 1 to 5 further agreed that either after his taking the possession of the company or whenever demanded

by T.M.Rama Iyer, they would execute the sale deed and get the same registered. On December 11, 1956, the said T.M.Rama Iyer executed a Deed of Assignment (Ex.B-4) in favour of the appellant and his younger brother, Gopalan Nair, whereby he assigned the Sivaram Oil Mill and Flour Mill to the appellant and his younger brother on a sale consideration of Rs.8,000. The sum of Rs.6,000 that was payable to the appellant inclusive of interest was adjusted against the said consideration and the balance amount of Rs.2,000 was paid by the appellant to the said T.M.Rama Iyer. In the said document, it was stated that after execution of the agreement dated March 22, 1955, T.M.Rama Iyer had taken the building where the mills are situate on a monthly rent of Rs.75 for a period of one year from the Vettathu Tharavad under an oral agreement. In the said document, it was further mentioned that the appellant and his younger brother had the liberty to manage the mills, to enter into rental agreements with the Jenmi of the building by paying the rent directly, to effect alienation etc. as per their wishes and he (T.M.Rama Iyer) would not have any right or liability hereafter. In the said document, it is also mentioned that the rent receipts for the rent paid to the Jenmi were being handed over with the document.

3. Respondents 1, 3 and 5 filed a suit (O.S.No.3 of 1964) against respondents 2, 4 and 6 as well as against the appellant and T.M.Rama Iyer. In the said suit, the plaintiffs, while seeking partition and separate possession of their shares in the suit properties, had also prayed for possession of the oil and flour mills and had asserted that the agreement dated March 22, 1955 executed by respondents 1 to 5 in favour of T.M.Rama Iyer was a sham transaction and no rights were conferred on T.M.Rama Iyer under the said agreement. T.M.Rama Iyer, who was defendant 1 in the said suit, died during the pendency of the suit. In the suit all disputes between the plaintiffs (respondents 1, 3 and 5) and defendants 2 to 4 (respondents 2, 4 and 6) and the legal representatives of T.M.Rama Iyer were settled out of court and the only dispute requiring adjudication was that relating to the property in question in these proceedings which was claimed by the appellant as the assignee from T.M.Rama Iyer. The said suit was dismissed by the Additional Sub Judge, Kozhikode by judgment (Ex.A-1) dated January 25, 1968. It was held that the agreement dated March 22, 1955

was not sham, nominal and void and it operates as an outright sale of plant and machinery. It was, however, held that the tenancy right of the plaintiffs had not been affected by either the agreement dated March 22, 1954 or the Deed of Assignment dated December 11, 1956 and that the plaintiffs would be entitled to possession of the site and buildings in which the plant and machinery were installed. It was further held that the appellant had been inducted into possession of the site and buildings by virtue of the agreement dated April 13, 1954, and that the appellant would be entitled to continue in possession of the same until the right created in his favour as per agreement dated April 13, 1954 was extinguished. Respondents 1 to 6 filed an appeal (A.S.No.129 of 1968) in the High Court against the said judgment and decree of the Additional Sub-Judge. The said appeal was dismissed by the High Court by its judgment dated April 6, 1973. The High Court found that according to the averments in the plaint what was conveyed under the agreement dated March 22, 1955 was only the oil mill and it was not the case of the plaintiffs that immovable property was conveyed under the said agreement and that in view of the pleadings, there was no scope for considering whether any immovable property had been transferred and therefore, no question of registration of the document arose.

4. While the said appeal was pending before the High Court, respondents 1 to 6 filed the suit giving rise to this appeal in the Court of Munsif, Kozhikode wherein it was prayed that the possession of the suit property may be restored to the plaintiffs-respondents by way of redemption and that the plaintiffs-respondents were willing to pay any amount that is found payable by them to the appellant. The said suit is based on the footing that the earlier suit was resisted by the appellant on the ground that he was in possession of and management of the business of the mill as possessory mortgagee thereof and the same had found favour with the court. The plaintiffs-respondents have, however, pleaded that since the appellant has continued in possession and management of the property even after the expiry of the term, no amount is likely to be payable on settlement of accounts. Respondent 7 was impleaded as defendant in the said suit on the ground that the appellant had leased the mill to him. The said suit was contested by the appellant. In the said suit, a

decree for possession of the suit property excluding the plant and machinery was passed in favour of the plaintiffs-respondents by the Additional Munsif, Kozhikode-I by his judgment dated June 22, 1972. The appeal filed by the appellant against the judgment and decree of the Additional Munsif was dismissed by the District Judge, Kozhikode by judgment dated November 20, 1976 and the second appeal filed by the appellant was also dismissed by the learned Single Judge of the High Court by judgment dated March 10, 1977.

5. The High Court was of the view that the appellant could not come forward with a case that there was relationship of landlord and tenant between the plaintiffs-respondents and him and he could not be evicted from the suit property since he is entitled to protection of the Kerala Building (Lease and Rent Control) Act. In this regard, the High Court, after referring to the judgment of the Additional Sub-Judge in the earlier suit (O.S.No.3 of 1964), has observed that in that suit the appellant did not put forward the case that as per the agreement (Ex.B-2) dated April 13, 1954 there was a relationship of landlord and tenant between plaintiffs-respondents and him and the case of the appellant in that suit was that the plaintiffs-respondents could get the possession of the property only on extinguishment of the charge created by the said agreement. The High Court held that in the circumstances the appellant could not be permitted to plead in this suit what he did not plead in the earlier suit. According to the High Court, the consideration paid for the movables under Deed of Assignment (Ex.B-4) dated December 11, 1956 would not make the appellant, the tenant of the property. The High Court was of the view that the appellant could not be allowed to put forward inconsistent pleas to the detriment of the opposite side. The High Court was also of the view that since there was a lease for running a business, it could not be said that the appellant is a tenant of a building and is entitled to the protection of the Kerala Building (Lease and Rent Control) Act.

6. In support of this appeal, Shri Wariyar, the learned counsel for the appellant, has submitted that the High Court was in error in relying upon the observations contained in the judgment of the trial court in a previous suit (O.S.No.3 of 1964) inasmuch as after the decision of the High Court in appeal (A.S.No.129 of 1968), the said judgment

of the trial court had merged in the judgment of the High Court dated April 6, 1973 and that is the only judgment which is operative and that the said judgment of the High Court shows that the only question which was considered by the High Court was whether the agreement (Ex.B-3) dated March 22, 1955 was inoperative on account of non-registration. According to Shri Wariyar, the High Court has held that the said agreement did not require registration inasmuch as it related to transfer of movable property, namely, the oil mill and that the effect of the said judgment of the High Court is that the plaintiffs-respondents are precluded from claiming possession of the oil mill. The only question that remains is whether plaintiffs-respondents can claim possession of the land and building in which the mill is installed and that involves the question as to whether plaintiffs-respondents, who were originally the lessee of the land and building, had a subsisting right in the same on the date of filing of the subsequent suit by them. Shri Wariyar has urged that the plaintiffs-respondents ceased to have any subsisting right in the property as a lessee in view of the agreement (Ex.B-3) dated March 22, 1955 which shows that there was an implied surrender by the plaintiffs-respondents of their leasehold right in the property in favour of T.M.Rama Iyer which fact is further established by Deed of Assignment (Ex.B-4) dated December 11, 1956 executed by T.M.Rama Iyer in favour of the appellant and his younger brother which indicates that a fresh lease had been created by the landlord in favour of T.M.Rama Iyer and T.M.Rama Iyer had surrendered his leasehold rights in favour of the appellant.

7. We find considerable force in the aforesaid submissions of Shri Wariyar.

8. After the decision of the High Court dated April 6, 1973 in A.S.No.129 of 1968 the judgment of the Additional Subordinate Judge stood merged in the judgment of the High Court. The judgment of the High Court shows that the earlier suit was confined to the oil mill only, treating it as movable property independent of the property. Since the said suit did not relate to the land and building in which the oil mill is installed the said suit and the plea raised by the appellant in that suit can have no bearing in the present suit relating to possession of the land and building. The learned Judge of the High Court, with due respect, was not right in

negating the plea raised by the appellant that he is in possession of property as a tenant on the view that the appellant did not raise this plea in the earlier suit and he could not be allowed to put forward inconsistent pleas. Since the question with regard to possession of the land and building arises in the present suit only it was permissible for the appellant to raise the plea that the plaintiffs have no subsisting leasehold interest in the suit property and that the appellant is in possession of the same as a tenant of the owner of the said property.

9. As to whether the plaintiffs had a subsisting leasehold interest in the property involves the question whether they had surrendered the said rights. The case of the appellant is that the plaintiffs had impliedly surrendered their leasehold rights when they executed the agreement (Ex.B-3) dated March 22, 1955 and thereafter a fresh tenancy was created in favour of T.M.Rama Iyer which was assigned by T.M.Rama Iyer in favour of the appellant.

10. Under clause (f) of Sec.111 of the Transfer of Property Act 1908, implied surrender is a mode for determination of a lease of immovable property. In English law, delivery of possession by the tenant to a landlord and his acceptance of possession effects a surrender by operation of law. It is also called implied surrender in contradistinction to express surrender which must be either by deed or in writing. It has been held that directing the occupier to acknowledge the landlord as his landlord, i.e., to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord. It has also been held that receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger, or whether he was already in possession as subtenant. [See *Halsbury's Laws of England*, 4th Edn. Vol.27, paras 444, 445, 446 and 450 and Note (1) to para 446]. Under the illustration to clause (f) of Sec.111 of the Transfer of Property Act, there would be an implied surrender of the former lease if a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. The said illustration is, however, not exhaustive of the cases in which there may be an implied surrender of the lease. Just as under the English law, there can be an implied surrender under the law of transfer of property in India, if the lessor grants a new lease to

a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his subtenant to pay the rent directly to a lessor. [*Konijeti Venkayya v. Thammanna Peda Venkata Subbarao*, 1956 An.W.R. 207; A.I.R. 1957 A.P. 619 and *Norattmal v. Mohanlal*, A.I.R. 1966 Raj. 89; 1966 Raj. L.W. 484; I.L.R. (1966) 16 Raj. 57].

11. Reference may, therefore, be made to the relevant clauses in the agreement (Ex.B-3) dated March 22, 1955 and the Deed of Assignment (Ex. B-4) December 11, 1956 on which reliance has been placed by Shri Wariyar. In the agreement (Ex.B-3) dated March 22, 1955, executed by respondents 1 to 5 in favour of T.M.Rama Iyer, it is stated:

"(4) We will not have any responsibility or objection for your paying the amount due to Kunhiraman Nair after the stipulated period and to take up the management by yourself, pay the rent of the building, conduct the business and if necessary to file a suit against Kunhiraman Nair and get the company vacated; and to do any thing as per your will and pleasure.

(5) The company is not charged by any other liability except the loan mentioned above. The gift deed given to us and the copy of the agreement with Kunhiraman Nair are hereby given to you. Either after your taking possession of the company or whenever you make demand we shall execute sale deed and get the same registered."

12. In the Deed of Assignment (Ex.B-4) dated December 11, 1956 executed by T.M.Rama Iyer in favour of the appellant and his younger brother, it is stated:

"(2) After this for the purpose of clearing of the loan liability to you; the mill etc. started by the abovesaid Naganatha Iyer and others was given to me as per the agreement dated the 22nd of March, 1955. They belong to me and I have on oral agreement taken the building wherein the mills situate on a monthly rent of Rs.75 for a period of 1 year from the Vettathu Tharavad which is the Jenmi of the same.

(3) I have decided to assign the Oil Mill and Flour Mill described in the schedule below to you. The sale consideration is fixed at Rs.8,000 inclusive of Rs.100 given by me as advance to the Jenmi. Of this Rs.8,000 the sum of Rs.6,000

due to you inclusive of interest is adjusted and after deducting the same, the balance amount of Rs.2,000 due to me is paid and the entire sale consideration has been paid to me in full satisfaction in the abovesaid 2 counts and I have handed over to you the mills described in the schedule with all the equipments and all the other rights pertaining to the same. You have derived the same and hereafter you are at liberty to manage the mills by yourself; to enter into rental agreements with the Jenmi of the building by paying the rent directly, to effect alienation etc. as per your wishes. I will not have any right, question or liability hereafter. I have made you believe and hereby certify that the properties are not charged by any loan liability or alienation and none except myself have any right over the same. The abovesaid agreement, the gift deed obtained by Naganatha Iyer and others and the rent receipts for having paid rent to the Jenmi are hereby give."

13. From the aforesaid clauses, it would appear that by executing the agreement (Ex.B-3) dated March 22, 1955, respondents 1 to 5 surrendered their leasehold interest in favour of T.M.Rama Iyer inasmuch as in clause (4) of the said agreement they have clearly stated that plaintiffs-respondents will not have any responsibility or objection for T.M.Rama Iyer paying the amount due to the appellant after the stipulated period and take up the management by himself and *pay the rent of the building and conduct its business*. By empowering T.M.Rama Iyer to pay the rent of the building respondents 1 to 5 were impliedly surrendering their leasehold interest in the premises in favour of T.M.Rama Iyer. This is borne out by the Deed of Assignment (Ex.B-4) dated December 11, 1956 wherein in clause (2), T.M.Rama Iyer had stated "I have on oral agreement taken the building where the mills situate on a monthly rent of Rs.75 for a period of one year from the Vettathu Tharavad which is the Jenmi of the same". The original rent for the property as let out to respondent 2 was Rs.40 per month. The fact that after execution of the agreement dated March 22, 1955, T.M.Rama Iyer entered into another agreement with the landlord on a higher monthly rent of Rs.75 would show that a fresh lease was created by the landlord in favour of T.M.Rama Iyer and the earlier lease in favour of respondent 2 stood determined by implied surrender. In clause (3) of the

Deed of Assignment (Ex.B-4) dated December 11, 1956, T.M.Rama Iyer has empowered the appellant "to enter into rental agreements with the Jenmi of the building by paying the rent directly to effect alienation." This shows that T.M.Rama Iyer had impliedly surrendered his leasehold rights by agreeing that the appellant could enter into rental agreements with the landlord by paying the rent directly. The case of the appellant is that ever since the execution of the Deed of Assignment (Ex.B-4) dated December 11, 1956, rent is being paid by him to the landlord directly. It is not the case of the plaintiffs-respondents that they had paid the rent for the premises to the landlord after March 22, 1955. In these circumstances, we are of the opinion that the plaintiffs-respondents, by executing the agreement (Ex.B-3) dated March 22, 1955, had impliedly surrendered their leasehold rights in the suit property in favour of T.M.Rama Iyer and on the date of the filing of the present suit they had no subsisting leasehold interest in the same. The suit for the recovery of the possession of the suit property filed by them on the basis that the plaintiffs-respondents are the lessees thereof was, therefore, not maintainable and is liable to be dismissed.

14. The appeal is consequently allowed, the judgment and decree of the High Court of Kerala, dated March 10, 1977 in S.No.1206 of 1976-E is set aside and O.S.No.636 of 1968 filed by respondents 1 to 6 against the appellant is dismissed. There will be no order as to costs.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.**Present:-** *Dr. T.K. Thommen and S.P. Bharucha, JJ.*

C.A.No.2945 of 1992

14th August, 1992.

Reserve Bank of India...*Appellant*

v.

S.S. Investments and others...*Respondents.*

Arbitration Act (X of 1940), Secs. 3 and 8 and Schedule I, Clause 4 - Agreement between parties providing for arbitration by arbitrators and the appointment of an umpire - One arbitrator making an award - Other arbitrator writing award later coming to different conclusion - Matter referred to umpire - Awards if made without joint deliberations of umpires and therefore vitiated - Umpire, if can enter upon the reference.

An agreement for the sale of some residential flats was entered into between the appellant and the respondent 1. A clause in the agreement provided that disputes between the parties would be resolved by arbitration. If the parties could not agree upon a common arbitrator, each could nominate one arbitrator who would appoint an umpire. Disputes having arisen, the appellant appointed respondent 2 who was a former Judge as an arbitrator and the respondent 1 nominated respondent 3, an advocate as arbitrators. They appointed respondent 4 as umpire. On 7.12.1989, respondent 2 made an award. On 12.12.1989, respondent 3 wrote to respondent 2 stating that he would write a separate award and on 30.12.1989 he made an award which was quite different from that given by respondent 2. The appellant requested respondents 2 and 3 to refer the matter to respondent 4. Respondent 1 objected to respondent 4 entering upon the reference on the ground that both the awards had been made without joint deliberation. The respondent 4 entered upon the reference on 19.11.1990. On 17.1.1991 both the counsels for the appellant and respondent 1, made a written submission to respondent 4 stating that they had no objection for extension of time for the umpire to make the award. Respondent 1 filed proceedings before the High Court contending that the arbitration proceedings were invalid and that the reference to respondent 4 was without jurisdiction. The High Court held that there was no joint deliberation between the arbitrators and

that the award passed by respondents 2 and 3 were invalid. In appeal,

Held:- In the present case it is not in dispute that respondents 2 and 3 were present at all the meetings in the arbitration proceedings. It is urged that there had been no joint deliberation and application of mind by them so that it cannot be said that there was any disagreement between them and respondent 4 was, therefore, not entitled to enter upon the reference. Regard must be had, to the ordinary course of conduct of judicial and arbitration proceedings, especially considering the fact that one of the arbitrators was a former Judge and the other was a member of the Bar. Discussions do ordinarily take place during the course of the arguments between counsel and the Judges or arbitrators. Questions are asked by the Judges or arbitrators which would indicate their minds to counsel and to each other. Discussions also, ordinarily, take place between the Judges or arbitrators *inter se* during the course of the hearings and immediately before or after the same. It is not, therefore, imperative that arbitrators should meet upon the conclusion of the hearings to discuss the matter and agree to an award or agree to disagree in that behalf. That there had been divergent views expressed even during the course of the present arbitration hearings is clear from the letter written by the respondent 3 to respondent 2 for he says "we could have sat together and discussed matters before writing the award even if our points of view or judgments varied or even differed on any issues or point for determination". That the respondent 2 wrote out his own award indicates that he had no doubt in his mind that the differences between him and respondent 3 about the case before them were irreconcilable. As has been said, disagreement can take a variety of forms. Upon the facts of this case there was a disagreement between respondents 2 and 3, the fact of such disagreement was conveyed to the parties when respondent 2 sent them his award and respondent 4 then became entitled to enter upon the reference as umpire. The High Court was not justified in placing reliance upon the fact that there was no plea on behalf of the appellant that there was a joint consultation between respondents 2 and 3 after the submission of the arguments by both sides and before the passing of the award by respondent 2, which, in its view, established that there was "no joint deliberation or united consideration" by

respondents 2 and 3. Parties to an arbitration cannot be expected to know that such joint consultations or deliberations had taken place between the arbitrators. The agreement to extend the time for respondent 4 to make the award should have been qualified by the respondent 1 and should have reserved to it the right to agitate its objection to the fourth respondent's jurisdiction. The terms of the joint submission made by counsel for the appellant and respondent 1 to respondent 4 are unqualified and in the circumstances, respondent 1 must be held to have waived its objection to the entering upon the reference by respondent 4 as umpire. [Paras 16 to 20]

Cases referred to:

Keshavsinh Dwarkadas Kapadia v. Indian Engineering Company, A.I.R. 1972 S.C. 1538: (1972) 1 S.C.R. 695: (1971) 2 S.C.C. 706. [Para 5]

Allen Pering and John Keymer, In re, (1835) 3 Ad. & E. 245: 111 E.R. 406 (K.B.). [Para 7]

Dalling v. Matchett, 125 E.R. 1138: (1740) Willes 215 (C.P.). [Para 8]

Abu Hamid Zahir Ala v. Golam Sarwar, A.I.R. 1918 Cal. 865: 22 C.W.N. 301: 25 C.L.J. 396. [Para 9]

J.Kuppuswami Chetty v. B.V. Anantharamier, (1947) 1 M.L.J. 297: A.I.R. 1948 Mad. 40. [Para 11]

Mamidi Appayya v. Yedan Venkataswami, A.I.R. 1919 Mad. 877: 24 M.L.T. 102: 1918 M.W.N. 477. [Para 12]

Sheodutt v. Pandit Vishnudatta, A.I.R. 1955 Nag. 116: 1955 Nag. L.J. 258: I.L.R. 1955 Nag. 224. [Para 13]

Winteringham v. Robertson, (1858) 27 L.J. Ex. 301. [Para 15]

Kapil Sibal, (H.S. Parihar, K.S. Parihar, Advocates, with him), for Appellants.

V.A. Bobde, Senior Advocate (*Mukul Mudgal, C.A. Sundaram and T. Ray*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by *Bharucha, J.*:- Leave to appeal granted.

2. This is an appeal against the judgment and order of the Madras High Court whereby it declared that arbitration awards given on December 7 and 30, 1989, by respondents 2 and 3 respectively, in respect of a dispute between the appellant and respondent 1, were not valid; and that the subsequent proceedings conducted by the umpire, respondent 4, were also not valid. The order of the Madras High Court remitted the matter to

respondents 2 and 3 to pass awards afresh in the light of its observations.

3. An agreement for the sale of five blocks of residential flats and a community complex, along with the land, was entered into between the appellant and respondent 1 on June 4, 1984. Clause 36 of the agreement provided that disputes between the parties would be resolved by arbitration; if the parties could not agree upon a common arbitrator each would nominate an arbitrator, who would appoint an umpire before entering upon the reference. Disputes having arisen the appellant appointed respondent 2, who was a former Judge, and respondent 1 appointed respondent 3, who was a member of the Bar, as their arbitrators. Respondents 2 and 3 entered upon the reference on April 19, 1988, appointed respondent 4 as umpire and heard the appellant and respondent 1. On December 7, 1989 respondent 2 made an award holding respondent 1 to be in breach of the agreement with the appellant and gave consequential directions. On December 12, 1989 respondent 3 wrote to respondent 2 stating that he could not subscribe to the award made by respondent 2. He said that "for the purposes of the record I shall write a separate award...." He added, "We could have sat together and discussed matters before writing the award even if our points of view or judgments therein varied or even if differed on any issues or point for determination." On December 30, 1989 respondent 3 made his award. He came to a conclusion quite different from that arrived at by respondent 2. The last day upon which an award could have been made was December 31, 1989. On April 3, 1990 the appellant requested respondents 2 and 3 to refer the matter to respondent 4 as umpire in view of the differing awards made by them. On April 19, 1990 respondent 1 objected to respondent 4 entering upon the reference. It stated that respondent 2 had made his award unilaterally and without any deliberations with respondent 3. Respondent 3 had made his award on December 31, 1989. Both the awards had been made without joint deliberations and, therefore, the arbitration proceedings were vitiated and there had to be a fresh arbitration. A copy of this letter was sent to respondent 4. On November 19, 1990 respondent 4 entered upon the reference as umpire. Counsel on behalf of the appellant presented his submissions to respondent 4 in the presence of the first respondent's representatives and counsel on

December 22, 1990 and January 12, 15 and 19, 1991. On January 26, 1991, the arguments on behalf of the appellant were concluded and the matter was adjourned to February 4, 1991 to enable counsel for respondent 1 to address respondent 4. In the meantime, on January 17, 1991, counsel for the appellant and respondent 1 made a written submission to respondent 4 which noted that his time to make the award expired on January 18, 1991 and that the proceedings before him were in progress. The submission stated, "The claimant and the respondent have no objection for extension of time by two months from January 18, 1991 for the umpire to make the award." On January 31, 1991 respondent 1 filed the proceedings before the Madras High Court upon which the judgment and order under appeal were passed. It prayed for declarations that the arbitration proceedings and awards passed therein were invalid and unenforceable, that the arbitration agreement was invalid and unenforceable and had ceased to have effect and that the reference to respondent 4 was without jurisdiction and invalid. Respondent 1 also prayed that the fourth respondent's authority as umpire be revoked and a permanent injunction be granted restraining the appellant and respondents 2, 3 and 4 from proceeding to pass any award or execute any award in respect of the reference before respondent 4.

4. The High Court held that the case was "one in which admittedly there has been no joint deliberation or consultation between respondents 2 and 3 before the passing of the awards and, therefore, the awards passed by respondents 2 and 3 individually in the circumstances will become void". It also stated that it was not possible to hold that respondent 1 had acquiesced in the competency of the reference to respondent 4. In the result, the High Court declared that the awards of respondents 2 and 3 were invalid and that the entering upon the reference by respondent 4 and the subsequent proceedings conducted by him were not valid. It remitted the matter to respondents 2 and 3 to pass awards afresh in the light of the observations it had made.

5. Mr. Sibal, learned counsel for the appellant, drew our attention to Sec. 3 of the Arbitration Act, 1940, which states that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule to the Act insofar as they are

applicable to the reference. Clause 4 of the First Schedule states that if the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators. In Mr. Sibal's submission, the awards individually made by respondents 2 and 3 and sent to the parties indicated that they could not agree and respondent 4 was, therefore, entitled to enter upon the reference as umpire. In the alternative, Mr. Sibal submitted, if the awards made by respondents 2 and 3 were not awards in law, respondents 2 and 3 had allowed their time to expire without making an award, in which event also respondent 4 was entitled to enter upon the reference. Our attention was invited by Mr. Sibal to the judgment of this Court in *Keshavsinh Dwarkadas Kapadia v. Indian Engineering Company*, A.I.R. 1972 S.C. 1538: (1972) 1 S.C.R. 695: (1971) 2 S.C.C. 706, wherein the Court stated thus:

"As to what constitutes disagreement cannot be laid down in abstract or inflexible propositions. It will depend upon the facts of the case as to whether there was a disagreement..... Disagreement between the arbitrators may take various shapes and forms. In the present case the arbitrators by reason of attitude of a party in correspondence addressed to the arbitrators could not agree to proceed with the matter. Where one of the arbitrators decline to act and the other is left alone it will in a case of this type amount to disagreement between the two arbitrators. In the present case, there was disagreement between the arbitrators. Time to make the award also expired. Therefore, from both points of view the umpire had authority to enter upon the reference."

6. Mr. V.A. Bobde, learned counsel for respondent 1, submitted that there had to be, between the arbitrators, a joint deliberation and application of mind to the case after the hearing was concluded. There had to be such discussion because each arbitrator should have the opportunity to change the other's mind. When parties selected the forum of joint arbitrators for resolution of their differences they were entitled to have a result arrived at after discussions between the arbitrators. Emphasis was laid by Mr. Bobde upon the authorities to which we now refer.

7. In the matter of the arbitration between *Allen Pering and John Keymer, In re.*, (1835) 3 *Ad. & E.* 245: 111 *E.R.* 406 (*K.B.*), a reference was made to Stevens and Vincent and such person or persons as they should appoint. They appointed a barrister as umpire. Stevens and Vincent did not agree and the three proceeded with the reference. After the case had been heard, at a meeting of the three the umpire stated the terms of a proposed award, to which Stevens objected. After some discussion Stevens left the other two to draw up the award saying he would not join in it if he could not change their minds. The three did not meet again. Afterwards, by a mistake of Vincent's clerk, the draft of a proposed award made by Vincent at an earlier stage of the case was sent to Stevens. Stevens, considering it to be a draft of the award that was then proposed to be made, sent it to the umpire with written objections. After this, and without any further communication with Stevens, the other two executed the award in the terms that they had proposed at the last meeting of the three. The award was objected to on the ground that it had been made by one of the arbitrators and the umpire without any consultation with or intimation to Stevens. The learned Judges upheld the objection. Lord Denman, C.J., after setting out the facts, noted that Stevens had placed his objections to the draft award that had been sent to him in writing but the other two, without meeting him or considering how far their view may be varied by the objections, executed an award. They were bound to hear what Stevens had to say. It was only upon full notice given to him that they were entitled to proceed without him. It is important to note that Lord Denman, C.J. said: (*E.R.* p.406)

"If, after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him. Here, Stevens, the arbitrator appointed by Pering, always took a view more favourable to Pering than the other arbitrators; and, on one occasion, he said that he would have no more to do with the matter. Had that declaration been acted on, I do not say that the award would not have been valid."

The same view was expressed by Coleridge, J. thus: (*E.R.* p.407)

"One of them refused his assent. I do not say that this might not have authorised the others to proceed without him; but they got into

communication with him again, and he sent them his objections. Now they either did or did not take those objections into their consideration. If they did not, the award is clearly bad for that reason; if they did, they ought to have consulted him upon them, before they made the award. Instead of this, they made another award."

8. In *Dalling v. Matchett*, 125 *E.R.* 1138: (1740) *Willes* 215 (*C.P.*), it was held that when a cause is referred to three persons and if they or any two of them are empowered to make an award, an award made by two of them is good if the third had notice of the meetings. But if he had no such notice, then such an award is bad.

9. The same principle was applied by Calcutta High Court in *Abu Hamid Zahir Ala v. Golam Sarwar*, *A.I.R.* 1918 *Cal.* 865: 22 *C.W.N.* 301: 25 *C.L.J.* 396, thus:

"The presence of all the arbitrators at all the meetings and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award."

10. The judgment quoted the then current edition of *Russell on Arbitration*, which said:

"As the arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist each other in arriving at a just decision."

11. In *J. Kuppuswami Chetty v. B.V. Anantharamier*, (1947) 1 *M.L.J.* 297: *A.I.R.* 1948 *Mad.* 40, the court held that it was well established that whilst an arbitration agreement might provide that the decision of the majority of the arbitrators would prevail, nevertheless the law required that all the arbitrators must give their united consideration to all matters arising in the arbitration which had been referred to them.

12. In *Mamidi Appayya v. Yedan Venkataswami*, *A.I.R.* 1919 *Mad.* 877: 24 *M.L.T.* 102: 1918 *M.W.N.* 477, a learned single Judge held that for a final award by arbitrators to be valid it was essential that all the arbitrators should have been present at all the meetings, including the last, that witnesses

should have been examined in the presence of all and that all should have consulted together as to the form that their award should take.

13. The last of the judgments referred to is *Sheodutt v. Pandit Vishnudatta*, A.I.R. 1955 Nag. 116: 1955 Nag.L.J. 258: I.L.R. 1955 Nag. 224. This was a case, where upon the facts, it appeared to the Court that one of the five arbitrators had dominated the proceedings and taken undue advantage of the fact that two arbitrators were illiterate. The court was left "with an uneasy feeling that all the arbitrators did not jointly deliberate in the proceedings or in the making of the award" and held that there had been such a "mishandling of the arbitration" as to result in substantial miscarriage of justice, for which reason the award was set aside.

14. Before we proceed further we must note that the relevant passage in *Russell on Arbitration*, 20th edn., now reads: (p.235)

"All the arbitrators must act together. As they must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all.

All must make award together. Where there are two or more arbitrators, all should execute the award at the same time and place. If they do not, the award may be invalidated, but as the objection is one of a formal character, if no other objection is shown, the court may remit the award to the arbitrators for correction."

15. While on *Russell on Arbitration*, we may refer with advantage to the discussion on what constitutes disagreement. It is said: (p.241)

"The question what constitutes such a disagreement between arbitrators as well entitle the umpire to make an award... is one upon which no definite rule can be laid down. It has been held that there was such a disagreement where one of the arbitrators declined to proceed further with the case, and also where one arbitrator refused to permit certain evidence to be produced which his fellow arbitrator declared to be essential, and in another case it was decided that non-agreement on important points was equivalent to disagreements."

One of the cases referred to by Russell in this context is *Winteringham v. Robertson*, (1858) 27 L.J. Ex. 301. A submission provided that the matters in difference should be referred to two arbitrators, and in case they should not agree it should

be lawful for them to appoint another person to be umpire or to concur with them in considering the matters referred. The arbitrators appointed an umpire, who sat with them throughout the reference. On the arbitrators submitting their views to the umpire, it appeared that they were not agreed on important points and the umpire formed the opinion that there was no likelihood of their agreeing. The umpire then made his award in favour of the plaintiff. The defendant objected to the award on the ground that it had been made before the arbitrators had disagreed. It was held that the non-agreement of the arbitrators was equivalent to disagreement; that on their non-agreement as to some of the matters in dispute the umpire could make an award as to all these matters, and that his award should be enforced.

16. In the present case, it is not in dispute that respondents 2 and 3 were present at all the meetings in the arbitration proceedings. It is urged that there had been no joint deliberation and application of mind by them so that it cannot be said that there was any disagreement between them and respondent 4 was, therefore, not entitled to enter upon the reference.

17. Regard must be had, in our view, to the ordinary course of conduct of judicial and arbitration proceedings, especially considering the fact that one of the arbitrators was a former Judge and the other was a member of the Bar. Discussions do ordinarily take place during the course of the arguments between counsel and the Judges or arbitrators. Questions are asked by the Judges or arbitrators which would indicate their minds to counsel and to each other. Discussions also, ordinarily, take place between the Judges or arbitrators *inter se* during the course of the hearings and immediately before or after the same. It is not, therefore, imperative that arbitrators should meet upon the conclusion of the hearings to discuss the matter and agree to an award or agree to disagree in that behalf.

18. That there had been divergent views expressed even during the course of the present arbitration hearings is clear from the letter written by the respondent 3 to respondent 2 for he says, "We could have sat together and discussed matters before writing the award even if our points of view or judgments varied or even differed on any issues or point for determination". That the respondent 2 wrote out his own award indicates that he had no

doubt in his mind that the differences between him and respondent 3 about the case before them were irreconcilable. As has been said, disagreement can take a variety of forms. Upon the facts of this case, we are of the view that there was a disagreement between respondents 2 and 3; the fact of such disagreement was conveyed to the parties when respondent 2 sent them his award and respondent 4 then became entitled to enter upon the reference as umpire.

19. We think that the High Court was not justified in placing reliance upon the fact that there was no plea on behalf of the appellant that there was a joint consultation between respondent 2 and 3 after the submission of the arguments by both sides and before the passing of the award by respondent 2, which, in its view, established that there was "no joint deliberation or united consideration" by respondents 2 and 3. Parties to an arbitration cannot be expected to know that such joint consultations or deliberations had taken place between the arbitrators.

20. Mr. Sibal drew our attention to the written submission made by counsel on behalf of the appellant and respondent 1 to respondent 4 extending time for him to make the award. In Mr. Sibal's submission, there was a categorical statement therein that respondent 1 had no objection to the extension of such time for respondent 4 to make the award, whereby respondent 1 had waived its objection to respondent 4 entering upon the reference as umpire. Mr. Bobde submitted, on the other hand, that the protest made by respondent 1 about respondent 4 entering upon the reference as umpire continued. In his submission, respondent 1 could not have acted otherwise because the authorities laid down that it is not open to a party to abstain from appearing before an arbitrator or umpire, although he objects to that arbitrator or umpire having entered upon the reference. The authorities do not say that the party so objecting is obliged to extend the time for the arbitrator or umpire to make the award. At any rate, the agreement to extend the time for respondent 4 to make the award should have been qualified by the respondent 1 and should have reserved to it the right to agitate its objection to the fourth respondent's jurisdiction. The terms of the joint submission made by counsel for the appellant and respondent 1 to respondent 4 are unqualified and, we think that, in the circumstances, respondent 1

must be held to have waived its objection to the entering upon the reference by respondent 4 as umpire.

21. In this view of the matter the appeal is allowed, the judgment and order of the Madras High Court dated July 8, 1991 is set aside and the petition and application filed by respondent 1 are dismissed. Respondent 1 shall pay to the appellant the costs throughout.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA

Present:- *L.M.Sharma, S.Mohan and
N.Venkatachala, JJ.*

C.A.No.4536 of 1992

22nd October, 1992.

K.Gopinathan

...Appellant

v.

Union of India.

..Respondent.

Civil Services - Deputation - Person on deputation subsequently absorbed in deputation post - Basic pay - Fixation - Basic pay cannot be reduced even though overall pay on absorption is higher. [Para 8] M.N.Krishnamani, Senior Advocate (Pravir Choudhari, Advocate, with him), for Appellant. Gobinda Mukhoy, Senior Advocate (Naresh Bakshi, Ms.Lalitha Kaushik and Shankar Divate, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by *Mohan, J.:-* Leave granted.

2. The appellant K.Gopinathan was working as Assistant Sub-Inspector of Police. He was taken on deputation in the Central Bureau of Investigation (in short CBI) on February 1, 1965. On such deputation he was paid his pay pertaining to the post of his parent office, as modified from time to time. Besides, he was also paid deputation duty allowance. On February 1, 1983, he was permanently absorbed and his pay was re-fixed.

3. It requires to be stated at this stage that on such absorption his basic pay was reduced from Rs.510 to Rs.390. Therefore, he submitted a representation to the Superintendent of Police, CBI pointing

out the loss caused to him by an incorrect fixation. In this regard he made repeated representations and ultimately on September 13, 1990 the appellant was informed that his pay fixation had been correctly done.

4. Aggrieved by that order, he moved Central Administrative Tribunal, Madras Bench by way of Original Application No.967 of 1990. Before the tribunal it was contended on behalf of the appellant that the basic pay on account of the absorption should not be reduced. Therefore, merely because the overall pay is more, that does not mean there could be a reduction of the basic pay.

He relied on the decision of the Bangalore and the New Delhi Tribunals for advancing this plea. However, the tribunal rejected the same. Hence, Mr.M.N.Krishnamani, learned counsel for the appellant commends the acceptance of the view of the Bangalore Bench as well as the Delhi Bench which found favour with this Court in SPL (C) No.2196 of 1992 while the respondents would submit that the reasoning in the impugned judgment is correct.

5. By means of the following tabulated statement we will point out the position of the appellant's pay as a deputationist and as absorbee in C.B.I.

	As a deputationist on the date of absorption	As an absorbee in C.B.I.
Basic Pay	Rs. 510	Rs. 390
Spl. Pay	Rs. 30	Rs. 30
Deputation allowance	Rs. 80	---
Personal Pay	--	Rs. 85
Dearness Pay	--	Rs. 214.70
DA/ADA	Rs. 279	Rs. 304
Total:	Rs. 899	Rs.1,023.70

6. Two things are striking: (i) His basic pay has been reduced from Rs.510 to Rs.390. (ii) However, the overall pay as a deputationist on the date of absorption was Rs.899 while after absorption in C.B.I. it is Rs.1,023.70.

7. On these facts the Tribunal comes to the conclusion as follows: (ATC p.581, para 4)

"In fact on the date of absorption, the dearness allowance available under the Tamil Nadu Government Pay Scales was only Rs.279 for the appellant, whereas the amount of D.A. available to him under the Central scales was Rs.518. It is also to be noted that out of Rs.518, an amount of Rs.214.70 has been merged with the pay. When the dearness pay of Rs.214.70 is added to the basic pay of Rs.390.00, we get the amount of Rs.604, which is higher than the basic pay of Government servant under the Tamil Nadu Government, attached to the post. We, therefore, hold that there has not been any reduction in the applicant's basic pay in substance, even though that basic pay consisted of two elements is different. Taking into account the fact that the Tamil Nadu Government scales were revised on April 1, 1978 and that of

the Central Government on January 1, 1973, we are of the view that both the scales are not comparable. When a person is being governed by the Tamil Nadu Government pay scales while he was on deputation, and therefore as on February 1, 1983, is absorbed under Central scale of pay the diminution in basic pay of the applicant is bound to occur. We also notice that even though the basic pay of the applicant rose to Rs.604 from Rs.510 by virtue of the addition of the dearness pay of Rs.214.70 with the existing basic pay of Rs.390.00. Therefore, this is a case in which there has not been any real reduction in the basic pay of the applicant.

8. We are afraid we cannot subscribe to this reasoning. While upholding the view of Central Administrative Tribunal, Principal Bench, New Delhi in Original Application No.1680 of 1989 in S.L.P. (C) No.2196 of 1992, we have pointed out how the basic pay cannot be reduced. The same principle will be applicable to this case as well. Accordingly, the appeal is allowed. However, there shall be no order as to costs.

B.S.

Appeal allowed.

IN THE SUPREME COURT OF INDIA.

Present:- Kuldip Singh and N.M.Kasliwal, JJ.

C.A.Nos.783 and 784 of 1981 3rd September, 1992.

M.Ramaswamy Pillai (Dead) by Lrs....Appellants
v.

Hazarath Syed Shah Mian Sakkaf Khadiri Thaikal
...Respondent.

(A) *Madras City Tenants Protection Act (III of 1922), Sec.9 - Landlord filing suit for possession of suit property on the ground that the appellant was a tenant holding over - Tenant filing petition under Sec.9 - Appellant, if can take different plea that appellant was not a tenant and so was not entitled to relief under Sec.9.*

Held: The only reason given for denying the benefit of Sec.9 of the City Tenants' Protection Act by the High Court to the appellant is that while executing the lease deed, the mutawalli had no power to grant such lease under the provisions of the Wakf Act 29 of 1954 as amended by Amendment Act 34 of 1964. The High Court was not correct in taking the aforesaid view. The appellant in the present case was a tenant long before the coming into force of the Wakf Act, 1954. The plaintiff had come forward with a clear case in the plaint that the appellant was a tenant holding over and as such he was not entitled to take a different plea in reply to the petition filed under Sec.9 of the Act that the appellant was not a tenant as the property in question was a wakf property and the mutawalli had no right to grant a lease. Thus, in the facts and circumstances of this case the defendant/appellant was entitled to the benefit of the provision of Sec.9 of the Act. [Para 8]

(B) *Pleadings - High Court cannot make out a new case beyond the pleadings.* [Para 6]

A.T.M.Sampath, for Appellant.

A.V.Rangan, for Respondent.

The Judgment of the Court was delivered by Kasliwal, J.:- This appeal by grant of special leave is directed against the judgment of the Madras High Court, dated April 2, 1980. The Hazarath Syed Shah Mian Sakkaf Khadiri Thaikal through trustee S.S.Peeran Sahib (hereinafter referred to as the 'plaintiff') filed a suit on September 15, 1967 for possession of a plot of land measuring 124' x 20' situated in the town of Tanjore. The original

tenant was M.Ramasamy Pillai who is now dead and is represented through his legal representatives who are the appellants in the present appeal. The plaintiff brought the suit on the allegation that the defendant took the suit property on lease for a period of 2 years from February 1, 1955 on a monthly rent of Rs.10 and executed a rent deed on November 17, 1955. It was further alleged that the defendant was in occupation of the site as a tenant ever since February 1, 1955 and after the expiry of the period of 2 years fixed in the rent deed, the defendant was continuing as a tenant holding over on the same terms. The defendant raised a superstructure on the land in suit. Till October, 1966 the superstructure was made up of mud walls and thatched roofing. But suddenly, the defendant renewed the roofing of the front portion into one of Calicut Tiles without the knowledge or permission of the plaintiff. It was further alleged in the plaint that the plaintiff wanted to construct pucca terraced shops on the site for which the necessary licence had been obtained from the Municipality and as such the property in suit was needed for the plaintiff's own use.

2. The defendant filed a written statement on November 7, 1967 and *inter alia* alleged that the site was originally in the occupation of Damodara Nair and one Panchapakesan as lessees. Damodara Nair had put up a pucca Mangalore tiled roofing over the back portion of the land. Panchapakesan and his father Sundaram Mudaliar had put up a thatched structure on the front portion of the land. The defendant had purchased the superstructures from both the above persons in or about the year 1942. The defendant used the back portion for his residence and the front portion for carrying on bicycle and motor cycle repairing shop. It was further alleged in the written statement that the plaintiff had recognised the occupation of the defendant and had also accepted him as a tenant and was receiving the rent from the defendant since 1942. In 1955 the plaintiff wanted a registered rent deed and as such a registered lease deed was executed on November 17, 1955. It was in fact, a renewal of the existing tenancy. The defendant also took the plea that under the Madras City Tenants' Protection Act, it was open to the tenant to claim compensation or pray for conveyance of the site on a price to be fixed by the court. The defendant also took a plea that the suit was not maintainable as the property

formed part of a Minor Inam under the Minor Inams Abolition Act 30 of 1963, but we are not concerned with this objection now.

3. The defendant also filed a separate petition under Sec.9 of the Madras City Tenants' Protection Act (hereinafter referred to as the 'Act') on November 6, 1967 and prayed for fixing a price for the suit site and to convey the property on payment of the price to be fixed by the Court. In reply to this petition under Sec.9, a stand was taken by the plaintiff that the property being a wakf property as such it was inalienable. It was also pleaded that the lease of the site under the lease deed of 1955 was invalid. It was also pleaded that even if the tenant was found entitled to the benefits of the City Tenants' Protection Act, he can claim the benefit only so far as the residential portion in the back side was concerned and not in respect of the entire property. The learned Munsif after remand of the case to him, by a common judgment dated March 10, 1976 decreed the suit for possession in favour of the plaintiff and dismissed the petition of the tenant filed under Sec.9 of the Act. The learned Munsif held that the lease deed dated November 17, 1955 being invalid, the tenant was not entitled to take benefit of Sec.9 of the Act. The tenant then filed appeals against the judgment in the suit for possession as well as miscellaneous appeal against the dismissal of his petition filed under Sec.9 of the Act. Both the appeals were dismissed by the learned Subordinate Judge. The second appeal in both the matters were also dismissed by the High Court by a common judgment dated April 2, 1980. The tenant aggrieved against the judgment of the High Court has filed the abovementioned two appeals.

4. We have heard learned counsel for the parties. The High Court held that there was no evidence on behalf of the appellant to show that he had been already recognised as a lawful tenant of the property prior to 1955 by the respondent. The High Court observed that a perusal of the recitals in Ex.A-5 the lease deed dated November 17, 1955 indicated that possession was with the respondent and the appellant was being inducted into the possession for the first time and if really, the appellants had earlier been in possession of the property concerned as a tenant having been inducted therein as far back as on 1942 there was nothing that precluded the parties from reciting this fact in 1955. The High Court thus held that

under the above circumstances it was not possible to conclude that there existed the relationship of landlord and tenant between the appellant and the respondent even prior to Ex.A-5.

5. The High Court further held that under the Mohammedan Law the mutawalli had no power to execute the lease in favour of the appellant for a period of two years and as such the lease was invalid. The High Court then held that though the lease in favour of the appellant was not void but only voidable, but in the counter filed by the respondent to the application filed by the appellant under Sec.9 of the Act, a specific objection had been taken that the lease was not binding on the wakf as the same was not for its benefit nor made for any necessity. The lease was thus not binding on the wakf, even in 1955 and the same can certainly be avoided by respondent in the course of the proceedings under Sec.9 of the Act. Taking the aforesaid view the High Court held that the appellants were not entitled to invoke any benefits under the Act.

6. In the facts and circumstances of this case the view taken by the High Court is wrong and is liable to be set aside. A perusal of the plaint dated September 15, 1967 clearly shows that the plaintiff had come forward with a clear case that the defendant was a tenant holding over and the High Court, was not right to make out a new case beyond the pleadings. In para 3 of the plaint it was stated as under:

"The defendant is in occupation of the site of the undermentioned property as a tenant ever since February 1, 1955 and is continuing as a tenant after the expiry of the period fixed in the rent deed holding over on the same terms."

Again in para 10, it was stated as under:

"As the defendant has specifically undertaken in the rent deed to surrender vacant possession of the site after the expiry of the lease period and as he is now holding over on the same terms, with the consent of the plaintiff-Thaikal, he has no right to refuse to deliver vacant possession of the site to the plaintiff-Thaikal whenever called upon to do so, particularly when the plaintiff-Thaikal requires the site for raising pucca terraced structures thereon."

7. The defendant had taken the plea that he had purchased the superstructures in or about the year 1942 from Damodara Nair and Panchapakesan and had taken up his residence in the tiled portion

and in the front portion he had been carrying on bicycle and motorcycle repair shop. The trial court had recorded the finding that it was made manifest by the evidence adduced in this case both oral and documentary that the defendant was in possession of the superstructure even from the year 1942. The defendant had filed property tax receipts issued by the Thanjavur Municipality to the mutawalli, the amount having been paid by the defendant as disclosed by Exs.B-5 to B-51 ranging over a period from 1942 to 1960. The trial court also observed that Exs.B-61 to B-68 were the receipts issued to the defendant evidencing payments of rent to the mutawalli. The trial court held that there can be no doubt that even from the year 1942 the defendant must have been in possession of the superstructures on the suit property. The High Court simply considered Ex.A-5 dated November 17, 1955 and held that there was no evidence to show that the appellant had been in possession of the property as a tenant under the respondent prior to the execution of Ex.A-5. The High Court placed reliance on the recitals in Ex.A-5 to indicate that the appellant was inducted into possession for the first time pursuant to the terms of the lease and observed that had the appellant been in possession of the property earlier then such facts should have been recited in Ex.A-5. The High Court was wrong in taking the above view. There was overwhelming evidence on record to show that the appellant was in occupation of the property long before 1955 and the stand taken by the appellant was correct that it was purely a renewal of the existing tenancy which had already come into existence from the year 1942. Be that as it may the suit for eviction had been filed on September 15, 1967 and the plaintiff himself had come forward with a clear case that the defendant was a tenant holding over.

8. The only reason given for denying the benefit of Sec.9 of the City Tenants' Protection Act by the High Court to the appellant is that while executing the lease deed Ex.A-5 dated November 17, 1955, the mutawalli had no power to grant such lease under the provisions of the Wakf Act 29 of 1954 as amended by Amendment Act 34 of 1964. In our opinion the High Court was not correct in taking the aforesaid view. The appellant in the present case was a tenant long before the coming into force of the Wakf Act, 1954. The plaintiff had come forward with a clear case in the plaint dated

September 15, 1967 that the appellant was a tenant holding over and as such he was not entitled to take a different plea in reply to the petition filed under Sec.9 of the Act that the appellant was not a tenant as the property in question was a wakf property and the mutawalli had no right to grant a lease vide Ex.A-5 dated November 17, 1955. Thus, in the facts and circumstances of this case the defendant/appellant was entitled to the benefit of the provision of Sec.9 of the Act.

9. It may however be noted that clause (b) to Subsec.(1) of Sec.9 as added by Sec.6(ii) of the Madras City Tenants' Protection (Amendment) Act, 1960, reads as under:

"9.(1)(b) On such application, the court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court, shall then fix the price of the minimum extent of the land decided as aforesaid, or of the extent of the land specified in the application under clause (a) whichever is less. The price aforesaid shall be the average market value of the three years immediately preceding the date of the order. The court shall order that within a period to be determined by the court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into court or otherwise as directed the price so fixed in one or more instalments with or without interest."

10. According to the above provision the court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court shall then fix the price of the minimum extent of the land according to the average market value of the three years immediately preceding the date of the order. While determining the aforesaid price of the land, we make it clear that the price shall be reckoned at the average market value of the three years immediately preceding the present order.

11. In the result, we allow these appeals, set aside the impugned order of the High Court as well as of the courts below and remand the case to the trial court with a direction to decide the petition filed under Sec.9 of the Act in accordance with law and in the manner indicated above. Parties to bear their own costs.

B.S.

Appeals allowed.

IN THE SUPREME COURT OF INDIA

Present:- A.M.Ahmedi and M.M.Punchhi, JJ.

C.A.No.4865 of 1992 17th November, 1992.

A.A.Haja Muniuddin ...Appellant

v.

Indian Railways ...Respondent.

Railway Claims Tribunal Act (LIV of 1987), Secs.13(1), 15 and 18(1) - Railway Claims Tribunal Rules (1989), Rules 6 and 44 - Civil Procedure Code (V of 1908), O.33 - Indigent person if can be permitted to prefer claim without payment of fee, on principle of O.33, C.P.C.

It will be seen from the scheme of the Act that on its coming into force from the appointed day, all suits pending in the Civil Court would stand transferred to the Claims Tribunal if the cause of action of the suit would have fallen within the jurisdiction of the Tribunal after the appointed day. Therefore, even a suit filed under the provisions of O.33 would stand transferred to the Claims Tribunal and the Claims Tribunal would be required to dispose of it as such. That is because Sec.13 specifically provides that the Claims Tribunal shall exercise, on or from the appointed day all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court provided the same relates to the recovery of compensation for loss, destruction, damage, deterioration or non-delivery of goods entrusted to the railways for carriage by railway. Sec.15 bars the jurisdiction of the Civil Court to entertain and try such suits on and from the appointed day. In other words, after the appointed day the Claims Tribunal alone would have jurisdiction to entertain and try claims referred to in clauses (a) and (b) of Sub-sec.(1) of Sec.13 of the Act. Sec.18 then sets out the procedure to be followed by the Claims Tribunal. It is true that Sub-sec.(1) of Sec.18 in term states that the Claims Tribunal shall not be bound by the procedure laid down by the Code, but that does not mean that it is precluded from invoking the procedure laid down by the Code even if the ends of justice so require. The sub-section further states that the Tribunal shall have powers to regulate its own procedure and Sub-sec.(3) of Sec.18 enumerates the matters in respect whereof the Claims Tribunal is permitted to exercise the same

powers vested in a civil court under the Code while trying a suit. Rule 44 in terms states that nothing in the Rules shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for the ends of justice. Nowhere in the Act is there any provision which runs counter to or is inconsistent with the provisions of O.33 of the Code. Although the Act and the Rules do not specifically provide for the application of O.33 of the Code, there is nothing in the Act or the Rules which precludes the Tribunal from following that procedure if the ends of justice so require. [Para 5]

Access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee. Such a view would leave indigent persons without a remedy. It is, therefore, essential that the provisions of the Act and the Rules must be broadly interpreted to ensure access to justice. If a claimant is left without redress even if he has a valid claim against the railway administration merely because he is an indigent person, it would be a sad day and the poor will lose confidence in the system. No one can be heard to say, much less the railway administration, that even though the claimant has a genuine claim for compensation, against the railway administration, he must forgo the same if he does not have the means to pay the requisite fee. Such an interpretation which denies justice must be avoided.

[Para 5]

Thus, when an indigent person approaches the Tribunal for compensation for the wrong done to him, the Tribunal cannot refuse to exercise jurisdiction merely because he does not have the means to pay the fee. In such a situation, the ends of justice require that the Tribunal should follow the procedure laid down in O.33 of the Code to do justice for which it came to be established.

[Para 5]

Ms.Sandhya Ramachandra, for Appellant.
Dr.Anand Prakash, Senior Advocate (Hemant Sharma, V.K.Verma and B.Krishna Prasad, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by Ahmedi, J.:- Special leave granted.

2. The short question which arises for determination in this appeal is whether an indigent person who is not possessed of sufficient means to enable him to pay the fee prescribed by Sub-sec.(2) of Sec.16 of the Railway Claims Tribunal Act, 1987

(hereinafter called 'the Act') can be permitted to prefer his claim as an indigent person on the principle embodied in O.33 of the Code of Civil Procedure, 1908 (hereinafter called 'the Code'). The brief facts giving rise to this appeal are as under.

3. The appellant despatched marble slabs from Makrana Railway Station for carriage by rail under railway risk to Ramanathapuram. The wagon carrying the marble slabs met with an accident. The marble slabs reached the station of destination in broken pieces. Treating the damage as a total loss, the appellant preferred a claim for Rs.1,05,000 before the Railway Claims Tribunal established under Sec.3 of the Act. The appellant was required to pay a fee of Rs.2,055 on the said claim-application under Sub-sec.(2) of Sec.16 of the Act read with Rule.6 of the Railway Claims Tribunal (Procedure) Rules, 1989 (hereinafter called 'the Rules'). However since the appellant did not have the means to pay the requisite fee, he lodged the claim-application on a fee of Rs.150 only and prayed that he may be permitted to prosecute the claim as an indigent person. The Tribunal, however, came to the conclusion that since O.33 of the Code had no application to claims preferred under the provisions of the Act, the appellant cannot be permitted to prosecute the application as such. The Tribunal, therefore, spurned the appellant's request. It is against the said order of the Tribunal that the present appeal by special leave has been brought to this Court.

4. In order to appreciate the contention urged before us it would be advantageous to bear in mind the scheme of the Act. The Act was enacted to *inter alia* provide for the establishment of a Railway Claims Tribunal for inquiring into and determining claims against the railway administration for loss, destruction, damage, deterioration or non-delivery of goods entrusted to it to be carried by railways and for matters connected therewith or incidental thereto. Sec.3 provides for the establishment of a Railway Claims Tribunal. Sec.13 which confers jurisdiction reads as under:

"13. *Jurisdiction, powers and authority of Claims Tribunal:* (1) The Claims Tribunal shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court or a Claims Commissioner appointed under the provisions of the Railways Act,—

(a) relating to the responsibility of the railway administration as carriers under Chapter VII of the Railways Act in respect of claims for—
(i) compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to a railway administration for carriage by railway;

(ii) compensation payable under Sec.82-A of the Railways Act or the Rules made thereunder; and

(b) in respect of the claims for refund of fares or part thereof or for refund of any freight paid in respect of animals or goods entrusted to a railway administration to be carried by railway.
(2) The provisions of the Railways Act and the Rules made thereunder shall, so far as may be, applicable to the inquiring into or determining, any claims by the Claims Tribunal under this Act."

Sec.15 provides that on or from the appointed day, no court or other authority shall have, or be entitled to, exercise any jurisdiction, powers or authority in relation to the matters referred to in Sub-sec.(1) of Sec.13. We now come to Sec.16 which reads as under:

"16. *Application to Claims Tribunal:* (1) A person seeking any relief in respect of the matters referred to in Sub-sec.(1) of Sec.13 may make an application to the Claims Tribunal.

(2) Every application under Sub-sec.(1) shall be in such form and be accompanied by such documents or other evidence and by such fee in respect of the filing of such application and by such other fees for the service or execution of processes as may be prescribed:

Provided that no such fee shall be payable in respect of an application under Sub-clause (ii) of clause (a) of Sub-sec.(1) of Sec.13."

Sec.18(1) provides that the Claims Tribunal shall not be bound by the procedure laid down by the Code, but shall be guided by the principles of natural justice and, subject to the other provisions of the Act and of any Rules, the Claims Tribunal shall have powers to regulate its own procedure. Sub-sec.(3) of Sec.18 then provides as under:

"18.(3) The Claims Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of Secs.123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing an application for default or deciding it *ex parte*;
- (h) setting aside any order of dismissal of any application for default or any order passed by it *ex parte*;
- (i) any other matter which may be prescribed."

Sec.24 provides that every suit, claim or other legal proceeding (other than an appeal) pending before any Court, Claims Commissioner or other authority immediately before the appointed day, being a suit, claim or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after the appointed day, within the jurisdiction of the Claims Tribunal, shall stand transferred on that day to the Claims Tribunal. It is, therefore, obvious that every suit pending before any court before the appointed day would stand transferred to the Claims Tribunal if the cause of action thereof is one that would have been, if it had arisen after the appointed day, within the jurisdiction of the Claims Tribunal. Sec.28 lays down that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Sec.30 empowers the Central Government to make Rules. In exercise of this power the Central Government made the Rules referred to above and brought them into force from the appointed day *i.e.* the date with effect from which the Claims Tribunal came to be established under Sec.3 of the Act. Rule 6 which is relevant for our purpose provides that every application made under Sub-sec.(1) of Sec.16 for seeking relief in respect of matters, other than claim of compensation for death or injuries to passengers, shall be accompanied by a fee as specified in Schedule II. Rule 44 lays down that nothing in the Rules shall be deemed to limit or otherwise affect

the inherent power of the Tribunal to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Tribunal. 5. It will be seen from the scheme of the Act that on its coming into force from the appointed day, all suits pending in the civil court would stand transferred to the Claims Tribunal if the cause of action of the suit would have fallen within the jurisdiction of the Tribunal after the appointed day. Therefore, even a suit filed under the provisions of O.33 would stand transferred to the Claims Tribunal and the Claims Tribunal would be required to dispose of it as such. That is because Sec.13 specifically provides that the Claims Tribunal shall exercise, on or from the appointed day all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court provided the same relates to the recovery of compensation for loss, destruction, damage, deterioration or non-delivery of goods entrusted to the railways for carriage by railway. Sec.15 bars the jurisdiction of the civil court to entertain and try such suits on and from the appointed day. In other words after the appointed day the Claims Tribunal alone would have jurisdiction to entertain and try claims referred to in Clauses (a) and (b) of Sub-sec.(1) of Sec.13 of the Act. Sec.18 then sets out the procedure to be followed by the Claims Tribunal. Sub-sec.(1) of Sec.18 states that the Claims Tribunal shall not be bound by the procedure laid down by the Code but shall be guided by the principles of natural justice and shall have powers to regulate its own procedure. It is true that Sub-sec.(1) of Sec.18 in term states that the Claims Tribunal shall not be bound by the procedure laid down by the Code but that does not mean that it is precluded from invoking the procedure laid down by the Code even if the ends of justice so require. The sub-section further states that the Tribunal shall have powers to regulate its own procedure and Sub-sec.(3) of Sec.18 enumerates the matters in respect whereof the Claims Tribunal is permitted to exercise the same powers vested in a civil court under the Code while trying a suit. Rule 44 in terms states that nothing in the Rules shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for the ends of justice. Nowhere in the Act is there any provision which runs counter to or is inconsistent with the provisions of O.33 of the Code. Although the Act and the Rules do not

specifically provide for the application of O.33 of the Code, there is nothing in the Act or the Rules which precludes the Tribunal from following that procedure if the ends of justice so require. If the view taken by the Tribunal is accepted as laying down the correct law, the result would be that a claimant who has a genuine claim for compensation under the provisions of the Act would be denied access to the Claims Tribunal if he is an indigent person and does not have the means to pay the fee required on the claim-application. Before the establishment of the Claims Tribunal he would have been able to file the suit invoking O.33 of the Code as an indigent person. Now that a special Claims Tribunal has been established under the Act, can it be said that indigent persons who do not have the means to pay the fee required on the claim-application are altogether debarred from seeking compensation from the railway administration for the wrong done to them? Access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee. Such a view would leave indigent persons without a remedy. It is, therefore, essential that the provisions of the Act and the Rules must be broadly interpreted to ensure access to justice. If a claimant is left without redress even if he has a valid claim against the railway administration merely because he is an indigent person, it would be a sad day and the poor will lose confidence in the system. No one can be heard to say, much less the railway administration, that even though the claimant has a genuine claim for compensation, against the railway administration, he must forgo the same if he does not have the means to pay the requisite fee. Such an interpretation which denies justice must be avoided. Sec.18(1) only says that the Claims Tribunal 'shall not be bound' by the procedure laid down by the Code but does not go so far as to say that it 'shall be precluded' from invoking the provisions laid down by the Code even if the same is not consistent with the Act and the Rules. Since the Claims Tribunal is empowered to regulate its own procedure, there is nothing in the Act and the Rules which precludes the invocation of O.33 of the Code. A view which advances the cause of justice must be preferred to the one which defeats it. We are, therefore, of the opinion that the Tribunal adopted a narrow interpretation of the relevant provisions of the Act in coming to the conclusion

that the Act as well as the Rules did not permit invocation of O.33 of the Code. The view taken by the Tribunal results in a person not having the means to pay the fee prescribed for preferring a claim being left without a remedy. Such a view would result in gross injustice. The Tribunal has the power to lay down its own procedure and as stated earlier Sec.18(1) does not preclude it from invoking the provisions of O.33 of the Code if the ends of justice so require. When an indigent person approaches the Tribunal for compensation for the wrong done to him, the Tribunal cannot refuse to exercise jurisdiction merely because he does not have the means to pay the fee. In such a situation we think the ends of justice require that the Tribunal should follow the procedure laid down in O.33 of the Code to do justice for which it came to be established.

6. In the result we allow this appeal, set aside the order of the Claims Tribunal and remit the matter to the Claims Tribunal to deal with the appellant's claim-application in the light of the principle enunciated hereinabove. In the facts and circumstances of the case there will be no order as to costs.

B.S. ----- *Appeal allowed.*

IN THE SUPREME COURT OF INDIA. [Civil Appellate Jurisdiction]

Present: A.M.Ahmadi, M.M.Punchhi and
K.Ramaswamy, JJ.

C.A.Nos.1749 and 1752 of 1992 11th January, 1993.

S.V.Chandra Pandian and others Appellants
v.

S.V.Sivalinga Nadar and others ...Respondents.

(A) *Partnership Act (IX of 1932) - Partnership firm*
- *No legal entity - Property would vest in all partners*
- *Rights of partners during its subsistence and on its dissolution.*

It is well settled that the firm is not a legal entity, it has no legal existence, it is merely a compendious name and hence the partnership property

would vest in all the partners of the firm. Accordingly each and every partner of the firm would have an interest in the property or asset of the firm but during the subsistence, no partner can deal with any portion of the property or belonging to him, nor can he assign his interest in any specific item thereof to anyone. By virtue of the implied authority conferred as agent of the firm, his action would bind the firm if it is done to carry on, in the usual way, the business of the kind carried on by the firm but the act or instrument by which the firm is sought to be bound must be done or exempted in the firm name or in any other names expressing or implying an intention to bind the firm. His right is merely to obtain such profits, if any, as may fall to his share upon the dissolution of the firm which remain after satisfying the liabilities set out in the various such clauses (i) to (iv) of clause (b) of Sec.48 of the Act. [Para 8]

(B) *Registration Act (XVI of 1908), Sec.17(1) - Partnership Act (IX of 1932), Sec.48 - Dissolution of partnership - Distribution of assets of firm amongst partners of firm - If amounts to partition of immovable properties - Whether amounts to relinquishment or extinguishment of share in immovable property - Award so distributing if requires registration.* Regardless of its character, the property brought into stock of the firm or acquired by the firm during its subsistence for the purposes and in the course of the business of the firm shall constitute the property of the firm unless the contract between the partners provides otherwise. On the dissolution of the firm each partner became entitled to his share in the profits, of any, after the accounts are settled in accordance with Sec.48 of the Partnership Act. Thus in the entire asset of the firm all the partners have all interest albeit in proportion to their share and the residue, of any after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit. Thus during the subsistence of the partnership, a partner would be entitled to a share in the profits and after its dissolution to a share in the residue, if any on settlement of accounts. The mode of settlement of accounts set out in Sec.48 clearly indicates that the partnership asset in its entirety must be converted into money and from the pool the disbursement has to be made as set out in clause (a) and sub-clauses (i)(ii) and (iii) of clause (b) and thereafter if there is any

residue that has to be divided among the partners in the proportions in which they were entitled to a share in the profits of the firm. So viewed, it becomes obvious that the residue would, in the eye of law, be moveable property i.e., cash and hence distribution of the residue among the partners in proportion to their shares in the profits would not attract Sec.17 of the Registration Act. Viewed from another angle, it must be realised that since a partnership is not a legal entity but is only a compendious name, each and every partner has a beneficial interest in the property of the firm even though he cannot lay a claim on any earmarked portion thereof as the same cannot be predicated. Therefore, when any property is allocated to him from the residue it cannot be said that he had only a definite limited interest in that property and that there is a transfer of the remaining interest in his favour within the meaning of Sec.17 of the Registration Act. Each and every partner of a firm has an undefined interest in each and every property of the firm and it is not possible to say unless the accounts are settled and the residue or surplus determined what would be the extent of the interest of each partner in the property. It is, however, clear that since no partner can claim a definite or earmarked interest in one or all of the properties of the firm because the interest is a fluctuating one depending on various factors such as the losses incurred by the firm, the advances made by the partners as distinguished from the capital brought in the firm on if cannot be said unless the accounts are settled in the manner indicated by Sec.48 of the Partnership Act, what would be the residue which would ultimately be allocable to the partners. In that residue which becomes divisible among the partners every partner has an interest and when a particular property is allocated to a partner in proportion to his share in the profits of the firm, there is no partition or transfer taking place nor is there any extinguishment of interest of other partners in the allocated property in the sense of a transfer or extinguishment of interest under Sec.17 of the Registration Act. Therefore, viewed from this angle also, it seems clear that when a dissolution of the partnership takes place and the residue is distributed among the partners after settlement of accounts, there is no partition, transfer or extinguishment of interest attracting Sec.17 of the Registration Act. [Para 16]

(C) *Registration Act (XVI of 1908), Sec.17(1) -*

Partnership Act (IX of 1932), Sec. 48 - Dissolution of partnership - Settlement of accounts - Residue divided among partners Arbitrators allotting lands and buildings of the firm or jointly owned by the partners to one or other or jointly, to some of the partners - Award - Whether confers exclusive rights to the allottees - Award, if requires registration.

Mere statements that a certain property will now exclusively belong to one partner or the other, as the case may be, cannot change the character of the document or the nature of the assignment because that would, in any case, be the effect on the distribution of the residue. The property falling to the share of the partner on the distributing of the residue would naturally belong to him exclusively but so long as, in the eye of law, it is money and not immovable property, there is no question of registration under Sec. 17 of the Registration Act. Besides as stated earlier, even when one looks at the award as allocating certain immovable property since there is no transfer, no partition or extinguishment of any right therein, there is no question of application of Sec. 17(1) of the Registration Act. The reference to other hand and buildings and house properties jointly owned by the disputants in clause (C) of paragraph 10 of the award merely indicates that certain properties belonging to the firm stood in the names of individual partners or in their joint names but they belonged to the firm and, therefore, they were taken into account for the purpose of settlement of accounts under Sec. 48 of the Partnership Act and distributed on the determination of the residue. The award read as a whole makes it absolutely clear that the arbitrators had confined themselves to the properties belonging to the two firms and had scrupulously avoided other properties in regard to which they did not reach the conclusion that they belonged to the firm. On a correct reading of the award, the court is satisfied that the award seeks to distribute the residue after settlement of accounts on dissolution. While distributing the residue, the arbitrators allocated the properties to the partners and showed them in the Schedules appended to the award. The court is, therefore, of the opinion that on a true reading of the award as a whole, there is no doubt that it essentially deals with the distributions of the surplus properties belonging to the dissolved firms. The award, therefore, did not require registration under Sec. 17(1) of the Registration Act. [Para 17]

Cases referred to:

Addanki Narayanappa v. Bhaskara Krishnappa, A.I.R. 1959 A.P. 380 (F.B.). [Para 4]
Addanki Narayanappa v. Bhaskara Krishnappa, A.I.R. 1966 S.C. 1300: (1966) 2 M.L.J. (S.C.) 60: (1966) 2 An.W.R. (S.C.) 60: (1966) 2 S.C.J. 490: (1966) 3 S.C.R. 400. [Para 11]
Ajudhia Pershad Ram Pershad v. Sham Sunder, A.I.R. 1947 Lahore 13. [Para 13]
Commissioner of Income Tax, West Bengal, Calcutta v. Juggilal Kamalapat, (1967) 1 S.C.J. 177: (1967) 1 S.C.R. 784: A.I.R. 1967 S.C. 401. [Para 12]
C.I.T., Madhya Pradesh v. Dewas Cine Corporation, A.I.R. 1968 S.C. 676: (1968) 2 S.C.R. 173: (1968) 1 S.C.J. 691: (1968) 1 I.T.J. 444.
 [Paras 11, 12]
C.I.T., U.P v. Bankey Lal Vaidya, A.I.R. 1971 S.C. 2270. [Para 14]
Malabar Fisheries Company, Calicut v. C.I.T., Kerala, (1980) 1 S.C.R. 696: A.I.R. 1980 S.C. 176. [Para 15]
Ratan Lal Sharma v. Purshottam Hari, A.I.R. 1974 S.C. 1066: (1974) 3 S.C.R. 109. [Para 17]
Lachman Das v. Ram Lal, (1989) 3 S.C.C. 99. [Para 17].

The Judgment of the Court was delivered by *Ahmadi, J.*:- The four appellants and respondents 1 and 2 are brothers. They were carrying on business in partnership in the name and style of Messrs. Sivalinga Nadar and Brothers and S.V.S. Oil Mills, both partnerships being registered under the Partnership Act, 1932. Most of the properties were acquired by the firm of Sivalinga Nadar and Brothers. The firm of Messrs. S.V.S. Oil Mills merely had leasehold rights in the parcel of land belonging to the first named firm on which the superstructure of the oil mill stood. Both the partnerships were of fixed durations. Disputes arose between the six brothers in regard to the business carried on in partnership in the aforesaid two names. For the resolution of these disputes the six brothers entered into an arbitration agreement dated 8th October, 1981, which was as under:

"We are carrying on business in partnership together with other partners under several partnership names. We are also holding shares and Managing the public Limited Company, namely, The Madras Vanaspati Ltd., at Villupuram. Disputes have arisen among us with respect to the several business ~~concerns~~ immovable and moveable properties standing in our names as well as other relatives.

We are hereby referring all our disputes, the details of which would be given by us shortly to you, namely, Sri B.B.Naidu, Sri K.R.Ramamani and Sri Seetharaman.

We agree to abide by your award as to our disputes."

All the three arbitrators were fairly well-conversant with the business carried on in different names by the aforesaid two partnership firms; the first two being their tax consultants and the third being their Chartered Accountant. The parties, therefore, had complete faith and trust in their objectivity and impartiality.

2. The arbitrators accepted and entered upon the reference and after giving the disputants full and complete opportunity to place their rival points of view before them, circulated a draft award and after considering the response and reaction of the disputants thereon made their final award on 9th July, 1984. The concluding part of the award reads as under:

"We hereby direct that each of the parties be allotted the schedule of properties mentioned in the various schedules A to F annexed to this award.

- | | |
|--------------------------|--------------|
| 1. S.V.Sivalinga Nadar - | Schedule 'A' |
| 2. S.V.Harikrishnan - | Schedule 'B' |
| 3. S.V.Chandrapandian - | Schedule 'C' |
| 4. S.V.Kasilingam - | Schedule 'D' |
| 5. S.V.Ramchandran - | Schedule 'E' |
| 6. S.V.Natesan - | Schedule 'F' |

We direct that the firms of M/s.Sivalinga Nadar and Brothers and M/s.S.V.S. Oil Mills and also the joint house property Rent Account be dissolved as at the close of business on 14th July, 1984."

The arbitrators then proceed to set out the properties belonging to or claimed to belong to the aforesaid two firms in paragraphs 6 to 24 of their award. Paragraph 25 is a residuary clause which says that any asset left out or realised hereafter or any liability found due other than those reflected in the account books, shall, likewise, be divided and/or borne, equally among the disputants. Paragraphs 26 and 27 deal with the use of the firm names. Paragraph 28 refers to the claim of Smt.C.Kanthimathi, sister of the six partners, with which we are not concerned in these appeals. Paragraph 29 refers to the business carried on by the relatives of the disputants in the names of Sri Brahmasakthi Agency and Srimagal Finance

Corporation. The arbitrators have recognised the fact that even though the said business is not carried on by the disputants it would be desirable to dissolve the said firms also w.e.f. 24th July, 1984 in the larger interest of peace and amity among the disputants and their relatives. Paragraph 30 refers to the properties standing in the name of the father of the six disputants, i.e., partners of the two firms in question. It is stated that although initially the disputants had shown an inclination to refer the dispute concerning the properties owned by their father to the arbitration of the three arbitrators but when it was noticed that the deceased had left a will disposing of the properties the need for resolution of the dispute through arbitration did not survive. In paragraph 31 the arbitrators have determined their fees and have directed the disputants to bear them equally. At the end of the award the properties falling to the share of the disputants have been set out in detail in Schedules A to F referred to earlier.

3. After the award was made on 9th July, 1984, O.P.No.230 of 1984 was filed by S.V.Chandrapandian and others for a direction to the arbitrators to file their award in court which was done. Thereupon, the applicants S.V.Chandrapandian and others filed a Misc.Appln.No.3503 of 1984 requesting the court to pass a decree in terms of the award. Before orders could be passed on that application, O.P.Nos.247 and 275 of 1984 were filed by S.V.Sivalinga Nadar and S.V.Harikrishnan respectively under Sec.30 of the Arbitration Act to set aside the award. The said applications came up for hearing before a learned single Judge of the High Court. Various points were raised and decided by the learned single Judge but it would be sufficient for our purpose to refer to the one which we are called upon to decide in these group of appeals. That is to be found in paragraph 71 of the judgment of the learned single Judge. The contention urged was that having regard to the allotment of partnership properties under the award, it was incumbent that the award should have been registered as required by Sec.17(1) of the Registration Act and since it lacked registration, the court had no jurisdiction to make it the rule of the court and grant a decree in terms thereof.

4. The learned single Judge answered the aforesaid contention in paragraph 72 of his judgment as under:

"The learned counsel for the respondents also

contended that the Award falls under Schedule 1, Art.12 of the Stamp Act and the allocation of properties owned by partnership firm on dissolution to the erstwhile partners is not partition of immovable properties. In this connection, learned counsel for the respondents placed reliance in the decision reported in *Addanki Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1959 A.P. 380 (F.B.), which decision has been confirmed in *Addanki Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1966 S.C. 1300: (1966)2 M.L.J. (S.C.) 60: (1966)2 An.W.R. (S.C.) 60: (1966)2 S.C.J. 490: (1966)3 S.C.R. 400 (S.C.). It was submitted by the learned counsel for the respondents that the contentions with regard to stamp and registration put forward by the petitioner cannot be accepted. It is to be pointed out that the Award has been submitted for registration long ago on 27.10.1984 itself and it is stamped and if there is any deficiency, the Registering Authority could direct proper stamp to be affixed and therefore I feel there could be no impediment for the award being made a rule of the court and a decree being passed in terms of the Award as contended by the learned counsel for the respondents."

The learned single Judge thereafter proceeded to make the final order in paragraph 78 of the judgment in the following terms:

"Thus on a careful consideration of the materials available and the contentions of either side it has to be decided that Appln. No.3505 of 1984 in O.P.No.230 of 1984 filed by the petitioners therein praying for a decree in terms of the arbitration Award dated 9.7.1984 has to be allowed and O.P.Nos.247 and 275 of 1984 and the applications filed in those two petitions, i.e., Application Nos.3474, 3476, 5030, 5031, 5032, 2827, 2828, 3773, 3762, 3874 of 1984 and 4886 and 4887 of 1985, are dismissed. The petitioner in O.P.No.230 of 1984 and the applicants in Appln. No.3505 of 1984 are directed to take steps for getting the Award registered. The parties in all these proceedings are directed to bear their own costs."

5. It may be mentioned that after the making of the award one of the arbitrators Sri B.B.Naidu passed away on 20th October, 1984. At the request of some of the parties the surviving arbitrators presented the award before the District Registrar,

Madras, for registration on 27.10.1984. Even though the signature of the deceased arbitrator was identified by the surviving arbitrators the document was kept pending for registration. In the meantime, on 23rd January, 1987, advocate for Sivalinga Nadar served notice on the Registrar not to register the document and threatened to take proceedings in court if the document was registered. It will thus be seen that the registration of the document was blocked by one of the disputants Sivalinga Nadar on the premise that the High Court had in O.P.No.247 of 1984 granted a stay against the operation of the award on 5th September, 1984.

6. Against the judgment of the learned single Judge, the matter was carried in appeal to a Division Bench of the High Court of Madras. The Division Bench of the High Court reversed the aforesaid finding recorded by the learned single Judge and came to the conclusion that the award required registration under Sec.17(1) of the Registration Act. In this view that it took, it did not think it necessary to go into the other contentions dealt with by the learned single Judge. It held that since the award required registration and was in fact not registered no proceeding for making the award the rule of the court could be entertained because in the absence of a valid award the court had no jurisdiction to grant a decree in terms of the award. It, however, took note of the fact that the award was presented for registration but on account of the conduct of one of the disputants it could not be registered as the Registering Authority was threatened with civil consequences. The correspondence in this behalf was sought to be placed on record as additional evidence but the Division Bench thought that would not alter the situation since the fact remained that the award was not registered even on the date of its judgment. It, therefore, made the following observation in paragraph 46 of the judgment:

"It, however, does not mean that if the award is validly registered and presented to be made a rule of the court in accordance with law, the court cannot entertain the same."

In this view of the matter the Division Bench allowed the appeal and set aside the impugned judgment of the learned single Judge and held that as the award was not registered, it could not be made the rule of the court. It made no order as to costs. It is against this decision of the Division

Bench of the High Court that the present appeals by special leave (we also grant special leave in S.L.P.No.9408 of 1992) have been filed.

7. Before we examine the contention based on Sec.17 of the Registration Act we may notice a few relevant provisions bearing on the interest of partners in partnership property as found in the Partnership Act, 1932. Sec.4 defines partnership as a relationship between persons who have agreed to share the profit of a business carried on by all or any of them acting for all. Sec.14 provides that subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. It is also clarified that unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm shall be deemed to have been acquired for the firm. Sec.15 says that the property of the firm shall be held and used by the partners exclusively for the purposes of the business subject of course to contract between the partners. Says Sec.18, subject to the provisions of the Act, a partner is the agent of the firm for the purposes of the business of the firm. Under Sec.19 the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, shall bind the firm. This authority to bind the firm is termed as "implied authority". Sec.22 lays down that in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. Sec.29 deals with the rights of transferee of a partner's interest. Sub-sec.(1) thereof provides that such a transferee will not have the same rights as the transferor-partner but he would be entitled to receive the share of profits of his transferor on the account of profits agreed to by the partners. Sub-sec.(2) next provides that upon dissolution of the firm or upon a transferor-partner ceasing to be a partner, the transferee would be entitled against the remaining partners to receive the share of the assets of the firm to which the transferor-partner was entitled and will also be entitled to an account as from the date of dissolution. Sec.30 deals with the case of a minor

admitted to the benefits of partnership. Such a minor is given a right to his share of the property of the firm and also a right to share in the profits of the firm as may be agreed upon but his share is made liable for the acts of the firm though he would not be personally liable for the same. Sub-sec.(4) however, debars a minor from suing the partners for an account or for his share of the property or profits of the firm except when he severs his connections with the firm, in which case for determining his share the law requires a valuation of his share in the property of the firm to be made in accordance with Sec.48. Secs.31 to 38 relate to incoming and outgoing partners. Sec.32 deals with the consequences of retirement. Sub-sec.(2) and (3) of Sec.32 deal with the consequences of retirement while Secs.36 and 37 speak about the rights of an outgoing partner to carry on competing business and in certain cases to share subsequent profits. Chapter VI deals with the dissolution of a firm. Sec.40 provides that a firm may be dissolved with the consent of all the partners or in accordance with the contract between the partners. Secs.41 and 42 deal with dissolution on the happening of certain events while Sec.43 permits a partner to dissolve a firm by notice if it is a partnership at will. Sec.44 speaks of dissolution through court. Sec.48 indicates the mode of settlement of accounts between the partners on dissolution while Sec.49 posits that where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm. Chapter VII deals with the registration of firms, etc., and Chapter VIII contains the saving clause.

8. The above provisions make it clear that regardless of the character of the property brought in by the partners on the constitution of the partnership firm or that what is acquired in the course of business of the partnership, such property shall become the property of the firm and an individual partner shall only be entitled to his share of profits, if any, accruing to the partnership from the realisation of this property and upon dissolution

of the partnership to a share in the money representing the value of the property. It is well-settled that the firm is not a legal entity, it has no legal existence, it is merely a compendious name and hence the partnership property would vest in all the partners of the firm. Accordingly, each and every partner of the firm would have an interest in the property or asset of the firm but during its subsistence, no partner can deal with any portion of the property as belonging to him, nor can he assign his interest in any specific item thereof to anyone. By virtue of the implied authority conferred as agent of the firm his action would bind the firm if it is done to carry on, in the usual way, the business of the kind carried on by the firm but the act or instrument by which the firm is sought to be bound must be done or executed in the firm name or in any manner names expressing or implying an intention to bind the firm. His right is merely to obtain such profits, if any, as may fall to his share upon the dissolution of the firm which remain after satisfying the liabilities set out in the various sub-clauses (i) to (iv) of clause (b) of Sec.48 of the Act.

9. In the present case, the six brothers who were carrying on business in partnership fell out on account of disputes which they could not resolve *inter se*. The partnership being of fixed durations could not be dissolved by any partner by notice. As they could not resolve their disputes they decided to resort to arbitration. The three arbitrators chosen by them were men of their confidence and they after giving the partners full and complete opportunity took care to first circulate a proposed award to ascertain the reaction of the disputants therein. The letter written to the arbitrators by S.V.Sivalinga Nadar dated 16th February, 1983 indicates that he was quite satisfied with the hearing given by the arbitrators. He was also by and large satisfied with the proposed award but thought it warranted certain adjustments to make it acceptable and rational. He was of the view that the award should provide for the reallocation of the shareholdings of Madras Vanaspati Ltd., whereas Brahmaksthi Tin Factory owned by his sons should be kept out of the purview of the arbitrators since it was not the subject matter of arbitration. Then he raised some objection as to the percentage of his share and the amount found due to him. In the subsequent letter written on 9th September, 1983 he has reiterated these very objections while raising certain

questions regarding valuation of partnership properties. Even the application filed under Secs.30 and 33 of the Arbitration Act in the High Court objections to the award as enumerated in paragraph 15 mainly concerned, (i) the conduct of the arbitrators who, it is alleged, acted negligently, with bias and against principles of natural justice, (ii) deliberate act in leaving out certain properties from consideration e.g., share-holdings of Madras Vanaspati Ltd., stock-in-trade and cash deposits the properties of Velayudha Perumal Nadar, etc., and (iii) failure to grant him a higher share to which he was entitled. No contention was raised regarding the want of registration of the award. However, being a question of law, the learned single Judge entertained the plea and rejected it, but it found favour with the Division Bench.

10. We now think it convenient to reproduce the relevant part of Sec.17 of the Registration Act:

"17(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which. Act No.16 of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871) or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely.

(a) instruments of gift of immovable property; (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred

rupees and upwards, to or in immovable property."

The submission made in this behalf before the courts below was that the award involved a partition of immoveable properties as a consequence of dissolution of the firms and since the value of the immovable properties which are the subject-matter of the award indisputably exceed the value of Rs.100, the award was compulsorily registrable in view of the mandatory nature of the language of Sec.17(1) which uses the expression 'shall be registered'. On the mandatory character of the provision there is no dispute. The question which requires determination is whether on the dissolution of the partnership the distribution of the assets of the firm comprising both moveable and immoveable properties after meeting its obligations on settlement of accounts amongst the partners of the firm in proportion to their respective shares amounts to a partition of immoveable properties or a relinquishment or extinguishment of a share in immovable property requiring registration under Sec.17 of the Registration Act if the allocation includes immovable property of the value of Rs.100 and above?. In other words, the question to be considered is whether the interest of a partner in partnership assets is to be treated as movable property or both moveable and immoveable depending on the character of the property for the purposes of Sec.17 of the Registration Act? This question has been the subject matter of decision in a few cases.

11. In *Addanki Narayanappa v. Bhaskara Krishnappa*, A.I.R. 1966 S.C. 1300: (1966) 2 M.L.J. (S.C.) 60: (1966) 2 An.W.R. (S.C.) 60: (1966) 2 S.C.J. 490: (1966) 3 S.C.R. 400, the members of two Joint Hindu families, the Addanki family and the Bhaskara family, had entered into partnership for carrying on business of hulling rice, etc.; each family having half share in that business. The capital of the partnership comprised, among other things, certain lands belonging to the two families. The firm acquired more lands in the course of business. Differences arose whereupon two members of the Addanki family filed a suit for dissolution of the partnership and accounts. All the members of the two families were made parties to the suit either as plaintiffs or as defendants. The Bhaskara family contended in defence that the partnership was dissolved in 1936 and accounts were settled between the two families under a *karar* executed in

favour of Bhaskara Gurappa Setty, the karta of the Bhaskara family, by five members of the Addanki family representing that family. The defendants, therefore, contended that the plaintiffs had no cause of action and the suit for dissolution of partnership and accounts was not maintainable. The relevant part of the agreement *karar* reads as under:

"As disputes have arisen in our family regarding partition, it is not possible to carry on the business or to make investment in future. Moreover, you yourself have undertaken to discharge some of the debts payable by us in the coastal parts in connection with our private business. Therefore, from this day onwards we have closed the joint business. So, from this day onwards, we have given up (our) share in the machine etc., and in the business, and we have made over the same to you alone completely by way of adjustment. You yourself shall carry on the business without ourselves having anything to do with the profits and loss. Herefor, you have given up to us the property forming our Venkatasubhayya's share which you have purchased and delivered possession of the same to us even previously. In case you want to execute and deliver a proper document in respect of the share which we have given to you, we shall at your own expense, execute and deliver a document registered."

Ex facie this document disclosed that the partnership business had come to a halt and the Addanki family has given up their share in the machine, etc., in the business and had made it over to the Bhaskara family. It also recites that the Addanki family had already received certain properties purchased by the partnership as its share in the partnership assets. The submission was that since the partnership assets included immovable property and the document recorded relinquishment by the members of the Addanki family of their interest therein which exceeded Rs.100 in value, the document required registration under Sec.17(1) (c) of the Registration Act. After referring to the provisions of law, treatise and the case law, both of English and Indian Courts, this Court reproduced the following passage from the decision in *Ajudhia Pershad Ram Pershad v. Shani Sunder*, A.I.R. 1947 Lahore 13, with approval:

"These sections require that the debts and liabilities should first be met out of the firm